An Analysis of Trustees' Actions in Value Shifting Arrangements in Estate-Planning Trusts: A Practical Framework for Tax Practitioners Informed by Experts' Perceptions under the Income Tax Act

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DEDICATIONS AND ACKNOWLEDGEMENTS

Dedication

"A well mediated rosary contains a threefold element: for each decade of the rosary is a picture, and for each picture there is a threefold emphasis, which is simultaneously: a mystical contemplation, an intimate reflection and pious intention." Saint Pope John XIII.

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An Analysis of Trustees' Actions in Value Shifting Arrangements in Estate-Planning Trusts: A Practical Framework for Tax Practitioners Informed by Experts' Perceptions under the Income Tax Act

This study examined whether trustees' actions specifically the vesting or distribution of a capital asset or a capital gain to a single beneficiary, or changes to the composition of trustees or beneficiaries constitute a disposal under paragraph 11(1)(*g*) of the Eighth Schedule to the Income Tax Act No. 58 of 1962 (the Act), thereby triggering a Value Shifting Arrangement (VSA) and a Capital Gains Tax (CGT) event. Existing literature provides limited analysis of how such actions give rise to VSAs in multi-beneficiary estate-planning trusts, revealing a significant doctrinal interpretative gap.

A mixed-methods approach was employed, combining doctrinal analysis of the Act, case law, SARS guides, and academic literature with empirical insights from expert interviews (participants) and an online questionnaire (respondents). The research investigated the nature of beneficiaries' rights, the statutory elements of the VSA definition, and the interaction between VSAs and other provisions of the Act, including gross income, donations tax, ordinary disposal rules (paragraph 11(1)(*a*) to (*d*)) of the Eighth Schedule) and estate duty, as well as the Davis Tax Committee's recommendations for trusts.

The research findings indicate that trustees' actions affecting discretionary (contingent) rights do not give rise to VSA disposals. Where beneficiaries hold vested rights, a VSA disposal and a CGT event may arise, particularly where trustees' decisions alter beneficiaries' interests within the VSA and CGT scope. Administrative trustees' actions that do not affect beneficiaries' interests such as appointing or removing a trustee do not constitute VSA disposals.

A comparative analysis of Australian and United Kingdom trust tax law, selected as international benchmarks, revealed similar distinctions between discretionary and fixed interests, although Australia's Value Shifting Regime is notably complex in its application. The study also identified statutory provisions that independently prevent certain trustees' actions from resulting in VSA disposals, and the Thistle Trust case

illustrated practical tax compliance challenges, including exposure to penalties and interest.

Drawing on doctrinal and empirical research findings, the study developed a practical framework to guide tax practitioners in analysing trustees' actions for potential VSA-related CGT consequences. The study concludes with limitations relating to trust diversity and recommends further research into the interaction between VSAs and the general anti-avoidance rules applicable to trusts.

Key words: Assets, contingent rights, discretionary trusts, disposals, estate-planning trusts, measurement of value shifting, non-discretionary trusts, value shifting arrangements, vested rights, vested trusts

Ukuhlaziywa Kwezenzo Zabaphatheli Ezinhlelweni Zokushintshwa Kwenani Kuma-Thrasti Ahlelelwa Ukuphathwa Kwefa: Uhlaka Olusebenzayo Lwabasebenzi Bezomthetho Wentela Olusekelwe Emibonweni Yochwepheshe Ngaphansi Komthetho Wentela Yengeniso

Lolu cwaningo luhlole ukuthi ngabe izenzo ezenziwa ngabaphathiswa be-trust, ikakhulukazi ukunikezela noma ukwaba impahla eyinhloko noma inzuzo etholakala ekuthengisweni noma ekukhuleni kwenani layo kumzuzi oyedwa, noma izinguquko ekwakhekeni kwabaphathiswa noma kwabazuzi, zibalwa njengokulahlwa noma ukudluliswa kwempahla ngaphansi kwesigaba 11(1)(*g*) Sesheduli Yesishiyagalombili yoMthetho Wentela Yomholo Namba. 58 ka-1962, ngaleyo ndlela kudale Uhlelo Olushintshayo Lwenani (i-VSA) kanye nesenzakalo Sentela Yenzuzo Yezimali (i-CGT). Imibhalo nezifundo okukhona kubonisa ukuhlaziywa okunomkhawulo kokuthi lezi zenzo zingaphakamisa kanjani ama-VSA kuma-thrasti ahlela ifa elimayelana nomhlaba anabazuzi abaningi. Lokhu kukhombisa ukuthi kusekhona isikhala elibalulekile ekuqondeni nasekuhumusheni izimiso zomthetho.

Kwasetshenziswa indlela yocwaningo exubile, ehlanganisa ukuhlaziywa okumayelana nezimfundiso eziyizinkolelo Zomthetho, imithetho yezamacala, iziqondiso ze-SARS, kanye nemibhalo yezifundiswa, nemibono evela kongoti kwezenhlokhono (ababambe iqhaza) kanye nohlu lwemibuzo olwenziwa nge-inthanethi oluphendulwe ngabaphenduli. Ucwaningo lwahlola uhlobo lwamalungelo abazuzi, izici ezibekwe ngumthetho ezakha incazelo ye-VSA, kanye nokuxhumana phakathi kwama-VSA nezinye izihlinzeko Zomthetho, okubandakanya imali engenayo ephelele, intela yezokusiza, imithetho ejwayelekile emayelana noma ukudluliswa kwempahla ngaphansi kwezigaba 11(1)(a) kuya ku-(d) Zesheduli Yesishiyagalombili, kanye nentela yefa yezomhlaba bese kuba izincomo Zekomidi ka-Davis Tax mayelana nama-thrasti.

Imiphumela yocwaningo ikhombisa ukuthi izenzo zabaphathiswa be-thrasti ezithinta amalungelo okuzikhethela noma amalungelo ancike ekwenzekeni kwesimo esithile azibangeli ukulahlwa noma ukudluliswa kwempahla okubhekwa njenge-VSA. Lapho abazuzi benamalungelo asevele egunyaziwe futhi esezinzile, ukulahlwa noma ukudluliswa kwempahla ngaphansi kwe-VSA kanye nesenzakalo

se-CGT kungahle kwenzeke, ikakhulukazi uma izinqumo zabaphathiswa ziguqula izabelo noma izinzuzo zabazuzi ngendlela ewela ngaphansi kwemibandela ye-VSA ne-CGT. Izenzo zokuphatha ezenziwa ngabaphathiswa ezingathinti izintshisekelo noma amalungelo abazuzi, njengokuqoka noma ukususa umphathiswa, azibhekwa njengokulahlwa noma ukudluliswa kwempahla ngaphansi kwe-VSA.

Ukuhlaziywa okuqhathanisa umthetho wentela wama-thrasti wase-Australia nowase-United Kingdom, okhethwe njengezibonelo zokuqhathanisa namazinga omhlaba, kwaveza ukuthi kunomehluko ofanayo phakathi kwenzalo yokuzikhethela kanye neqondile. Nokho, Uhlelo Lwezentela lwase-Australia ibonakala iwukuvuleleka kakhulu ekusetshenzisweni kwayo. Ucwaningo luphinde lwathola izihlinzeko zomthetho ezivimbela ngokuzimele ukuthi ezinye izenzo zabaphathiswa bama-trust ziholele ekulahlweni noma ekudluliswe kwempahla okubhekwa njenge-VSA, udaba lwe-Thistle Trust lakhombisa izinselelo ezikhona ekuthobeleni izimfuneko zentela ngokwenza, okubandakanya ukubhekana nezijeziso kanye nenzalo ngenxa yokungathobeli noma ukubambezeleka ekufezeni izibopho zentela.

Ngokusekelwe emiphumeleni yocwaningo lwezomthetho kanye nocwaningo olusekelwe emininingwaneni eqoqwe kubabambiqhaza, lolu cwaningo lwakha uhlaka olusebenzayo lokuqondisa ongoti bentela ekuhlaziyeni izenzo zabaphathiswa bama-trust ukuze kutholakale imiphumela engaba khona ye-CGT ehlobene nama-VSA. Ucwaningo luphetha ngokuchaza imikhawulo yalo, ikakhulukazi ephathelene nokwehlukahlukana kwama-trust, futhi luncoma ukuthi kwenziwe olunye ucwaningo mayelana nokuxhumana phakathi kwama-VSA kanye nemithetho ejwayelekile yokugwema noma yokulwa nokugwenywa kwentela esebenza kuma-trust.

Amagama asemqoka: Izimpahla, amalungelo angakabi nesiqiniseko, azotholakala kuphela uma kwenzeka okuthile, i-trasti enegunya lokuzikhethela ekwabeleni abazuzi impahla noma inzuzo, ukulahla noma ukudlulisa, ama-trasti ohlelo lwezomhlaba, ukukalwa kokushintsha kwenani, ama-trasti angenalo igunya elibanzi lokuzikhethela ukuthi yimuphi umzuzi ozothola impahla noma inzuzo, izinhlelo

ezishintshayo kwezenani, amalungelo asuke eqinisekisiwe, abazuzi benamalungelo aqinisekisiwe bama-trasti

Tshekatsheko ya Ditiro tsa Batlhokomedi ba Diterasete mo Dithulaganyong tsa Phetiso ya Boleng mo Diteraseteng tsa Thulaganyo ya Boswa: Letlhomeso le le Dirisiwang ke Badiri ba Lekgetho, le le Theilweng mo Ditemogong tsa Baitseanape, go ya ka Molao wa Lekgetho la Lotseno

Thutopatlisiso eno e ne ya sekaseka gore a ditiro tsa batlhokomedi ba diterasete, segolobogolo go bewa kgotsa go abiwa ga thoto ya letlotlo kgotsa poelo ya matlotlo go moamogeladitshiamelo a le mongwe fela, kgotsa diphetogo mo popego ya batlhokomedi ba diterasete kgotsa baamogeladitshiamelo, di kaya phatlhalatso go ya ka temana ya 11(1)(g) ya Mametlelelo ya Borobedi ya Molao wa Lekgetho la Lotseno wa bo58 wa 1962 (Molao), mme ka jalo di baka Thulaganyo ya Phetiso ya Boleng (VSA) le tiragalo ya Lekgetho la Dipoelo tsa Matlotlo (CGT). Dikwalo tsa thuto tse di leng teng di na le tshekatsheko e e lekanyeditsweng ya gore ditiro tse di ntseng jalo di baka jang di-VSA mo diteraseteng tsa thulaganyo ya boswa tse di nang le baamogeladitshiamelo ba le bantsi, mme seno se senola phatlha e kgolo mo tlhalosong ya thuto ya molao.

Go ne ga dirisiwa mokgwa o o kopanyang mekgwa e e farologaneng, o o kopantseng tshekatsheko ya thuto ya semolao ya Molao, molao wa dikgotlatshekelo, dikaelo tsa SARS le dikwalo tsa thuto, mmogo le kitso ya maitemogelo e e bonweng mo dipotsolotsong le baitseanape (batsayakarolo) le lenanetsotso la dipotso la mo inthaneteng (baarabi). Patlisiso e ne ya batlisisa mofuta wa ditshwanelo tsa baamogeladitshiamelo, dintlha tsa semolao tsa tlhaloso ya VSA, le tirisano magareng ga di-VSA le ditlamelo tse dingwe tsa Molao, go akaretsa letsenokakaretso, Lekgetlo la Dikatso, melao e e tlwaelegileng ya phatlhalatso (temana ya 11(1)(a) go fitlha go (d) ya Mametlelelo ya Borobedi) le kgethisoboswa, mmogo le dikatlanegiso tsa Komiti ya Lekgetho ya Davis malebana le diterasete.

Diphitlhelelo tsa patlisiso di bontsha gore ditiro tsa batlhokomedi ba diterasete tse di amang ditshwanelo tsa boikgethelo (ditshwanelo tse di ikaegileng ka maemo) ga di bake diphatlhalatso tse di amanang le VSA. Fa baamogeladitshiamelo ba na le ditshwanelo tse di tlhomameng, phatlhalatso ya VSA le tiragalo ya CGT di ka tlhaga, segolobogolo fa ditshwetso tsa batlhokomedi ba diterasete di fetola dikgatlhego tsa

baamogeladitshiamelo mo maemong a a akarediwang ke VSA le CGT. Ditiro tsa tsamaiso tsa batlhokomedi ba diterasete tse di sa ameng dikgatlhego tsa baamogeladitshiamelo, jaaka go tlhoma kgotsa go tlosa motlhokomedi, ga di kaye diphatlhalatso tsa VSA.

Tshekatsheko ya tshwantshanyo ya molao wa lekgetho la diterasete wa Australia le wa United Kingdom, e e tlhophilweng jaaka ditekanyetso tsa boditšhabatšhaba, e ne ya senola dipharologano tse di tshwanang magareng ga dikgatlhego tsa boikgethelo le dikgatlhego tse di tlhomameng, le fa Thulaganyo ya Phetiso ya Boleng ya Australia e raraane thata mo tirisong ya yone. Thutopatlisiso eno e ne ya supa gape ditlamelo tsa semolao tse ka botsone di thibelang ditiro dingwe tsa batlhokomedi ba diterasete go felela ka diphatlhalatso tsa VSA, mme kgetsi ya Thistle Trust e ne ya bontsha dikgwetlho tsa boikobela lekgetho mo tirisong, go akaretsa go nna mo kotsing ya dikotlhao le morokotso.

Go ikaegilwe ka diphitlhelelo tsa patlisiso ya thuto ya molao le ya maitemogelo, thutopatlisiso eno e ne ya tlhama letlhomeso le le dirisiwang go kaela badiri ba lekgetho fa ba sekaseka ditiro tsa batlhokomedi ba diterasete mabapi le ditlamorago tse di ka nnang teng tsa CGT tse di amanang le VSA. Thutopatlisiso eno e konela ka go supa dikgoreletsi tse di amanang le mefutafuta ya diterasete, mme e akantsha gore go dirwe dipatlisiso tse di oketsegileng ka ga tirisano magareng ga di-VSA le melao e e akaretsang ya go thibela go tila lekgetho e e dirisiwang mo diteraseteng.

Mafoko a botlhokwa: Dithoto, ditshwanelo tse di ikaegileng ka maemo, diterasete tsa boikakanyetso, diphatlhalatso, diterasete tsa thulaganyo ya boswa, tekanyo ya phetiso ya boleng, diterasete tse e seng tsa boikakanyetso, dithulaganyo tsa phetiso ya boleng, ditshwanelo tse di tlhomameng, diterasete tse di nang le ditshwanelo tse di tlhomameng

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LIST OF LATIN TERMS

Latin Term	Meaning
alter ego trust	An alter ego trust is a type of trust arrangement where the founder acts as both the trustee and the primary beneficiary during their lifetime. This means that the person who establishes the trust retains control over the trust assets and benefits from them directly, making the trust function essentially as a legal 'second self' for asset management and estate planning purposes.
inter vivos trusts	Trust formed during the lifetime of the founder of the trust.
right in personam	A personal right against a person or trustee to act in good faith regarding the assets held in a trust.
right in rem	A real right or ownership to or in property.
stipulatio alteri	A contract entered into by two parties for the benefit of a third party.
Spes	Hope or an expectation; a contingent right to property.
ultra vires transactions	Ultra vires transactions refer to actions or agreements entered into by a trust that exceed the scope of authority or powers granted in the trust deed. Such transactions are considered illegal or unlawful because the trustees act beyond the legal limits of their conferred powers. As a result, any ultra vires transaction is null and void, having no legal effect, and cannot be ratified by the trustees or beneficiaries.
unius est exclusio alterius	When two possibilities exist simultaneously in law for one event, the most explicit option takes precedence over the second option, which is ignored.

LIST OF ABBREVIATIONS AND TERMS

Abbreviations and terms	Meaning of abbreviations and terms
Act	Income Tax Act No. 58 of 1962
ATO	Australian Tax Office
CASRERC	UNISA College of Accounting Science Research Ethics Review Committee
CFP	Certified Financial Planner
CGT	Capital gains tax
Co Act	Company's Act No. 71 of 2008
DTC	Davis Tax Committee
CUT	Central University of Technology
Eighth Schedule	Eighth Schedule to the Income Tax Act of South Africa No. 58 of 1962
EDA	Estate Duty Act No. 45 of 1955
Experts	Experts with expertise in both trust administration and the tax laws applicable to trusts.
FPI	Financial Planning Institute of Southern Africa
GAA	General Law Amendment Act No. 50 of 1956
GAAR	General Anti-Tax Avoidance Rules
GVSR	General value shifting regime (Australia) in terms of the Income Tax Assessment Act 1997, No 38 of 1977.
HMRC	His Majesty's Revenue and Customs
IHTA 1984	Inheritance Tax Act 1984, UK General Acts 1984 c 51
ITAA	Income Tax Assessment Act 1997, No. 38 of 1997
LSSA	Law Society of South Africa
N/A	Not applicable
Ordinary disposals	Subparagraphs 11(1)(*a*), (*b*), (*c*) and (*d*) of the Eighth Schedules of the Income Tax Act of South Africa No. 58 of 1962
P-value	Fisher Exact value
Paragraphs	Paragraphs of the Eighth Schedule to the Income Tax Act of South Africa No. 58 of 1962
Participants	Experts who were interviewed
Participant one to participant eight	Anonymous label provided for each of the participants who took part in the interviews
QuestionPro	Online survey software to create surveys and questionnaires, which provides a web-based survey data collection and reporting platform.
RERC	UNISA College of Accounting Research Ethics Review Committee
Respondents	Experts who participated in the online questionnaire
SA	South African
SAICA	South African Institute of Chartered Accountants
SAIPA	South African Institute of Professional Accountants
SAIT	South African Institute of Taxation
SARS	South African Revenue Service

SPSS	SPSS (Statistical Package for the Social Sciences), also known as IBM SPSS Statistics, is a software package used for the analysis of statistical data.
TAAA	Tax Administration Act No. 28 of 2011
TCGA92	Taxation of Chargeable Gains Act of 1992, UK General Acts 1992 c 12
The Tax Faculty	An accredited continuous professional development for the Financial Planning Institute
TPCA	Trust Property Control Act No. 57 of 1988
Transfer Duty Act	Transfer Duty Act No. 40 of 1949
TSEM	HMRC Internal Guide on Trusts, Settlements and Estates Manual Internal Guide on Trusts, Settlements and Estates Manual
UK	United Kingdom
UNISA	University of South Africa
UNISA RERC Form 1	UNISA College of Accounting. Research Ethics Review Committee Form 1, 2019, (research ethics application form for conducting research involving humans)
UNISA Research Ethics	University of South Africa, Policy on Research Ethics, 2016
VS (AUS)	Value shifts, Divisions 723;724 and 727 of the Income Tax Assessment Act 1997, No. 38 of 1997
VS (UK)	Value Shift, section 29 of the Taxation of Chargeable Gains Act of 1992, UK General Acts 1992 c 12
VSA	Value shifting arrangement, paragraph 1 of the Eighth Schedule
VSAs	Value shifting arrangements, paragraph 1 of the Eighth Schedule

CHAPTER 1

INTRODUCTION TO VALUE SHIFTING ARRANGEMENTS IN TRUSTS

1.1 INTRODUCTION

This chapter establishes the foundation for the study by outlining the conceptual, legal, and methodological framework for analysing trustees' actions that may give rise to Value Shifting Arrangements (VSAs) within estate-planning trusts, as defined in paragraph 1 of the Eighth Schedule of the Income Tax Act No. 58 of 1962 (the Act). Consistent with the focus of the thesis, the chapter situates the inquiry within the broader capital gains tax (CGT) regime and the statutory mechanisms designed to prevent the shifting of value between connected persons without triggering a CGT event, while also recognising that the analysis of trustees' actions necessarily intersects with other components of the Act most notably the Gross Income definition, the Donations Tax provisions and the ordinary disposal rules, which collectively inform the tax consequences arising from transactions and distributions within estate-planning trusts. The chapter introduces the background to the research, identifies the existing knowledge gap, and presents a doctrinal examination of the core elements of a CGT event (1.1). It then outlines the motivation for the study (1.2), the problem statement (1.3), and the contribution of the study (1.4), followed by the research objectives and the research questions (1.5), the scope and limitations (1.6), the research methodology (1.7), definitions of key terms (1.8), and an overview of the thesis structure (1.9), concluding with a summary (1.10). SARS (2020:776) characterises a VSA as an anti-avoidance measure aimed at preventing the transfer of value between entities without the recognition of a CGT event an issue of relevance in the administration of estate-planning trusts.

The study is grounded in a doctrinal analysis of the Act, SARS revenue guides, relevant case law, and established tax scholarship, which collectively shape the interpretation of VSAs in the South African trust environment. In alignment with the thesis title's emphasis on expert perceptions, the doctrinal analysis is complemented by insights from individuals who possess substantial working

knowledge of trusts and first-hand practical experience in trust administration and estate-planning. These experts are the online questionnaire respondents and the interview participants defined as practitioners actively engaged in the administration and taxation functions relating to trusts (see section 1.7.2.1). Their detailed professional profiles including years of experience, professional body affiliations, and work environments are presented in section 5.2 of Chapter 5 and section 6.2 of Chapter 6. Their insights are triangulated with the doctrinal findings to develop a practical framework for tax practitioners, ensuring that the study reflects both statutory interpretation and the realities of trustees' decision-making in estate-planning trusts involving vested and contingent beneficiary rights. In addition, the study incorporates an international comparative perspective, drawing on foreign trust and capital gains tax frameworks to assess whether elements of these tax aspects apply to an asset that is vested in a single beneficiary. This type of trustee action lies at the core of the primary research problem addressed in this study: the vesting or distribution of an asset in one beneficiary may alter the rights and interests of all beneficiaries, thereby affecting their respective market value interests in the trust as contemplated in the definition of a VSA in paragraph 1 of the Eighth Schedule. Seven additional trustee actions have been identified and may affect beneficiaries' market-value interests; however, they are addressed only within the study's secondary research objectives (see section 1.5.1.1). The central focus remains on whether the vesting of an asset in one beneficiary constitutes a VSA and how trustees' decisions in this regard should be analysed within the statutory framework. This doctrinal uncertainty, together with the need to consider comparative international approaches, underscores the importance of a systematic analysis of trustees' actions within the VSA framework, informed by both legal interpretation and expert professional experience, and motivates the development of the practical framework proposed in this thesis.

Davis, Beneke and Jooste (2024:2A.8.4) mention that VSAs are both vague and broad in scope, especially in instances where trustees vest or distribute an asset to one of the beneficiaries of a trust. The research aims to clarify when such shifts in beneficiaries' entitlements constitute a VSA under the Act, and to guide tax practitioners in managing these risks within the legal framework. Trust asset ownership and the capital gains attribution rules add to the complexity of interpreting

VSAs. It is further noted that the gross income definition in section 1 of the Act, as well as paragraphs 11(1)(*a*), (*b*), (*c*) and (*d*) of the Eighth Schedule, may override a VSA. A comprehensive literature review, conducted by the researcher with the additional support of two librarians, revealed a pronounced lack of academic research on the tax treatment of VSAs within SA *inter vivos* trusts and estate planning. This absence of scholarly work on VSAs in the context of estate-planning trusts creates a significant interpretive gap, as the proper interpretation of a VSA is essential to determining whether trustees' actions constitute a paragraph 11(1)(*g*) disposal under the Eighth Schedule and thereby give rise to a CGT event (Davis *et al.*, 2024:2A.8.4). By acknowledging this gap, the research underscores its intention to assist tax practitioners by developing a practical framework for identifying, managing, and mitigating VSAs in trusts. Accordingly, a thorough assessment of all applicable legislative provisions is essential when analysing the tax consequences of trustees' actions. Trusts present a complex and evolving CGT landscape because multiple permutations of trustee actions, beneficiary transactions, residency distinctions, attribution rules, and connected-person constraints interact to determine where a capital gain is taxed, requiring careful navigation by tax professionals working with trusts (SARS, 2020:583). In The Thistle Trust v. CSARS [2024] ZACC 19, the court emphasised the risk that trustees' actions may lead to misinterpretation of the attribution rules regarding the distribution of capital gains to beneficiaries of a second-tier trust, with the potential for unintended CGT implications and understatement penalties. Thus, this research is positioned to fill the identified knowledge gap and provide practical guidance for tax practitioners to identify VSAs arising from trustees' actions.

The Davis Tax Committee (the DTC) Report on the Feasibility of Wealth Tax in South Africa (DTC, 2018:81) offers recommendations regarding the application of CGT to discretionary trusts, which bear relevance to trust-related VSAs. These recommendations are incorporated into the study's analysis. Additionally, the research considers VSAs as they apply to foreign trusts used in estate planning, allowing for a comparative examination between South Africa and selected international tax jurisdictions. Incorporating possible VSAs from foreign trust frameworks adds depth to the study, emphasising the significance of referencing global best practices in trust administration and tax compliance. The research

centres on the interconnectedness of key concepts arising from trustees' actions, such as trusts, estate planning, capital gains tax events, disposals, and VSAs. The subsequent sections of this introduction address each of these foundational concepts in greater detail.

1.1.1 Background on trusts in estate planning

This study examines a VSA as applied to *inter vivos* trusts used for estate planning in the SA context. The inclusion of VSAs related to foreign trusts aims to provide an alternative perspective that may improve the understanding of a VSA within the SA framework. In section 1 of the Trust Property Control Act No. 57 of 1988 (the TPCA), a trust is defined as an arrangement contained in the trust instrument or a trust deed; whereby trust assets are controlled by the trustees of a trust for the benefit of the trust beneficiaries according to the provisions contained in the trust deed. The trustees control the trust's assets, in agreement with the stipulations of the trust's founder (estate planner) as contained in the trust deed. Davis *et al*. (2024:1.1) state that an estate plan deals with the control and disposition of the estate planner's assets either during his or her lifetime, or after his or her death. SA trust law, influenced by Roman Dutch Law, recognises a *stipulatio alteri* as a third-party benefit contract (Pace & Van der Westhuizen, 2023:B5.2). The underlying trust assumptions used in this study are further discussed in section 1.8 below.

Davis *et al*. (2024:14.2) describe an example of a basic family trust structure: The founder, often a grandparent, makes the initial donation. Trustees, usually parents and an independent trustee, manage the trust assets for the beneficiaries, who are typically family members like the trustees' children. Trust assets can include items such as shares in private companies, stock exchange shares, commercial property, or farmland. An estate plan, using a trust, has some of the following benefits: continuity, flexibility, preservation of assets, provisions for minor children and spouses, protection from creditors, prevention of asset fragmentation, reduction of income tax, estate duty, and CGT (Olivier, Strydom, Van den Berg, Roux & Van der Merwe, 2023:8.2.1). According to paragraph 1 of the Eighth Schedule, the definition of a VSA includes those related to trusts as a capital gain disposal. This study focuses on the actions of trustees of a family trust within an estate plan, which could

result in VSAs. The impact of trustees' actions potentially leading to CGT and VSAs is a consideration in estate planning. Therefore, it is essential to discuss the core elements of CGT next.

1.1.2 Core elements of CGT events

CGT was introduced in South Africa on 1 October 2001, and a capital gain is a critical component of taxable income and included in terms of section 26A of the Act. To constitute a CGT event, four core elements must be present: a capital asset, a disposal of a capital asset, measurable proceeds, and measurable base cost of a capital asset (Olivier, 2007:37).

The first core element of a capital gain is that a capital asset should exist. Capital is not defined in section 1 of the Act, nor in paragraph 1 of the Eighth Schedule of the Act (the Eighth Schedule). The broad definition of an asset (paragraph 1 of the Eighth Schedule) encompasses several types of assets, including rights to or in assets which is pertinent to a VSA related to beneficiaries of a trust. Paragraph 1(*a*) of an asset as defined in paragraph 1 of the Eighth Schedule defines an asset as any property, including immovable property, movable property, corporeal and incorporeal property. Paragraph 1(*b*) of an asset in paragraph 1 of the Eighth Schedule defines any right or interest of whatever nature as an asset. The second core element is a disposal of a capital asset that should occur for a capital gain to occur, and the definition in paragraph 1 read with paragraph 11(1)(*a*) to (*g*) of the Eighth Schedule defines a disposal. The third core element is that the proceeds of a disposal should be measurable. Paragraph 35(1) of the Eighth Schedule defines proceeds as the amount received or accrued from disposing of an asset. According to paragraph 35(2), the proceeds of a VSA are specifically quantified. The fourth core element is that the base cost of a disposal should be measurable. Paragraph 20(1)(*a*) of the Eighth Schedule defines base cost as the cost of the acquisition of an asset, including the cost of any improvements of an asset. Base cost represents the initial cost incurred to acquire the asset, including any subsequent improvements or enhancements. The base cost of a VSA is measured in terms of the formula contained in paragraph 23(*a*) of the Eighth Schedule. A taxable capital gain arises when the proceeds from the disposal of an asset exceeds its base cost,

resulting in a gain that is subject to taxation (paragraph 3(*a*) of the Eighth Schedule). A capital loss arises from a disposal when the base cost of an asset exceeds its proceeds (paragraph 4(*a*) of the Eighth Schedule).

Without the four core elements, no CGT or VSA is possible. Thus, analysing trustees' actions for a potential VSA first requires verifying these four elements. If the four elements are not present, no VSA will occur. The reason for mentioning the four elements is for an overall approach of analysing trustees' actions.

1.1.3 Paragraph 11(1) disposals

A disposal is required to trigger a CGT event, which may result in a capital gain. To analyse trustees' actions which may result in a VSA related to a trust, all the disposal rules should be examined to establish if the disposal rules contained in paragraphs 11(1)(*a*) to (*f*) of the Eighth Schedule do not preclude a paragraph 11(1)(*g*) disposal.

A VSA disposal is defined in paragraph 11(1) of the Eighth Schedule as follows:

> "(1) Subject to subparagraph (2), a disposal is any event, act, forbearance, or operation of law which results in the creation, variation, transfer, or extinction of an asset, and includes-
> (*g*) the decrease in value of a person's interest in a company, trust, or partnership as a result of a value shifting arrangement."

Accordingly, a decrease in a person's interest in a trust must be quantified by determining the extent to which the value of that interest is reduced. Moreover, because the first core element of any capital gains tax event under paragraph 11(1) is the existence of an asset, this requires consideration of whether the relevant beneficial interest in the trust constitutes an "asset" for purposes of the Eighth Schedule.

1.1.4 Definition of a VSA

The Eighth Schedule's paragraph 11(1)(*g*) disposal rule considers “the decrease in a person's interest in a company, trust, or partnership as a result of a VSA”. The definition of a VSA in paragraph 1 of the Eighth Schedule to the Act is as follows:

> “VSA means an arrangement by which a person retains an interest in a company, trust, or partnership, but following a change in the rights or entitlements of the interest in that trust or partnership (other than because of a disposal at market value as determined before the application of paragraph 38), the market value of the interest of that person decreases and –
>
> *(a)* the value of the interest of a connected person in relation to that person held directly or indirectly in that company, trust, or partnership increases; or
> *(b)* a connected person in relation to that person acquires a direct or indirect interest in that company, trust, or partnership.”

The five essential elements that define a VSA, as outlined in paragraph 1 of the Eighth Schedule to the Act, can be summarised by the following questions: (i) Is there an arrangement? (ii) Have the beneficiaries retained an interest in the trust after the VSA? (iii) Are the beneficiaries connected persons? (iv) Has there been a change in rights and entitlements resulting in a change in interest in the trust? (v) What is the significance of the parenthesised paragraph 38 exclusion? These five elements are discussed in research questions A, B, C, E, F, G, and H in section 1.5.2 below.

The parenthesised paragraph 38 exclusion within the definition of VSA in paragraph 1 of the Eighth Schedule, is ambiguous. Paragraph 38 of the Eighth Schedule is aimed at donations, consideration not measurable in money and transactions between connected persons, not at an arm's length price. The definition of a VSA requires that at least one trust beneficiary experiences a market value reduction comparable to a donation, which may therefore be excluded from a VSA. A donation

is defined in section 55(1) of the Act and “means a gratuitous disposal of property including any gratuitous waiver or renunciation of a right”. A change in a trust beneficiary’s rights that results in a reduction of their interest in a trust asset without any form of compensation can be described as a donation of the beneficiary’s interest in the trust. Provided that the beneficiary is not coerced into accepting a reduced interest, this reduction is comparable to a donation.

A reduction in a beneficiary’s interest in a trust may conflict with the ordinary disposal rules of paragraphs 11(1)(*a*), *(b*), (*c*) and (*d*) of the Eighth Schedule (the ordinary disposals) depending on how the reduction occurs. Examples of overlapping ordinary disposals with a reduction in a beneficiary’s interest, as required for a VSA, could include for example a “donation” or “cession” of an asset (paragraph 11(*a*)), a “waiver of a right” or a “renunciation of right” to an asset (paragraph 11(1*)*(*b*)), a “loss” of an asset (paragraph 11*(*1)(*c*)), or “vesting” an asset in a beneficiary (paragraph 11(1)(*d*)). Uncertainty about interpreting changes in beneficiaries' rights in a trust's asset as potential donations complicates a VSA. The possibility exists that trustees’ actions which change a beneficiary’s rights in a trust’s asset may also be described in the paragraphs of the ordinary rules of the Eighth Schedule which indicates the multifaced and complex legislation of VSAs in South Africa. (The ordinary disposals are discussed in research question D in section 1.5.2 below).

1.2 MOTIVATION FOR THE STUDY

The motivation to study VSAs related to trusts stems from a notable lack of prior research and knowledge gap in the tax implications of VSAs related to trustees’ actions covering both contingent and vested rights of beneficiaries, specifically the unresolved question of whether such trustee-initiated changes to beneficiaries’ rights constitute a VSA that triggers a paragraph 11(1)(*g*) disposal and therefore a CGT event. Key reasons include: (1) Janse van Rensburg (2007:292) found VSAs are open to interpretation; (2) Pieterse (2002:29-31) noted further research is needed on trust-related VSAs; (3) the findings of Davis *et al*. (2024:2A.8.4) concur with the findings of Pieterse and the complexity of VSAs related to trusts; (4) experts in trust literature and academia (perceptions of anonymous authors of different trust

textbooks and one academic) agree that such research benefits stakeholders; (5) Thistle Trust v. CSARS [2024] ZACC 19 highlighted the CGT risks arising from the incorrect tax interpretation and disclosure of the capital gain consequences of trustees' actions, with the potential for interest and tax penalties due to tax non-compliance; (6) there is a need to assess the impact of the DTC's (2018:81) recommendations. In addition, this study will provide a vital practical framework to address VSAs in trusts, offering essential guidance for tax practitioners. By establishing this structured approach, the research aims to ensure that VSAs in trusts are properly understood and managed, supporting accurate tax compliance and effective VSA disclosure when completing income tax returns for trusts and trust beneficiaries.

1.3 PROBLEM STATEMENT

Trust's exposure to VSAs remains insufficiently examined, with limited research addressing the CGT consequences of trustee actions, such as vesting or distributing assets of trusts to a single beneficiary of a trust. Additional trustees' actions for example adding or removing beneficiaries to or from a trust have not been researched for VSAs. This knowledge gap creates uncertainty for tax experts and trustees involved in estate planning and has critical implications for avoiding potential tax non-compliance consequences by incorrectly interpreting VSAs related to trusts which may result in understatement tax penalties and interest. This study examines how complex VSA rules apply to trusts by analysing trustees' actions from tax and trust law perspectives, providing guidance for tax practitioners dealing with VSA complexities in trusts.

According to SARS, (2020:776) the purpose of a VSA is to prevent any manipulation in asset values which could circumvent capital gains tax consequences (SARS, 2020:776). Trustees must be mindful of actions that could result in a VSA and trigger a CGT disposal. The actions of trustees may have far-reaching income tax consequences, particularly where undisclosed VSA-related disposals give rise to CGT events, resulting in underpayments of provisional tax together with the associated interest and penalties. In the case of The Thistle Trust v. CSARS [2024] ZACC 19, SARS raised an additional assessment for the 2014, 2015, and 2016 tax

years of The Thistle Trust, effectively ignoring the disclosure of capital gains which were vested in the beneficiaries of The Thistle Trust and taxed The Thistle Trust itself (see section 2.6.1 in Chapter 2). SARS also imposed understatement penalties in terms of section 222(1) of the Tax Administration Act No. 28 of 2011 (the TAA) in its revised assessments. Trustees' actions, if incorrectly applied, could have CGT, understatement penalties and section 89*bis*(2) of the Act interest consequences. Janse van Rensburg (2007:292) states that paragraph 11(1)(*g*) of the Eighth Schedule is different from the ordinary disposals contained in paragraph 11(1)(*a*) to (*f*) which require an asset to be realised or disposed. This inconsistency complicates the measurement of a VSA.

1.4 CONTRIBUTIONS OF THE STUDY

The study explores beneficiaries' rights in a trust as capital gains tax assets, comparing them to assets/property for gross income, donations tax, and estate duty purposes. It also examines the overlap of VSA disposals with the ordinary disposal rules, donations tax, and gross income implications to guide tax practitioners regarding the tax implications of VSAs on trusts. The goal is to assist tax practitioners to meet the trusts income tax compliance responsibilities effectively. The tax implications in terms of the Act that could be triggered by a VSA occurring in a discretionary (Pace & Van der Westhuizen, 2023:B6.3.1) or non-discretionary (vested) (Olivier *et al*., 2023:5.3.2) trust, have not been researched previously. SARS (2020:776) provides an example of a VSA related to a company interest but does not provide details of VSAs for trusts in Chapter 14 of the SARS Comprehensive Guide to Capital Gains Tax (SARS, 2020:583-642), indicating a lack of guidance on VSAs related to trusts. The study contributes to the field of taxation by assisting tax practitioners in meeting estate-planning trust' income tax compliance responsibilities, specifically by correctly identifying the VSAs related to trustees' actions and correctly disclosing any resulting capital gains in either the trust income tax returns or the personal income tax returns of the beneficiaries. This study's significance lies in comprehensively researching the tax implications of VSAs under the Act for both discretionary and vested trusts.

The DTC's (2018:81) tax treatment recommendations on trusts and VSAs will be reviewed and may aid with policy-making purposes. Examining VSAs related to trusts in foreign countries could offer new insights from the foreign trust experts interviewed. A comparative analysis of the VSAs related to trusts in foreign countries may provide fresh insights to VSAs of trusts from a foreign perspective as informed by data collected from interviews conducted with foreign trust experts.

During the preliminary phase of the research three recognised trust experts, were consulted regarding the feasibility and relevance of a study on VSAs in the context of trusts. Two of these specialists were consultants with practices focused on trusts, tax, and estate administration, and have authored prominent reference works on SA trusts. Consultant 1 had over 32 years of experience in the field (academic qualifications: B. Juris, LLB, and a Certificate in Tax Law), while Consultant 2 had more than 12 years' experience (academic qualifications: BCom Law, LLB, and LLM in Estate Planning). The third expert was a senior lecturer with 18 years of teaching experience in trust taxation (academic qualifications: BCom, BCom Honours in Management Science (Taxation), and LLB cum laude). All three experts agreed that further research into VSAs concerning trusts is justified.

The Thistle Trust v. CSARS [2024] ZACC 19 (see section 2.6.1 of Chapter 2) considered the interpretation of the attribution rules by trustees of a trust who were beneficiaries of another trust, specifically regarding the distribution of capital gains which the Thistle Trust received and later distributed to individual beneficiaries. This case also addressed the trust's liability for tax compliance and potential understatement penalties under section 222(3) and (4) of the TAA. This study offers a coherent, practice-oriented framework that strengthens tax practitioners' ability to identify and interpret VSAs in the trust context and ensures tax compliance which mitigates any penalties as described in the above case.

1.5 RESEARCH OBJECTIVES AND RESEARCH QUESTIONS

1.5.1 Primary research objective

The primary research objective is to determine, from the perceptions of the respondents and participants, how CGT could be triggered by a VSA when trustees vest or distribute a trust asset to one of the beneficiaries of a trust used in a SA estate planning exercise. The types of trusts under analysis in this study are *inter vivos* trusts which could either be classified as a discretionary or a vested trust. Williams (2005:90) describes an example of a VSA occurring when a variation to the trust deed of a vested trust results in a beneficiary's interest being reduced, for example from 33.3% to 25% (see illustration in section 2.4.1 of Chapter 2).

1.5.1.1 Secondary research objectives

The secondary research objectives expand on the primary research objective by examining alternative trustees' actions that may also influence the trust beneficiaries' rights to the assets held in the trust. This study identifies eight secondary research objectives. The first seven are based on current tax legislation, while the eighth considers the recommendations of the DTC's Report (2018:18). The secondary research objectives are formulated as follows:

- **Secondary research objective 1**

  To determine whether the trustees' action of the sale of a capital asset and the vesting or distribution of the capital gain in or to a beneficiary of a trust would result in a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).

- **Secondary research objective 2**

  To determine whether the trustees' action of adding additional beneficiaries to the trust would result in a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).

- **Secondary research objective 3**

  To determine whether the trustees' action of removing beneficiaries from a trust would result in a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).

- **Secondary research objective 4**

  To determine whether the trustees' action of appointing new trustees to the trust would result in a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).

- **Secondary research objective 5**

  To determine whether the trustees' action of removing trustees from the trust would result in a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).

- **Secondary research objective 6**

  To determine whether the trustees' action of donating a beneficiary's interest in a trust (with the consent of the beneficiaries) would result in a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).

- **Secondary research objective 7**

  To determine if other trustees' actions, not covered in the primary or secondary research objectives 1 to 6, would result in a VSA from the perspective respondents and participants who participated in this study (discussed in Chapters 7 and 8).

- **Secondary research objective 8**

  To determine whether the of the DTC's Report on the Feasibility of Wealth Tax in South Africa (DTC, 2018:81) would have any impact on a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).

1.5.2 Research questions

All the research questions A to K will be applied to the primary and secondary research objectives 1 to 8 of this study. The following research questions have been formulated to address the primary and secondary research objectives formulated for this study:

1.5.2.1 Nature of the trust's assets (A)

Do beneficiaries' rights or interests in trust assets constitute "property" for purposes of section 55(1) of the Income Tax Act and section 3(2) of the Estate Duty Act, and an "asset" for the purposes of paragraph 1 of the Eighth Schedule given that the CGT definition of "asset" incorporates "property" and is the disposal of such rights excluded from the section 1(1) gross-income definition, which does not define "asset"?

1.5.2.2 Income tax (excluding capital gains tax) implications (B)

Do any of the actions taken by the trustees, as mentioned in the primary and secondary research objectives 1 to 8 result in gross income and income tax (excluding capital gains) implications, and should they therefore be excluded from a VSA?

1.5.2.3 Donations tax implications (C)

Do any of the selected trustees' actions mentioned in the primary and secondary research objectives 1 to 8 result in donations tax, and should they therefore by implication be excluded from a VSA?

1.5.2.4 Ordinary disposal implications (D)

Do any of the selected trustees' actions mentioned in the primary and secondary research objectives 1 to 8 result in a paragraph 11(1)(*a*) to (*d*) ordinary disposal of the Eighth Schedule to the Act, and should they therefore be excluded from a VSA?

1.5.2.5 Beneficiary's interest in a trust (E)

Are the beneficiaries' interests in a trust, as referred to in the definition of a "VSA" in paragraph 1 of the Eighth Schedule to the Act, considered to be a capital asset for CGT purposes pertaining to trust beneficiaries in discretionary or vested trusts?

1.5.2.6 Measuring a VSA (F)

How are proceeds and base costs of a VSA quantified in a trust context? Are there examples of VSAs related to trusts, companies, or partnerships in the SARS guides that can provide guidance in determining the value to be placed on a VSA in a trust context?

1.5.2.7 Value shifting disposal implications (G)

Do any of the trustees' actions mentioned in the research objectives meet the definition of paragraph 1 of the VSA and does it fall within paragraph 11(1)(*g*) of the Eighth Schedule of the Act?

1.5.2.8 Other trustees' actions (H)

Do any of the trustees' actions not mentioned in the primary and secondary research objectives 1 to 7 constitute a VSA?

1.5.2.9 Implications of the DTC's recommendations (I)

What are the implications for trustees' actions if the recommendations of the DTC's Report on the Feasibility of Wealth Tax in South Africa (DTC, 2018:81) in relation to VSAs are implemented in South Africa on VSAs?

1.5.2.10 Additional comments applicable to a VSA in trusts (J)

Are there any additional relevant comments which may be applicable to VSAs in trusts?

1.5.2.11 Foreign value shifting alternatives (K)

Are there examples of VSAs in the foreign revenue guides for trusts in Australia and the UK that could apply to or inform the tax treatment under the Income Tax Act of South African trusts?

1.6 SCOPE AND DELINEATIONS OF THE STUDY

The study is pertinent to the analysis of trustees' actions related to VSAs as defined in paragraph 1 of the Eighth Schedule of the Act. This study only included *inter vivos* SA discretionary and vested resident trusts used in an estate plan. The trust examples examined are either classified as a discretionary trust in which the

beneficiaries only have a contingent right; or a non-discretionary vested trust in which the beneficiaries have a vested right (not a real right). A non-discretionary *bewind trust* in which the beneficiaries have a real right in the trust's assets is excluded from the scope of this study.

In the case of hybrid trusts that hold specific assets, those assets for which beneficiaries' rights are considered contingent rights are examined within the discretionary trust component, while assets in which beneficiaries have vested rights are administered within the vested trust component. The rights conferred to beneficiaries whether discretionary or vested are determined according to the stipulations set out in the trust deed or the trustees' prior resolution.

For the purposes of this study, all the parties in the trust estate planning exercise (trustees, beneficiaries and the trusts examined) are deemed to be SA residents for normal tax purposes. Furthermore, all the trust under investigation in this study are assumed to have two or more trust beneficiaries, as the definition of a VSA in paragraph 1 of the Eighth Schedule requires at least two beneficiaries for any value shifting to occur.

The following trusts are excluded from the scope of this study: Black economic empowerment trusts, collective investment scheme trusts, employee share trusts, non-resident trusts, personal service trusts, public benefit trusts, real estate investments trusts, special trusts, testamentary trusts, and unit trusts.

The study examined trustees' actions that result in an inclusion in gross income, donations tax, and ordinary disposal implications under paragraphs 11(1)(*a*) to (*d*) of the Eighth Schedule, as these preclude a VSA. Additionally, the deemed disposals in terms of paragraphs 12(2)(*a*) to (*f*), 12A and 9H of the Eighth Schedule are excluded from this study. A beneficiary's interest in a discretionary and vested trust should be a capital asset to be subject to VSA and CGT consequences (see discussion in section 1.1.2 above). Case law tests distinguishing between capital and revenue receipts were discussed, capital receipts are mentioned in the gross income definition (section 1 of the Act). The definition of an asset in paragraphs (*a*) and (*b*) of paragraph 1 of the Eighth Schedule describes an asset as *property*, which

indicates that the terms asset and property are interchangeable for CGT purposes. Therefore, property was examined in the definition of property for donations tax in section 55(1) of the Act, and property in terms of section 3(2) of the Estate Duty Act No 45 of 1955 (the EDA).

Sections of the EDA will be referenced only to contextualise the types of estate-planning trusts commonly employed in SA estate planning, ensuring that the hypothetical trust structures analysed are uniformly understood by both respondents and participants; estate duty itself does not form part of the study and is considered solely to indicate whether a beneficiary's capital asset for CGT purposes aligns in any respect with "property" for estate duty purposes when examining beneficiaries' rights.

This study focuses on trustees' actions as outlined in the primary (section 1.5.1) and secondary research objectives (section 1.5.1.1). Trustees' actions which may include tax evasion, as described in section 235(1)(*a*) to (*e*) of the TAA, were excluded from the study. This study refers briefly to GAAR and to alter-ego trusts solely to mark the limits of the analysis: GAAR-related trustee conduct falls within a separate anti-avoidance regime and alter-ego trusts arise where the founder retains effective control over trust assets and can override trustees' decisions, potentially resulting in capital gains being attributed to the founder. These references therefore serve only a contextual function and confirm that neither GAAR-triggering conduct nor alter-ego trusts forms part of the substantive inquiry undertaken in this study.

Value shifting was reviewed in Australia and the UK. These countries were selected for comparative analysis purposes because English Law has influenced their trust laws according to Pace and Van der Westhuizen (2023:B2) and (Olivier *et al.*, 2023:5.3.1); their trusts are used for estate planning purposes in Australia (EY, 2023:11, 463); they have CGT legislation in Australia (section 104.5 of the ITAA) and the UK (section 2(b) of TCGA92); and they have value shifting legislation in Australia (section 104-5 K8 of the ITAA) and the UK (section 29 (1) to (5) of the TCGA92). The foreign trusts examined in Australia and the UK were classified as either discretionary or non-discretionary trusts. The same trustees' actions which

were examined for the SA trusts were also examined for the foreign trusts. The impact of gift and inheritance taxes on VSAs of trusts in foreign countries was not examined if those countries did not have similar SA donations taxes or estate duty.

In the analysed trust structures, assets were not donated to the trusts, potentially invoking paragraphs 68, 69, 71, 72, and 73 of the Eighth Schedule. These anti-avoidance provisions pertain to donations, settlements, and dispositions, deeming any capital gain associated with these donations to be that of the donor or their spouse. This study examines the VSA impact on the beneficiaries only, as the trust assets were not donated by the donor who is not a beneficiary. Any CGT implications from the trustees' actions on the trust itself were excluded from the scope of this study. This study also excluded transfer pricing tax avoidance in terms of section 31(1)(*a*)(ii) of the Act, as all the parties in the trust structures examined were deemed to be SA residents as defined in the definition of a "resident" under section 1(1) of the Act.

The research also related to any other type of capital assets which may include, amongst others, assets such as farmland property, artwork, or shares in listed companies. Shares in an unlisted company were used in the trust structures examined to facilitate the calculation of changes in beneficiaries' interest percentages in the assets of a trust.

This study investigated VSAs related to beneficiaries' interests in trusts, applicable to any assets held in a trust, such as fixed properties or company shares. Although it does not primarily focus on company and partnership VSAs, these entities may be examined if the trust holds company shares or is part of a partnership. Due to the lack of examples of VSAs related to trusts found in the research, examples of company and partnership VSAs were included for analysis purposes.

Trust deeds contain multiple clauses or restrictions which may vary according to the draftsperson and the intention of the trustees; therefore, it is not possible to examine all the possible permutations of trust clauses or restrictions other than those that are specified in the trust structures provided in the online questionnaire and interview guides.

The study identified a lack of research on the tax treatment of VSAs related to trusts in an Income Tax Act context. It focused on perceptions gained from interviews and the completion of an online questionnaire by trust experts. Similarly, a lack of research on the tax treatment of VSAs related to Australian and UK trusts necessitated insights from foreign trust experts.

The comparative analysis of foreign trusts focuses on foreign value shifting and specific trust disposal rules compared to the SA VSA and trust disposal rules, as each country's trust and CGT legislation is unique, making a detailed comparison difficult. This study does not cover a detailed analysis of SA trust law or foreign trusts.

1.7 RESEARCH METHODOLOGY

1.7.1 Research design and approach

The study's development and design were motivated by the lack of research on the tax treatment of trust VSAs under the Act, leading to the adoption of a mixed-methods research approach. This approach relied on the perceptions of trust experts who participated in interviews and completed an online questionnaire. According to Creswell (2016:217), the mixed-methods design enables the collection and analysis of data from both online questionnaires (quantitative data analysis) and interview guides (qualitative data analysis) to derive the research findings. Guidance was provided by a university Professor X, who has over 30 years of experience in trusts and trust research; a trust tax consultant with 20 years of experience; and an attorney with 40 years of trust experience. These experts offered valuable insights into various aspects of the overall research design for this study. Their identities have been kept confidential as they are still in practice and did not grant permission for their names to be disclosed.

1.7.1.1 Pragmatic paradigm

A pragmatic approach was adopted, using both quantitative and qualitative data to answer the research questions. Kaushik and Walsh (2019:2) note that the pragmatic view aims to solve real-life problems through mixed methods. This approach combined an online questionnaire, interviews, and a doctrinal analysis to gain a comprehensive understanding of the topic, supplemented by triangulation to enhance participants' perceptions.

1.7.1.2. Convergent mixed-methods research design

Creswell and Creswell (2018:217) describe a convergent mixed-methods design in which the quantitative and qualitative data are collected and analysed concurrently (see Diagram 4.1 in Chapter 4). This study employs a convergent mixed-methods research design, considering both online questionnaire data and interview data as equally important (Baxter & Walker, 2019:1). To inform the questionnaire and the interviews a hypothetical trust structure with thick descriptions of all the parties to the trust, the trust's capital assets, the trustees' powers and the beneficiaries' rights was created to analyse the trustees' actions within each trust framework to identify whether a potential VSA could be triggered. The hypothetical case was provided to respondents and participants to facilitate triangulation of the quantitative and qualitative data. The mixed-methods approach presented in Chapters 5 to 9 was used to evaluate the perceptions of the respondents who relied on their practical knowledge to examine the tax treatment of VSAs in trusts under the Act.

1.7.2 Research process

The research plan comprised several essential steps: securing approval from UNISA's College of Accounting Research Ethics Review Committee (the CASRERC), conducting a literature review with support from Central University of Technology (CUT) and UNISA librarians, and seeking gaps in VSAs in trust research. The research instruments underwent review during the ethical clearance process by the CASRERC and were revised based on feedback from trust tax experts in a pilot study. The quantitative and qualitative data collected were

converged during the data analysis process. The overall research methodology underwent a review by a UNISA (qualitative) and an external (quantitative) consultant. The results and findings were reported after data integration and triangulation.

1.7.2.1 Respondents and participants

The experts engaged in this study comprised respondents who completed the online questionnaire (see section 5.2 of Chapter 5) and participants who contributed through the interview guide (see section 6.2 of Chapter 6), each requiring expertise in both trust administration and the tax laws applicable to trusts. The questionnaire inquired about their working knowledge of each trust type. Those lacking knowledge were directed to the next question or they could exit the questionnaire at any time, and those without any working knowledge of trust law were excluded. Interview participants met stricter criteria than online questionnaire respondents, and the interview participants had to have a minimum of 10 years of experience and working knowledge of both trust types covered in the study. Each of the interview participants had over 30 years of experience with trusts. The online questionnaire respondents were required to have experience and a working knowledge of at least one of the two trust types covered in the study. Of the online questionnaire respondents, 38.24% had over 10 years of experience with trusts (see Table 5.4 in Chapter 5) and 100% of the SA and foreign participants had over 10 years of experience (see Tables 6.1 and 6.2 in Chapter 6). The online questionnaire aimed to evaluate how trustees' actions are measured against VSAs, with Delice (2010:2008) recommending at least thirty respondents for a questionnaire when employing a mixed-methods combination of interviews and questionnaires. Snowball sampling was more effective than conducting random sampling as the response rate improved. Initially, only a few respondents completed the online questionnaire, but eventually thirty-two respondents completed it.

The experts in this study are professionals with first-hand experience in trust and tax law and were selected as respondents from the following professional bodies and organisations to participate in this study:

(1) South African Institute of Chartered Accountants (SAICA).
(2) Provincial Law Societies.
(3) South African Institute of Professional Accountants (SAIPA).
(4) South African Institute of Taxation (SAIT).
(5) Institute of Certified Financial Planners.
(6) Leading Tax Academics.
(7) The Fiduciary Institute of South Africa.

Respondents and participants were asked questions based on a hypothetical trust structure which was set up to be a case study. Onwuegbuzie and Collins (2007:288) recommend interviewing at least five participants for case studies. In this study, eight participants were interviewed: six from South Africa, one from Australia, and one from the UK.

1.7.2.2 Research instruments

A single research questionnaire was developed for both the online questionnaire and the interview guide, incorporating identical questions. Precoding derived from the initial literature review established a coding framework for analysis. Structural coding was implemented during the literature review, and the questionnaire development phases, organising data based on content or concepts pertinent to specific research questions (Saldaña, 2013:84). The foreign interview guides adhered to the same questions contained in both the SA research instruments and were modified to comply with relevant trust and CGT legislation identified in the foreign literature review.

1.7.2.3 Data collection and storage

Maarouf (2019:3) states that the researcher can conduct data collection either concurrently or sequentially when using quantitative data and qualitative data, depending on the rationale for selecting the mixed-methods design. In this study, both quantitative and qualitative data were considered equally important and were comparatively integrated (see Diagram 4.1 in Chapter 4). Data were collected through interviews held with trust experts (specialists who consult on the tax and

legal aspects related to trusts frequently or issue opinions to complex tax trust issues) and an online questionnaire completed by professionals (persons who consult on the tax and legal aspects of trusts and do not necessarily issue tax opinions on trust issues). The data from the online questionnaire were captured in real time and automatically stored in the cloud using QuestionPro. The data from the individual interviews conducted were captured by audio recordings, Zoom meetings, the participants entering their responses into the interview guides and notes taken during the interviews. All responses from the interviews were documented on the interview guides and saved in Microsoft Word format.

1.7.2.4 Data analysis

Content analysis was the model adopted for the qualitative data analysis. Bengtsson (2016:11) explains that qualitative content analysis presents data in words and themes, enabling interpretation of results. The precoding and structural coding laid the foundation for the manual coding. Qualitative data were analysed through manual coding as a viable option recommended by an external research specialist. Content analysis can also be applied to quantitative data analysis (Bengtsson, 2016:10). The online questionnaire data results were downloaded from QuestionPro in a SPSS (.sav) format and sent to a quantitative research specialist for analysis using SPSS. Both descriptive and inferential analysis were conducted using SPSS. A quantitative data specialist analysed the data using SPSS with both descriptive and inferential statistics. The Fishers Exact Score Test was used for comparing the results of quantitative and qualitative analysis (Kim, 2017:152). The integration of the data took place in Chapters 7 and 8 by means of inferential statistical tests conducted on cross-tabulation results and triangulation of the quantitative and qualitative data sets. Additionally, triangulation of doctrinal analysis was conducted in Chapter 3 to further support the robustness and validity of the research findings by integrating multiple perspectives and sources of evidence within the legal framework.

1.7.2.5 Trustworthiness, validity, and reliability considerations

The research used detailed narrative and tabular descriptions of trust structure attributes to improve quality and transferability. According to Lowe (2019:117) pilot studies assist to evaluate the adequacy of the research instruments for quality and appropriateness to the study. A pilot test was conducted for the online questionnaire and interview guide to assess their adequacy. Several experts contributed to the design and review of the research tools. These included a multimedia educational specialist with extensive experience in developing online questionnaires using QuestionPro, as well as Advocate A, Professor Y, senior lecturers in tax and trusts, and Professor Z. Their combined expertise helped ensure the quality and validity of the research instruments. Both quantitative and qualitative consultants evaluated the methods for coherence and integrity. Validity was further supported by using mixed-methods and triangulation.

1.7.3 Ethical considerations

Prior to data collection from the respondents and the participants, ethical clearance (see Appendix G) for the research instruments used in this study was obtained, which is a prerequisite of UNISA (UNISA Research Policy, 2016:5). The UNISA Research Policy (2016:16) describes the ethical requirements regarding the protection of the identity of participants in the research, and the voluntary participation without compensation of the participants in research. All interviews were conducted on a voluntary basis, and respondents remained anonymous. Additionally, no interview participants or online questionnaire respondents received any payment to maintain impartiality.

1.8 DEFINITIONS OF KEY TERMS AND CONCEPTS

1.8.1 Definition of beneficiaries and trustees

Understanding a beneficiary's rights in a trust's assets is crucial for examining VSAs. According to section 1(1) of the Act, a beneficiary of a trust is defined as "a person who has a vested or contingent interest in all or a portion of the receipts or

accruals or the assets of that trust". The definition does not describe the beneficiaries' rights in detail, nor does it describe a vested right which may be personal rights against the trustees or a real right to the trust's assets. The trustees' responsibilities are also not described in this definition. An understanding of a trustees' obligations and responsibilities of a trust is crucial when examining trustees' actions related to VSAs in the context of trusts. The term 'trustee' is defined in section 1(1) of the Act as a person who is appointed in terms of an agreement of parties having the administration or control of the property of a trust. The definition also extends to executors and administrators of deceased estates and trustees of special trusts. The definition does not describe the trustees' obligations and responsibilities in any detail.

1.8.2 Definitions of resident beneficiaries, trusts, and trustees

A natural person is regarded as a resident for the purposes of the Act in one of two ways. First, if an individual is ordinarily resident in South Africa, as outlined in paragraph (*a*)(i) of the definition of a "resident" in section 1(1) of the Act, they are considered a resident. Second, a person can also qualify as a resident if they satisfy the physical presence requirements stipulated in paragraph (*a*)(ii) of the definition of a "resident" in section 1(1) of the Act. Therefore, natural persons will be considered residents if they either have their ordinary residence in South Africa or if they are physically present in the country for the required period as set out in the legislation. In Cohen v. CIR 1946 AD 174, 13 SATC 362, the court held that someone is an ordinary resident of a country if they habitually return there after traveling abroad. The indicators for residency would be the country in which the taxpayer has a home, family, a business, and personal belongings. CIR v. Kuttel 1992(3) SA 242 (A) applied the principle in Cohen v. CIR stating that a person is an ordinary resident in a country in which he has his usual or principal residence. A trust is classified as a resident according to paragraph (b) of the definition of "resident" in section 1(1) of the Act if it was formed or established in South Africa or has its place of effective management located within the Republic of South Africa. For the purposes of this study, all the beneficiaries, trusts and trustees analysed for the SA trusts' hypothetical trust structure meet the requirements of the definition of a resident contained in section 1(1) of the Act.

1.8.2.1 *Inter vivos* trusts

An understanding of the definition of a trust is crucial in this study, as VSAs related to trusts are the focus point of the study. The definition of the term "trust" contained in section 1(1) of the Act defines the term "trust" as follows:

> "Trust means any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust."

The trust deed or will contains the responsibilities of the trustees and the rights of the beneficiaries. The definition includes a trust which is formed during the agreement between the founder and the trustees which are called *inter vivos* trusts during the lifetime of the founder.

1.8.3 Discretionary and non-discretionary trusts

In this study, trusts are classified as discretionary or non-discretionary, depending on whether trustees can make distributions to beneficiaries with or without restrictions. Trusts are classified in the strict sense as ownership trusts or in the wide sense, depending on whether trustees or beneficiaries own the assets (Cameron, De Waal, Wunsh, Solomon & Kahn, 2002:9). In ownership trusts, the ownership of the trust assets is vested in the trustees. Both discretionary and non-discretionary (vested) trusts are ownership trusts. To establish if a trust is a discretionary or a non-discretionary trust, one must establish the nature of the rights that are held by the trust beneficiaries to or in the trust assets and the obligations or restrictions, if any, on the trustees in distributing the trust's assets to the beneficiaries (De Koker & Williams, 2024:12.20). Hybrid trusts allow trustees to distribute some assets with restrictions and others at their discretion.

1.8.3.1 A discretionary trust

A discretionary trust allows the trustees at their sole discretion to distribute a trust's assets, income, or capital to trust beneficiaries as and when the trustees exercise

their rights to make distributions to the beneficiaries (Pace & Van der Westhuizen, 2023:B6.3.1). In a discretionary trust the trustees could vest a trust asset or income in a trust beneficiary by exercising their right to vest income or assets to any of the beneficiaries of the trust (De Koker & Williams, 2024:12.19). These rights enhance the flexibility of the trustees' actions. In a discretionary trust, assets are transferred to trustees, making it a type of ownership trust.

1.8.3.2 A non-discretionary trust

A non-discretionary trust (vested trust) restricts the trustees' ability to distribute any income or assets to a specified beneficiary or beneficiaries. A vested trust is a non-discretionary trust (Olivier *et al.*, 2023:5.3.2) which obligates the trustees to distribute the income or capital of the trust to identified trust beneficiaries, making such trusts less flexible when compared to discretionary trusts. A vested trust specifies that trust assets or trust income belong to the trust beneficiaries, normally with the stipulation in the trust deed or in terms of a trustees' resolution (De Koker & Williams, 2024:12.19). Once a trust asset is vested in a trust beneficiary, the trustees of the vested trust hold and manage the asset in a fiduciary capacity for the benefit of the trust beneficiary until the asset or income is distributed to the beneficiary (Honiball & Olivier, 2009:5). In a vested trust, ownership of assets is transferred to the trustees.

1.8.3.3 Beneficiaries' contingent and vested rights

For this study, the hypothetical trust structures to be analysed are categorised as either discretionary or vested (non-discretionary) trusts. The selection of trusts with uniform beneficiaries' rights which are either contingent or vested is to facilitate the testing of these rights in the interview guide and online questionnaire used in the analyses of trustees' actions. In discretionary trusts, beneficiaries do not have a fixed right to trust assets; instead, their interests are contingent on trustee discretion regarding distributions. Conversely, in vested trusts, beneficiaries hold a defined right to receive trust assets, established by the trust deed or a trustee resolution (Olivier *et al.*, 2023:4.3.3.2). These categories are used in the study to investigate how the classification of beneficiaries' rights as contingent or vested influences their

exposure to VSAs. Hybrid trusts have assets which are subject to both contingent and vested rights. The prerequisite of a capital asset as a core element for CGT is discussed in section 1.1.2 above, and therefore both contingent and vested rights need to be examined as capital assets may be subject to VSAs.

1.9 OVERVIEW OF CHAPTER STRUCTURE AND CONTENT

Below is a summary of this thesis's chapters:

1.9.1 Chapter 1: Introduction to value shifting arrangements in trusts

This chapter introduced the background to the study by outlining the existing research gap, the core elements of CGT events, the motivation, problem statement, contributions of the study, research objectives and research questions, the scope and limitations, research methodology, key terms and concepts, the structure of the thesis, and a concluding summary.

1.9.2 Chapter 2: Conceptual framework of the study: SA and foreign trusts

This chapter established the conceptual and comparative framework for analysing VSAs in trusts. It clarified trustees' powers, beneficiaries' rights, the tax consequences of trustees' actions, and introduced a hypothetical trust structure applied across SA, Australian, and UK trusts. This chapter provided the doctrinal grounding required for the study's later analytical and empirical components.

1.9.3 Chapter 3: Value shifting arrangements in a South African and foreign trust context

The literature review examined tax law, court decisions, and SARS guidelines to determine if beneficiaries' rights are "capital assets" for CGT purposes. It assessed how gross income, donations tax, and ordinary disposals might exempt trustees from VSA classification, and reviewed the VSA definition in the Eighth Schedule of the Act as it relates to trustees' actions. The doctrinal analysis conducted in this chapter of the research questions was used to address the research objectives of

this study. The chapter also discussed GAAR's application to trusts. CGT and VSA definitions in Australia and the UK were compared with SA practice. The results of the doctrinal analysis contributed to the integrated analysis presented in Chapters 7 and 8.

1.9.4 Chapter 4: Research methodology

The research methodology and design aspects for this study were discussed in depth in Chapter 4.

1.9.5 Chapter 5: Quantitative results for the online questionnaire on trusts

The online questionnaire results were reported separately for each of the two SA trust types. An independent qualified statistician analysed the data using SPSS. Chapters 7 (discretionary trusts), and 8 (non-discretionary trusts) interpreted the data for each trust type.

1.9.6 Chapter 6: Qualitative findings for SA and foreign trust experts

The expert interviews were reported separately for each of the two SA trust types. Responses were manually coded, noting similarities and differences. Findings for each trust type was interpreted in Chapters 7 (discretionary trusts), and 8 (non-discretionary trusts).

1.9.7 Chapter 7: Analysis of the research results for discretionary trusts

This chapter combined findings from the online questionnaire (Chapter 5) and interviews (Chapter 6) on discretionary trusts, analysing cross-tabulation results. Triangulated data informed the conclusions and recommendations presented in Chapter 9.

1.9.8 Chapter 8: Analysis of the research results for non-discretionary trusts

This chapter consolidated the findings from the online questionnaires (Chapter 5) and interviews (Chapter 6) concerning non-discretionary (vested) trusts. It examines the cross-tabulation of these data sets, employing triangulation between the online questionnaire responses and participants interview insights. The final conclusions and recommendations are presented in Chapter 9.

1.9.9 Chapter 9: Summary of the study results, conclusions and recommendations

This chapter summarised potential VSAs related to estate planning structures based on trustees' actions studied. It proposes a VSA framework for the SA trust context for tax practitioners and suggests directions for future research.

1.10 SUMMARY

This chapter introduced the study and an analysis of trustees' actions resulting in VSAs, paragraph 11(1)(*g*) disposal and CGT event from the experts' perspectives. It covered the introduction and background to the study, the core elements of a CGT event, the motivation for the study, problem statement, and contribution of the study. The research objectives and research questions, scope and limitations, and research methodology were made clear. Definitions of key terms and concepts were provided, as well as the layout of the study in eight subsequent chapters.

The next chapter provides the conceptual framework on SA and foreign trusts for this study.

CHAPTER 2

CONCEPTUAL FRAMEWORK OF THE STUDY: SA AND FOREIGN TRUSTS

2.1 INTRODUCTION

This chapter establishes the conceptual and comparative foundation for analysing VSAs within both South African and foreign trust environments. It undertakes a doctrinal examination of a hypothetical trust structure, applying the relevant statutory frameworks across three jurisdictions the SA Act, the Income Tax Assessment Act 1997, No 38 of 1977 (the ITAA), and the Taxation of Chargeable Gains Act of 1992, UK General Acts 1992 c 12 (the TCGA92) to address the study's research objectives formulated in chapter 1 sections 1.5.1 and 1.5.2. The hypothetical structure, functions as a unifying analytical device, enabling a consistent evaluation of the legal mechanics of VSAs across tax jurisdictions. It also provides the substantive basis for the empirical phase of the study, informing the design of both the online questionnaire and the semi-structured interview guide.

In complementing this conceptual and comparative foundation, the chapter also situates the analysis within the broader South African estate-planning context. Following a pragmatic mixed-methods approach, the research integrates data collected via interviews with experts and an online questionnaire, which are triangulated with the doctrinal analysis conducted in chapter 3 of the literature review. A central aim of the thesis is to assist tax practitioners with interpreting the tax consequences of trustees' actions under the Act in relation to VSAs. By providing these tax practitioners with a practical framework, this study intends to support the identification and resolution of the tax treatment related to VSA issues within trusts, thereby helping to prevent tax non-compliance penalties and interest that may arise from the incorrect tax treatment and disclosure when filing the income tax returns of the trust and the beneficiaries.

This study therefore offers a pioneering analysis on the subject. VSAs, as defined by paragraph 1 of the Eighth Schedule to the Act, are anti-tax avoidance measures for CGT purposes that may shift capital value between connected parties without

fair market value compensation, thus postponing or avoiding the income tax liability. In a trust context, a VSA refers to an arrangement or transaction arising from trustees' actions that effectively reduces the value of one beneficiary's interest while increasing the interest of another beneficiary, without a market value exchange (paragraph 1, Eighth Schedule to the Act).

Research on the income tax implications (see section 2.3.2 below) of trustees' actions resulting in VSAs is limited. The complex relationship between beneficiaries' rights and trust assets further complicates interpretation of the income tax implications applicable to the VSA in trusts. Analysing trustees' actions for the tax consequences arising due to or triggered by a VSA is additionally complicated by sections of the Act and paragraphs of the Eighth Schedule to the Act that may preclude or eliminate a VSA. This chapter covers trustees' powers and beneficiaries' rights (SA context) (section 2.2), implications of trustees' actions under the Act (SA context) (section 2.3), illustration of a VSA (SA and foreign context) (see section 2.4), legal framework a SA perspective (section 2.5), trustees' actions of tax non-compliance: case law (SA context) (section 2.6), and a summary (section 2.7).

2.2 TRUSTEES' POWERS AND BENEFICIARIES' RIGHTS (SA CONTEXT)

2.2.1 Trustees' powers

The trustees' actions and powers regarding the assets held in a trust are prescribed in terms of the trust deed. The trustees of the trust have a fiduciary obligation to the beneficiaries of a trust regarding the trust's assets. Trustees act according to the trust deed, which may give them broad powers to manage, invest, or distribute trust assets to beneficiaries. The trust deed may permit the trustees to dispose of the trust's assets to third parties and conduct commercial transactions. The trustees may vary the rights of beneficiaries within the powers conferred to them in the trust deed and related trust case law. Trustees may have unlimited powers to distribute trust income or assets at their discretion, giving beneficiaries a discretionary right. Alternatively, trustees may be required by the trust deed or by prior trustees' resolutions to distribute specific assets or income to certain beneficiaries, resulting

in a vested right for those beneficiaries. The trustees' actions are subject to the terms contained in the trust deed. An understanding of both the trust deed and resolutions passed by the trustees would be required to understand the nature of the beneficiaries' rights to trust assets or for the analysis of trustees' actions.

2.2.2 Beneficiaries' rights

As discussed under section 1.8.3 of Chapter 1, trusts can be classified as either discretionary (contingent rights) (Olivier *et al*., 2023:5.3.1) or non-discretionary (vested) trusts (Olivier *et al*., 2023:5.3.2) based on whether trustees have the discretion to distribute or vest assets or are limited by the specific rights outlined in the trust deed or by trustee resolutions. Consequently, beneficiaries' rights may either be contingent or vested in nature. To facilitate the interviews and the online questionnaire in this study, both homogenous discretionary (contingent rights) and non-discretionary (vested or fixed rights) trust structures are analysed.

The study also recognises the existence of hybrid trusts, which may contain assets subject to both types of rights. In such situations, the findings must be applied accordingly: assets governed by contingent rights are analysed in the context of discretionary trusts, while assets with vested rights are considered under findings relevant to vested trusts. This nuanced approach ensures that each type of beneficiary interest within a hybrid trust receives analysis tailored to its legal and tax implications. In this context, the terms "vested right" and "contingent right"' refer to a beneficiary's interest in a trust. In discussions of trust law and estate planning, the terms "rights" and "interests" are often used interchangeably to describe a beneficiary's entitlement under the trust. This interchangeable usage highlights the necessity of analysing the specific nature of each beneficiary's position, as any adjustment to these rights or interests may constitute a VSA.

2.3 IMPLICATIONS OF TRUSTEES' ACTIONS UNDER THE ACT (SA CONTEXT)

2.3.1 Implications of trustees' actions

The Commissioner for the South African Revenue Service (CSARS) is mandated to administer and collect income tax on both revenue and capital receipts, as well as donations tax, under section 2(1) and 3 the Act. Furthermore, the Commissioner oversees the collection of estate duty in terms of section 6(1) and 6(2) of the EDA. The latter is particularly salient to estate-planning trusts, providing the necessary fiscal context for the trust structures analysed in this study. The actions undertaken by the trustees may trigger any of the aforementioned taxes, given the extent of their powers and responsibilities as outlined in the trust deed. Consequently, all these taxes may be applicable to assets held in a trust and are discussed in this study. An analysis of trustees' actions for a VSA will require an analysis of the taxes mentioned under the Act, which may eliminate the occurrence of a VSA.

2.3.1.1 The characterisation of trust interests as "assets" for tax purposes

An "asset'' is defined for CGT purposes in paragraph 1 of the Eighth Schedule to the Act, with no explicit mention of a beneficiary's interest in a trust. Paragraph (*b*) of this definition does include "a right or interest of whatever nature to or in such property" as an asset without mentioning if these rights are contingent or vested rights in the trust assets. Therefore, understanding how discretionary or vested interests are defined as property for estate duty and donations tax purposes could assist to determine if a beneficiary's interest in trust assets qualifies as an asset in the hands of a beneficiary. Both the sections on donations tax and estate duty assist in understanding the nature of a beneficiary's interest in a trust. CGT consequences are determined in the Eighth Schedule to the Act when related to capital assets held in a trust.

2.3.2 Income tax and CGT consequences of trustees' actions

South Africa's income tax system imposes tax on natural persons at progressive marginal rates ranging from 0% to 45%, while companies and trusts are taxed at

flat rates of 27% and 45%, respectively. For CGT purposes, only a portion of a capital gain is included in taxable income; 40% for natural persons and 80% for companies and trusts resulting in maximum effective CGT rates of 18% for natural persons (45% × 40%), 21.6% for companies (27% × 80%), and 36% for trusts (45% × 80%). Trustees' management of trust assets may therefore give rise to either gross income or capital gains, each carrying distinct income tax consequences. VSAs operate to prevent the avoidance or deferral of CGT by countering transactions that shift value between connected persons without triggering a taxable disposal. The income tax implication of a VSA is accordingly to ensure that any shifted value is subjected to CGT at the effective tax rates applicable to the ultimate beneficiaries namely 18% for natural persons already at the maximum marginal tax rate of 45%, 21.6% for companies, and 36% for trusts by deeming a disposal and taxing the resulting capital gain in accordance with paragraph 23(*a*) (base cost) and paragraph 35(2) (proceeds) of the Eighth Schedule (see section 2.4.1 below). This study therefore examines how trustees' actions may inadvertently or deliberately trigger VSAs and evaluates the CGT implications of such actions within the estate-planning trust context.

2.4 ILLUSTRATION OF A VSA (SA AND FOREIGN CONTEXT)

An example of a VSA could occur when the trustees of a vested trust transfer or distribute an asset to a beneficiary of that trust which results in a change in the beneficiary's rights in or to the trust's assets.

2.4.1 SA hypothetical trust structure VSA illustration

The X Family Trust is a vested trust and has three trustees, namely Mr X, Mrs X and Mr Y. Mr Y is an independent trustee. A, B and C are the beneficiaries of the X Family Trust. All the trust beneficiaries are the children of Mr X and Mrs X. The X Family Trust holds 120 equity shares in ABC (Pty) Ltd, an unlisted company with a market value of R1 800 000. The base cost of the shares is R600 000. The equity shares are equally vested in the beneficiaries.

From the hypothetical trust structure of the X Family Trust described above, if the trustees vest 40 equity shares of ABC (Pty) Ltd worth R600 000 to trust beneficiary A, resulting in an increase in value of R600 000 in the hands of beneficiary A with a corresponding reduction of 20 shares valued at R300 000 each for both trust beneficiaries B and C, a possible VSA arises. Beneficiaries B and C forfeit 20 equity shares each to beneficiary A without receiving compensation. Table 2.1 below depicts the potential changes in value and interest resulting in a VSA.

Table 2.1: Vesting a trust's assets

Beneficiary	Interest prior to change in vesting	Value prior to change in vesting	Value after change of vesting	Value shifted	Interest after change of vesting
A	33.33%	R600 000	R1 200 000	R600 000	66.66%
B	33.33%	R600 000	R300 000	(300 000)	16.67%
C	33.34%	R600 000	R300 000	(300 000)	16,67%

Source: Williams (2005:90) - adapted

Beneficiary A's interest in the trust increased by R600 000 or 33,33%, and beneficiaries B and C's combined market value has decreased by R600 000 or 33,33%. In the absence of any other sections of the Act and paragraphs of the Eighth Schedule to the Act, precedence of a VSA in terms of paragraph 11(1)(*g*) may arise in a scenario as illustrated above. Beneficiaries B and C would have a reduction in their interest in the trust, which results in a VSA disposal in terms of paragraph 11(1)(*g*) of the Eighth Schedule. The proceeds of the disposal for beneficiaries B and C would be quantified in terms of paragraph 35(2) of the Eighth Schedule by the difference between the market value immediately prior to the disposal less the market value of their interests immediately after the disposal which is R300 000 (R600 000 – R300 000). The base cost for beneficiaries B and C is quantified in terms of paragraph 25(2)(*a*) as follows:

> "Y = [(A – C) x B]/ A, where (i) "Y" represents the amount to be determined; (ii) "A" is the market value of that person's interests immediately prior to the disposal; (iii) ''B'' is the person's base cost of the interests calculated immediately prior to the disposal; and (iv) ''C"; is the

market value of that person's interests immediately after the disposal. The base cost of a beneficiary's is equal to R100 000 ([(R600 000 – R300 000) x R200 000]/ R600 000). The capital gain for beneficiaries B and C respectively is R200 000 (R300 000 – R200 000) (paragraph 3(*a*) of the Eighth Schedule).

2.4.2 Illustration of a hypothetical foreign trust structure value shifting

This section covers trusts in Australia, and the UK which have been selected for international benchmarking for the study, because their trust law is also based on English law and they have CGT regimes inclusive of value shifting legislation. The VSA illustration from section 2.4.1 is also analysed under Australian and UK law, assuming that under both Australian and UK law the X Family Trust is a fixed trust which holds 120 shares in either Australian dollars or UK pounds. The X Family Trust is a fixed trust and has three trustees, namely Mr X, Mrs X and Mr Y. Mr Y is an independent trustee. A, B and C are the beneficiaries of the X Family Trust. All the trust beneficiaries are the children of Mr X and Mrs X. Before the 'trustees' actions of vesting an additional 40 shares to beneficiary A, beneficiaries A, B and C are each entitled to 40 shares in ABC company (an unlisted company). All the parties in the hypothetical Australian trust structure are Australian tax residents, and all the parties in the hypothetical UK trust structure are UK tax residents.

In the Australian legislation capital gains event K8 does highlight a "direct value shift" affecting interests in a trust in terms of section 104-250 and division 725 of the ITAA. In terms of section 725-50 of the ITAA a direct value shift under a scheme involving equity or loan interests in an entity (the target entity) has consequences under this division if, and only if: "(a) the target entity is a trust at some time during the scheme period; and (b) section 725-55 (Controlling entity test) is satisfied; and (c) section 725-65 (Cause of the value shift) is satisfied; and (d) you are an affected owner of a down interest, or an affected owner of an up interest, or both". The trustees of the X Family Trust would be the controller, ABC company would be the target entity, and the beneficiaries are the affected owners of the trust. If the trustees vest an additional 40 shares of ABC company worth $600 000 to trust beneficiary A, resulting in an increase in value of $600 000 in the hands of beneficiary A with a

corresponding reduction of 20 shares valued at $300 000 each for both trust beneficiaries B and C, a possible VSA has taken place. The tax consequences for a down lift down interest are provided in section 725-365 of the ITAA and the up-interest section 725-370 of the ITAA. The requirements of section 725-50 of the ITAA in terms of a direct interest in a trust are more complex and different from a VSA described in the SA context in Table 2.1 above.

In the UK provision 29(1)(a) of the TCGA92 describes a disposal with a corresponding acquisition of an asset for no consideration as a possible value shifting disposal in the UK. Provision 29(1)(b) of the TCGA92 includes a disposal of an asset for less than market value as a value shifting in the UK. The shares are equally vested in the beneficiaries. If the trustees vest an additional 40 shares of ABC company worth £600 000 to trust beneficiary A, resulting in an increase in value of £600 000 in the hands of beneficiary A with a corresponding reduction of 20 shares valued at £300 000 each for both trust beneficiaries B and C, a possible VSA has taken place. Provisions 29(1)(a) and (b) of the TCGA92 which may result in value shifting from beneficiaries B and C to beneficiary A for a UK fixed trust is similar to a VSA described in the SA context in Table 2.1 above.

The illustration in section 2.4.1 could lead to anti-avoidance measures being triggered in both Australia and the UK for fixed or non-discretionary trusts. Australia's value shifting laws emphasise control and target entities, differing from the SA and the UK approaches regarding trusts.

2.5 LEGAL FRAMEWORK SA PERSPECTIVE

The legal framework for the study is drawn from applicable tax legislation and court cases, offering a theoretical basis for VSAs in trusts. Section 1 of the TPCA defines a trust as an arrangement, established by a deed or an instrument, where trustees manage assets for the beneficiaries under specified terms. This covers both discretionary and vested trusts, clarifying that trustees' powers differ according to whether beneficiary rights are contingent or vested. Section 1(1) of the Act describes a trust as any fund managed by a fiduciary appointed by trust deed,

agreement, or will; however, this study focuses solely on *inter vivos* trusts, and not testamentary trusts. The Act's definition aligns with section 1 of the TPCA.

Section 1(1) of the Act defines a "beneficiary" of a trust as "a person who has a vested or contingent right in a trust. Section 1(1) of the Act defines gross income, excluding capital receipts, with relevant case law on distinguishing capital receipts and accruals. It also defines a "connected person" as per a VSA in paragraph 1 of the Eighth Schedule. Section 1(1) of the Act defines a "resident" for individuals under paragraph (a) of this definition, while paragraph (*b*) of the definition covers non-individuals. Section 26A states that taxable capital gains, determined by the Eighth Schedule, are included in taxable income calculations. Revenue receipts are excluded from the Eighth Schedule and have no CGT consequences. Section 1(1) of the Act describes the meaning of taxable income.

Property for donations tax is defined in section 55(1) of the Act as any right in or to property, movable or immovable, corporeal or incorporeal, wheresoever situated. Section 3(2) of the EDA includes any right in or to property, movable, or immovable, corporeal, or incorporeal for estate duty purposes. Section 3(3)(*d*) of the EDA includes any property which the deceased is competent to dispose prior to death, if not already included in the deceased's estate as deemed property for estate duty purposes. The analysis of these definitions of property is to obtain an understanding of whether both a contingent and vested right in a trust would be considered as an asset as defined for CGT purposes.

Section 55(1) of the Act defines a donation as any gratuitous disposal of property including any gratuitous waiver or renunciation of a right which is also mentioned in paragraph 11(1)(*b*) of the Eighth Schedule. Section 58(1) of the Act deems that a donation occurs when an asset is disposed of for not an adequate value. Paragraph 11(1)(*g*) describes a VSA disposal. Paragraph 22 of the Eighth Schedule indicates that a donation for donations tax purposes would also result in a paragraph 11(1)(*a*) disposal and therefore could exclude a paragraph 11(1)(*g*) disposal. A VSA could result from a change in family circumstances. A wealthy beneficiary taxed at a maximum effective tax rate on CGT may choose to donate his interest in a trust to a less wealthy beneficiary who is taxed at a lower effective tax rate on CGT. Both

beneficiaries are connected persons and as such both a VSA and donations tax could be applicable for the wealthy beneficiary.

A VSA is an anti-tax avoidance measure which is aimed to include in the CGT net any schemes that circumvent the ordinary disposals in paragraphs 11(1) of the Eighth Schedule to the Act. The following paragraphs of the Eighth Schedule to the Act are pertinent to a VSA:

- Paragraph 1's definition of an asset for CGT purposes, which is required to establish whether the beneficiary's contingent or vested rights are included as assets for CGT purposes.
- Paragraph 1's definition of a VSA, which is required to establish if the trustees' actions are within the parameters of this definition.
- Paragraphs 11(1)(*a*), (*b*), (*c*), (*d*), and (*f*) ordinary disposals, which may preclude a VSA.
- Paragraph 11(1)(*g*) which describes a VSA disposal.
- Paragraph 13(1)(*f*) which fixes the timing of a VSA.
- Paragraph 20(1)(*h*)(iv) which provides that the base cost of the asset must be determined under paragraph 23.
- Paragraphs 23(*a*), 23(*b*)(i) and 23(*b*)(ii) base cost measuring formula which is required to measure the proceeds and establish a VSA.
- Paragraph 22 describes the measurement of donations tax to be included in the base cost of an asset for CGT purposes for the donor.
- Paragraph 35(2), which describes the measurement of the proceeds of a VSA which is required to establish VSA.
- Paragraph 35(3)(*a*) prevents double taxation by reducing CGT proceeds by any part of the amount already taxed under normal income-tax rules.
- Paragraph 38(1)(*a*) describes the deemed market value of a disposal by way of donation, consideration not measurable in money or transactions between connected persons not at an arm's length price, which is required to understand the VSA definition.

In addition to legislation, relevant court decisions, SARS guides, and research cases on gross income, donations tax, and ordinary disposals were reviewed to determine if these tax consequences could limit the application of VSA provisions. (A comparative analysis of the equivalent Australian and UK tax legislation was conducted to obtain an international benchmark on VSAs). This analysis establishes a framework for applying VSAs to trustees' actions.

2.6 TRUSTEES' ACTIONS OF TAX NON-COMPLIANCE: CASE LAW (SA CONTEXT)

2.6.1 The Thistle Trust v. CSARS [2024] ZACC 19

In The Thistle Trust v. CSARS [2024] ZACC 19, a capital gain was distributed from one trust to a second-level trust. The trustees of the second-level trust subsequently distributed the capital to its beneficiaries, who were natural persons, and reported the capital gains in the tax returns of these individuals, who were taxed at a lower effective tax rate than the trust. The court determined that the trustees of The Thistle Trust had incorrectly disclosed the capital gains in the beneficiaries' tax returns instead of in the trust's tax return. The conduit principle states that income or capital not taxed within a trust is taxed in the hands of the beneficiary and retains its character (SIR v. Rosen 1971(1) SA 173(A) (32 SATC 249)). However, the conduit principle does not apply if a second-tier trust receives a capital gain from a first-tier trust and then distributes any part of that gain to its beneficiaries.

The constitutional court (the CC) also discussed the trust's exposure to an underestimate penalty (section 221(1) of the TAA) and interest due to the trustees' incorrect application of the conduit principle. The underestimate penalty is calculated by multiplying the tax shortfall (section 222(3) and (4) of the TAA) by the highest percentage indicated in the table of section 223(1) of the TAA. According to section 223(1)(*ii*) of the TAA, if reasonable care is not taken, a 25% penalty applies for standard cases, and for gross negligence section 223(1)(*iv*) imposes a 125% penalty for obstructive or repeat cases. This research seeks to address issues of non-compliance that may arise if a VSA is not correctly identified or disclosed on the income tax returns of both the trust beneficiaries and the trust itself. The Act

specifies that, “Any person who wilfully or negligently fails to disclose to SARS any material facts which should have been disclosed under a tax Act,” such a person may have committed a criminal offence of non-compliance in terms of section 234(2)(*i*) of the TAA.

2.7 SUMMARY

This chapter provides a conceptual framework of the different provisions under the Act that could be triggered when a VSA arises. The trustees’ actions and powers, and the implications of trustees’ actions under the Act which may lead to a VSA were discussed. An illustration of a hypothetical South African trust structure that could trigger a VSA was examined and the capital gains consequences for the beneficiaries were illustrated. Australian and UK value shifting is highlighted under the relevant tax legislation in the foreign tax jurisdictions using the same hypothetical trust structure described. This hypothetical trust structure was adequately discussed and will be uniformly applied in the research instruments to resolve the research problem. The legal framework for VSAs in a SA context was provided. Tax compliance consequences for the trustees’ action of incorrectly disclosing capital gains in The Thistle Trust v. CSARS [2024] ZACC 19 case highlights how the incorrect interpretation of CGT consequences by the trustees’ actions resulted in tax non- compliance.

The conceptual framework developed in this Chapter provides the analytical structure necessary to address the research questions and to evaluate whether the research objectives formulated in Chapter 1 have been achieved. It demonstrates the need for a dedicated interpretive approach to the tax treatment of VSA complexities arising from trustees’ actions, thereby enabling a clearer and more consistent characterisation of such actions. In doing so, the framework supports tax practitioners in navigating compliance challenges and mitigating the risk of tax non-compliance, directly contributing to the study’s overarching objective of improving the interpretation and disclosure of VSA-related capital gains.

The next chapter will discuss value shifting arrangements in a South African and foreign trust context.

CHAPTER 3

VALUE SHIFTING ARRANGEMENTS IN A SOUTH AFRICAN AND FOREIGN TRUST CONTEXT

3.1 INTRODUCTION

This chapter undertakes a detailed doctrinal analysis of the research problem by examining VSAs in both contingent-rights (discretionary) and vested-rights (vested) trust contexts. The analysis is structured around the research questions formulated in Chapter 1 and the conceptual framework of Chapter 2, which serve as the evaluative framework for determining whether the research objectives are ultimately achieved. In addition, the chapter incorporates comparative insights from foreign trust jurisdictions to assess their potential applicability to South Africa and to support the broader objectives of the study. The aim of the study is to develop a practical framework to assist tax practitioners in identifying, analysing, and correctly characterising and disclosing any capital gain arising from a VSA triggered by trustees' actions (interpreting VSAs) in the tax return of the taxpayer in whose hands it is taxable.

To assess trustees' actions that may result in a VSA disposal as defined in paragraph 1 of the Eighth Schedule and paragraph 11(1)(*g*), the chapter also reviews other relevant taxes that could preclude a VSA within trusts. It involved a detailed analysis of the relevant provisions of the Act, with particular attention to the definition and scope of VSAs. The analysis also includes an examination of gross income, donations tax, ordinary disposals, and the definition of a VSA in terms of the Eighth Schedule to the Act. Also, the general anti-avoidance rules (GAAR) in the Act and alter ego trusts are discussed to provide contextual boundaries to the estate-planning trusts examined in this study. This doctrinal analysis was supported by interpretations found in key court decisions, revenue authority guidance documents, and prior academic literature. Together, these sources provided the legal context necessary to understand the regulatory framework surrounding the tax treatment of VSAs under the Act and to interpret the divergent respondents and participants' perceptions explored in the empirical chapters (Chapters 7 and 8).

The study also includes perspectives from Australia and the UK to benchmark trustees' actions on VSAs internationally. These tax jurisdictions were selected for comparative analysis because the research demonstrated that only a very limited number of countries satisfy all five criteria required for this study: (i) trust law with English-law origins; (ii) the use of trusts for estate-planning purposes; (iii) the existence of capital gains tax legislation; (iv) statutory value-shifting rules and (v) use both discretionary and non-discretionary (fixed) trusts. A comprehensive search undertaken by the researcher, together with two specialist librarians from UNISA and the CUT, confirmed that only a small subset of jurisdictions met all five criteria concurrently, thereby justifying their inclusion in the comparative component of the study. By comparing South African practices with those abroad, it evaluates alignment with global standards. Reviewing literature from Australia and the UK could assist in determining if foreign VSAs match the SA VSA definition and the paragraph 11(1)(*g*) disposal provision of the Eighth Schedule. The chapter analyses relevant tax laws, research, and revenue guides from these tax jurisdictions in relation to value shifting in trusts, comparing their approaches to that of the South African tax treatment framework. It is noted that not all tax jurisdictions recognise trusts in their legislation or have a capital gains tax regime.

Firstly, from a SA perspective, this chapter analyses the nature of a trust's asset (3.2), gross income (3.3), donations tax (3.4), ordinary disposals (3.5), VSAs (3.6), DTC's recommendations for trusts (3.7), the general anti-avoidance rule and Alter-Ego Trusts: contextual boundaries of the study (3.8), conclusion SA trust context (3.9). This is followed, by a foreign trust perspective, and it investigates Australian and UK Trust VSAs, and provides an overview of Australian and UK Trust CGT (3.10), discretionary and non-discretionary foreign trusts (3.11), disposal rules applicable to foreign trusts (3.12), foreign value shifting regime and definitions (3.13), conclusion of the Australian and UK trust context (3.14) and a chapter summary (3.15).

3.2 THE NATURE OF A TRUST'S ASSETS

3.2.1 Capital nature of an asset

In the definition of gross income contained in section 1(1) of the Act, it excludes receipts of a capital nature, which indicates that a receipt from the disposal of an asset could either be of a capital or a revenue nature. Section 1(1) of the Act does not define the term "capital". Paragraph 1 of the Eighth Schedule does not describe the meaning of capital. Paragraph 3 of the Eighth Schedule states that a capital gain may arise when an asset is disposed of during the year of assessment of the taxpayer without defining the meaning of capital. The interpretation of capital has been left for the courts to decide upon.

In the case of Visser v. CIR 1937 TPD, an agreement was reached between the taxpayer and another person not to acquire mining options on certain farm properties, and that, in return, shares would be issued to the taxpayer in the other person's company. Pursuant to the agreement, a letter of undertaking was issued to the taxpayer to acquire shares in a company for services rendered or to be rendered. The court had to decide if the value of the shares were either of a capital or a revenue nature. The court held that the shares were of a revenue nature and therefore included in gross income. The income was for services rendered or the product of the taxpayer's wits. The court also drew the analogy of a tree and fruit, where the tree (capital) produces the fruit (income).

In the case of CIR v. Pick 'n Pay Employee Share Purchase Trust 54 SATC 271; the court had to decide if the proceeds of the sale of shares by the company to the trust were of a capital or a revenue nature. The court held by majority that the sale of the shares by the company was in terms of a share incentive scheme and the company had no intention of making a profit. From a trust beneficiary's perspective, it may be difficult for a beneficiary to enter any profit-making scheme that involves an interest in a trust. The trust deeds examined in this study, place the assets under the control and administration of the trustees until the assets are distributed to the beneficiary. This restricts the beneficiaries' capacity to enter a profit-making scheme related to their interests in a trust. The conduit principle from Armstrong v. CIR, 1938

AD 343 (10 SATC 1) states that dividends distributed to a trust beneficiary are treated as dividends in their hands, and the income distributed to beneficiaries retains its character. A capital gain vested or distributed to a beneficiary also retains its character based on the conduit principle, the capital or revenue nature of the asset held in the trust will determine if the beneficiary's rights in the trust are capital or not. In Natal Estates Ltd v. SIR (1975 A) (37 SATC 193), it was ruled that a taxpayer's intention could change after acquiring an asset. The capital or revenue nature of the asset should be determined right before the VSA, as a trust's intentions may change after the trust acquires the asset.

3.2.2 Property for donations tax purposes

Section 54 of the Act levies donations tax on the value of the donation of any property disposed of under a donation (whether directly or indirectly and whether in trust or not) by a resident. In terms of section 55(1) of the Act, and for donations tax purposes, property is defined as: *"*any right in or to property, whether movable or immovable, whether corporeal or incorporeal, wherever situated*"*. If a beneficiary has a right to or in trust assets, within the parameters of the definition of "property" for donations tax purposes in terms of section 55(1) of the Act, it is advocated by Honiball and Olivier (2009:182) that it is possible for a trust beneficiary to donate such a right to a third party. According to Williams (2005:25), one of the tests to determine if an item constitutes "property" is that the property should be transferable, which is quite possible for a vested interest. A discretionary interest is subject to an expectation that the trustees either vest or distribute the trust asset to the trust beneficiary (SARS, 2020:589). The uncertainty of whether the discretionary interest will ever be vested in a trust beneficiary makes any calculation of any possible value thereof, as required in section 54 of the Act, almost impossible. Therefore, Honiball and Olivier (2009:182) are of the opinion that a trust beneficiary's vested interest could constitute property for donations tax purposes, whereas a discretionary interest cannot be considered as an asset in the hands of a trust beneficiary for donations tax purposes. This view is supported by De Koker and Williams (2024:23.3).

3.2.3 Property for estate duty purposes

Section 2(1) of the EDA levies estate duty on the estate of any person who dies after 1 April 1955. Any property owned or deemed to be owned by a deceased person prior to his/her death is considered as property for estate duty purposes (section 3(3) of the EDA. Section 3(2) of the EDA states that "property" means: *"*any right in or to property, movable or immovable, corporeal, or incorporeal, and includes– (a) any fiduciary, usufructuary, or like interest in property (including a right to an annuity charged upon property) held by the deceased prior to his death". The definition of "property" in section 3(2) of the EDA is remarkably akin to that of the definition of "property" for donations tax purposes contained in section 55(1) of the Act. Davis *et al*. (2024:2.9.1) describe donations tax as estate duty paid in advance. A trust beneficiary's interest in a vested trust is transferable to the heirs of a deceased trust beneficiary and accordingly considered as property for estate duty purposes (Cameron *et al.*, 2002:557). A discretionary interest in a trust is not transferable to the heirs of a deceased trust beneficiary (Cameron *et al*., 2002:556). A discretionary right is regarded as a conditional right and not property for estate duty purposes (Cameron *et al.*, 2002:556).

Section 3(3)(*d*) of the EDA stipulates that:

> "Property which is deemed to be the property of the deceased includes – property (being property not otherwise chargeable under this Act or the full value of which is not otherwise required to be taken into account in the determination of the dutiable amount of the estate) of which the deceased was immediately prior to his death competent to dispose for his own benefit or for the benefit of his estate*,"* is regarded as property for estate duty purposes.

A beneficiary interest in a trust asset held by a discretionary trust before vesting is a *spes* and the beneficiary would not be able to dispose of the unvested asset held in the trust. If a beneficiary is not competent to dispose of a property prior to death, the rights to that property would be excluded from section 3(3)(*d*) of the EDA.

Section 3(3)(*d*) of the EDA includes an asset held by a discretionary trust if the same person is both the sole trustee and beneficiary. This allows the trustees to distribute the trust's assets to themselves, making them able to dispose of the assets before their death (see *alter ego* trusts discussed in section 3.8.1 below). Excluding trustees as beneficiaries ensures that trust assets are not included in the beneficiary's estate. As discussed in section 1.1.1 of Chapter 1, one of the benefits of an estate plan is to reduce estate duty. To avoid the estate duty consequences of section 3(3)(*d*) of the EDA, the trustees' powers are limited (Davis *et al*., 2024:2.4.1). In the SA context, trust deeds are drafted to ensure that no single trustee is competent to dispose of an asset for their own benefit and thereby reducing estate duty. Davis *et al*. (2024:14.5) suggest that the trust structure should include at least three trustees, with one being an independent trustee, allowing a simple majority to make decisions.

3.2.4 Asset for CGT purposes

3.2.4.1 Asset for CGT

To determine if a capital gain event has occurred, one must first establish whether the taxpayer possesses an asset (Jansen van Rensburg, 2007:29). Before analysing if a VSA arising in a trust context would trigger a CGT event, it is essential to examine the beneficiary's interest in a trust as an asset. Cash or currency is excluded from the definition of an asset for CGT purposes (paragraph 1 of the Eighth Schedule). Secondly, once an asset has been identified, the capital or revenue nature should be examined. The capital nature has been discussed in section 3.2.1 above; assets are defined in paragraph 1 of the Eighth Schedule of the Act as:

> *"*Property of any nature whether movable or immovable, corporeal, or incorporeal expressly excluding currency, but including gold and platinum coins; any right or an interest of any such property," which may include a beneficiary's right in a trust as an asset for CGT purposes.

Williams (2005:89) concludes in his analysis of the definition of an asset for CGT purposes that a right to property is a personal right, whereas a right in property could be considered as a real right. An asset is also described as property in this definition, which indicates that the terms “asset” and “property” may be used interchangeably for CGT purposes. SARS (2020:44) provides a list of assets that could be subject to CGT. The list includes land and buildings, homes, shares, a participatory interest in a collective investment scheme, an endowment policy, collectibles (examples include jewellery and artwork), personal-use assets (e.g., a boat), contractual rights, goodwill, trademarks, and a loan, specifically excluding trading stock (SARS, 2020:44). Beneficiaries’ interests in trusts are not specifically mentioned as a qualifying asset for CGT purposes in the above list provided by SARS. However, a contractual right is mentioned which may include a beneficiary’s right in a trust.

3.2.4.2 Beneficiaries’ rights

A beneficiary is not defined in the Eighth Schedule; however, section 1(1) of the Act defines a “beneficiary” of a trust as “a person who has a vested or contingent interest in all or a portion of the receipts or accruals or the assets of that trust”. Davis *et al*. (2024:5.11) differentiate a “contingent interest” as an interest which is dependent upon a future uncertain event, whereas a “vested interest” is certain. The definition of an “asset” in paragraph 1 of the Eighth Schedule to the Act has two components, namely: part (*a*) “as being property of any nature” and part (*b*) a right, “as an interest in property or to property”. In both discretionary and vesting trusts, beneficiaries can sue trustees for negligence that causes a loss of trust assets. Cameron *et al*. (2002:373) state that, in both instances the beneficiaries have a personal right to property held in a trust. A discretionary interest and a vested interest in a trust is considered being a right to property or a personal right (Williams, 2005:41). SARS (2020:597) states that both personal and real rights are included in the definition of an asset as defined in paragraph (*a*) of the “asset” definition in the Eighth Schedule to the Act. The beneficiaries’ rights in both discretionary and vested trusts covered in this study are qualifying assets for CGT purposes.

3.2.5 Comparative analysis of beneficiaries' rights as capital assets

The capital nature of an asset can be determined by tests developed by the courts over the years. A beneficiary's rights to, or in, a trust's asset could be either capital or revenue in nature when applying the conduit principle. Neither an asset, nor property is defined in section 1(1) of the Act - for gross income purposes. However, property is defined in the Act for donations tax and an asset for CGT purposes. The definition of an "asset" for CGT purposes in paragraph 1 of the Eighth Schedule, and the definitions of "property" for donations tax purposes in section 55(1) of the Act, and for estate duty purposes in section 3(2) of the Estate Duty Act, respectively, show a high correlation. A discretionary interest or a vested interest in a trust represents a right held by the beneficiaries to have trustees manage assets according to the trust deed. A beneficiary's interest in a vested trust is transferable and would therefore be property for donations tax and estate duty purposes. However, a beneficiary's contingent right to a trust asset depends on future trustees' decisions. Thus, a beneficiary's interest in a discretionary trust is a *spes* or hope and has no value and is therefore excluded from estate duty and donations tax. For CGT purposes a beneficiary's interest in a discretionary trust is valued at nil rand in terms of paragraph 81 of the Eighth Schedule. Both discretionary and vested rights in a trust give the beneficiary a personal right, which is considered an asset under paragraph (*a*) of the "asset" definition in the Eighth Schedule. According to SARS (2020:597), the definition of an 'asset' in paragraph 1 is broadly construed and encompasses both contingent and vested beneficiary rights as assets under paragraph 11(1)(*a*) of the Eighth Schedule. This is because both types of rights are considered personal rights held by the beneficiary, which fall within the ambit of the asset definition for CGT purposes.

3.3 GROSS INCOME

3.3.1 Definition of gross income

Gross income is defined in section 1(1) of the Act to be "in relation to any year of assessment means in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident, during such year

or period of assessment, excluding receipts or accruals of a capital nature". If the assets were purchased in a speculative manner with the intention of making a profit (Stephan v. CIR 1919 32 SATC 54), then the future proceeds will fall within the ambit of the gross income definition. In the case of CSARS v. Capstone 556 (Pty) Ltd [2016] ZASCA 2, 2016(6) 139 (SCA), the court first examined whether the receipt or accrual was of a revenue nature. The court held that the dominant intention of acquiring the shares were a long-term capital investment to rescue a business. The receipt was fortuitous, and the receipt was therefore of a capital nature. The trustee's intention when acquiring assets for a trust will assist in determining whether a receipt from the disposal of the asset is a revenue or a capital receipt. The method of sale may also result in a revenue receipt. Court cases dealing with the capital and revenue nature of receipts and accruals have been discussed in section 3.2.1.

Section 26A of the Act includes any amount of a "taxable capital gain" as determined in terms of the Eighth Schedule to the Act in the taxable income of a taxpayer. The term "taxable income" is defined in section 1(1) of the Act to mean the aggregate of:

> "(*a*) the amount remaining after deducting from the income of any person all the amounts allowed under Part I of Chapter II to be deducted from or set off against such income; and
> (*b*) all amounts to be included or deemed to be included in the taxable income of any person in terms of this Act."

Taxable income comprises gross income, less both exempt income and deductible expenditure plus the taxable portion of a capital gain included in taxable income in terms of section 26A of the Act. Both gross income and a taxable capital gain is subject to income tax. The method of calculating the taxable income arising from a capital gain is determined within the provisions of the Eighth Schedule, whereas the computation of taxable income for gross income is determined within the remaining provisions of the Act excluding the Eighth Schedule.

Paragraphs (*a*) to (*n*) of the definition of “gross income” in section 1(1) of the Act includes specific capital amounts. Special inclusion paragraph (*h*)(i) states that the amount specified for improvements in the lease agreement, or if unspecified, their fair and reasonable value, is included in the landlord's gross income if the tenant is responsible for such improvements. Paragraph 35(3)(*a*) of the Eighth Schedule denies the duplication of a revenue receipt or accrual to be included in both gross income and again in taxable income by way of a taxable capital gain from the proceeds of a disposal if an asset whereby it determines the following:

> *“*The proceeds from the disposal, during a year of assessment, of an asset by a person, as contemplated in subparagraph (1) must be reduced by any amount of the proceeds that must be or was included in the gross income of that person or that must be or was taken into account when determining the taxable income of that person before the inclusion of any taxable capital gain*”.*

Thus, if any receipt or accrual of trustees’ actions results in a gross income implication, it will be excluded from the CGT calculation under the Eighth Schedule.

3.3.1.1 Income (excluding capital gains) implications

Income (excluding capital gains) implications of a transaction will result in a revenue receipt, which is included in the gross income and the calculation of taxable income. In such an instance the taxable income is based on amounts received as described in section 25B(1) of the Act as “any amount (other than an amount of a capital nature which is not included in gross income, or an amount contemplated in paragraph 3B of the Second Schedule”. Taxable income is defined in section 1(1) of the Act as gross income less exempt income and allowable deductions which is taxed at the applicable tax rates of the taxpayer. Capital receipts are not included in gross income in terms of the general definition of gross income, and section 26A of the Act distinguishes between gross income and a capital receipt in the form of a taxable capital gain drawn from the CGT calculation under the Eighth Schedule. The courts have developed tests to distinguish between revenue and capital receipts. These

tests are applicable to assets held within both discretionary and vested trusts. This distinction is crucial as amounts already included in gross income are excluded from the Eighth Schedule's CGT calculation. Paragraph 35(3)(*a*) of the Eighth Schedule excludes any amounts included in gross income from the calculation of proceeds of a capital gain. Therefore, trustees' actions resulting in a revenue receipt or gross income, will be excluded from the Eighth Schedule and have no CGT and VSA implications (section 26A of the Act). Capital gains are determined within the provisions of the Eighth Schedule, revenue and gross income not. When analysing trustees' actions resulting in a VSA, the possibility of a revenue receipt should be considered, which could preclude a VSA from the scope of gross income.

3.4 DONATIONS TAX

3.4.1 Donations tax definitions

Sections 54 to 64 of Part V of the Act deals with donations tax. Section 55(1) of the Act defines a donation as any gratuitous disposal of property including any gratuitous waiver or renunciation of a right. Section 58(1) of the Act deems the sale of any property for an inadequate consideration to be a donation. Donations tax is levied in terms of section 64 of the Act, at a flat rate 20% on amounts up to R30 million, and 25% on amounts above R30 million on the total value of taxable donations of property made by SA residents, subject to the exemptions mentioned in section 56(1)(*a*) to (*r*), and section 56(2)(*a*) to (*c*). To analyse the trustees' actions, donations tax helps clarify the notion of a "donation'' for purposes of paragraph 11(1)(*a*) of the Eighth Schedule by showing how a gratuitous disposal may parallel a reduction in a beneficiary's interest; this comparison assists in determining whether such a diminution falls within paragraph 11(1)(*a*). Although a donation is not defined in paragraph 1 of the Eighth Schedule to the Act, paragraph 11(1)(*a*) of the Eighth Schedule describes a donation to qualify as a disposal for CGT purposes. Considering how a donation is defined for donations tax purposes may assist with understanding its application for CGT purposes. As discussed in section 3.6.2.4 below, sub-paragraphs (*a*) and (*b*) of a VSA as defined in paragraph 1 of the Eighth Schedule require a beneficiary's interest in a trust to decrease, alongside a corresponding increase in another beneficiary's interest, analogous to

a donation for donations tax purposes. The parenthesised paragraph 38 of the Eighth Schedule exclusion (related to donations between connected persons) from the VSA definition creates a potential ambiguity. A comparative analysis of common concepts between donations tax and CGT will facilitate a better understanding of the working and characteristics of VSAs.

3.4.1.1 Donations tax implication

A donations tax implication of a transaction results in donations tax becoming payable on the donation, calculated after deducting any permissible exemptions. A donation may be subject to both donations tax and CGT. Paragraph 22 of the Eighth Schedule includes a portion of the donations tax in the calculation of the base cost of an asset disposed of by way of a donation in terms of paragraph 11(1)(*a*) of the Eighth Schedule. Donations tax is distinct from CGT. It is applicable to the donation of property, whereas CGT applies to capital gains realised from the disposal of a capital asset. Trustees' actions which are subject to donations tax implications and is subject to CGT in terms of paragraph 11(1)(*a*) would be excluded from a paragraph 11(1)(*g*) VSA as this would result in double taxation.

3.4.1.2 Deemed Donations, Market-Value Deeming and the Measurement of VSA Proceeds

A deemed donation in terms of section 58(1) of the Act allows SARS to invoke donations tax whenever there has been a transfer of property for an inadequate consideration. In the Estate Welch's v. CSARS 66 SATC 303 case, on page 315, it was mentioned that both an element of generosity and the requirements of a common law were not required when testing for the application of section 58(1) of the Act for a deemed donation. A deemed donation is wider than a donation in that it applies to the circumstances in which there is no intention to donate.

Paragraph 38(1)(*a*) of the Eighth Schedule also deems a disposal by way of a donation, consideration not measurable in money or transactions between connected persons not at an arm's length price to be disposed for an amount equal to the asset's market value. The person who acquires the asset is deemed to have

acquired the asset at market value (paragraph 38(1)(*b*)). Paragraph 38 does not only apply to donations but to disposals which are not measurable in money, which include any barter transactions. Transactions between connected persons not at an arm's length price, are deemed to occur at market value (paragraph 38(1)(*a*)). Section (1)(*b*)(i) of the Act defines a connected person as any natural person or any relative and any trust of which such natural person or such relative is a beneficiary as being connected to a trust, meaning any transactions between the trust and the beneficiary not at arm's length price will be deemed to occur at market value.

Section 58(1) of the Act triggers a donation for donations tax purposes where property is disposed of for inadequate consideration. In such cases, the transaction is deemed to be a donation to the extent of the difference between the property's market value and the consideration actually received. Whereas paragraph 38(1)(*a*) and (*b*) do not trigger a disposal in the context of CGT. Paragraph 38(1)(*a*) and (*b*) deem the proceeds of a donation to be at market value. Paragraph 35(2) prescribes that, the proceeds of a VSA for a paragraph 11(1)(*g*) disposal are measured as the difference between a person's interest immediately prior and immediately after a VSA occurs. If the parenthesised paragraph 38 exclusion in the paragraph 1 of definition of a VSA does not exist, the proceeds of VSA would instead be determined under paragraph 38(1)(*a*), which governs market-value deeming for disposals between connected persons. Otherwise, there would be a conflict between paragraph 35(2) and paragraphs 38(1)(*a*) and (*b*) of the Eighth Schedule in calculating the proceeds of a VSA (see section 3.6.2.5 below).

3.4.2 Legal formalities of a donation

Both section 58(1) of the Act which deals with a deemed donation for donations tax purposes and paragraph 13(1)(*a*)(iii) of the Eighth Schedule which deals with the timing of a donation (a paragraph 11(1)(*a*) disposal) require that all the legal formalities of a valid donation be adhered to for donations tax and CGT purposes. These formalities would include the consent of the donor and the donee, being the legal formalities as examined in court cases that dealt with donations for donations tax purposes. An understanding of the legal formalities of a donation is necessary

to distinguish if the trustees' actions with the consent of the beneficiaries constitute a donation or a VSA.

3.4.2.1 Estate Welch's v. CSARS 66 SATC 303

In the Estate Welch's v. CSARS 66 SATC 303 case, which was a divorce settlement, Mr Welch signed a consent paper in which he agreed to pay R3 216 760 to a new trust for their child's maintenance and to request his former spouse to relinquish her rights to the RF Welch Family Trust. In the event of the trust not being able to pay the maintenance, the obligations would revert to Mr Welch. Mr Welch died on 16 December 1996 before the funds were transferred to the new trust by his executors. The key issue was the transfer of R3 216 760 to the new trust was a donation made in terms of section 54 of the Act. One of the court's significant findings was that a "donation" for donations tax purposes was the same as the common law definition of a donation. Accordingly, the court found that the essential feature of a "donation" was that the donor had to, out of his/her or own "free" will, dispose of property, without any compensation in return. Both Mr Welch and his former spouse had separate legal representation and arrived at a negotiated settlement amount for maintenance payments of both his ex-wife and their child. The court found that the transfer of funds to the trust by the executors was not motivated by generosity, but rather because of a divorce settlement.

The common law definition of a donation, as noted by Davis *et al*. (2024:2.9.2), involves a contract between the donor and donee, where the donor gives a gift to the donee without receiving any consideration in return. The donor would therefore have to consent to the donation out of his or her own free will. This results in the reduction of the donor's estate and an increase in the donee's assets. Section 55(3) of the Act states that a donation takes effect once all the legal formalities are complied with. Paragraph 13(1)(*a*)(iii) of the Eighth Schedule specifies that the timing of a disposal of an asset by way of a donation is the date when all the legal formalities are met, which applies for both donations tax and CGT purposes.

3.4.2.2 Income Tax Case No. 1840 72 SATC 79

Paragraph 11(1)(*b*) of the Eighth Schedule includes a waiver or relinquishment of an asset as a disposal, and a waiver or relinquishment is not defined in paragraph 1 of the Eighth Schedule. Income Tax Case No. 1840 72 SATC 79 which dealt with a renunciation of a right or waiver of loan accounts is analysed next. In ITC 1840 72 SATC 79 a trust was originally formed in 1973 for the estate planner's six children who were beneficiaries of the trust. In 1994 the trustees then formed six new trusts; each new trust now had one of the original beneficiaries as a single beneficiary of each of the new trusts with the intention of separating the original trust's assets equally amongst the six trust beneficiaries. The trustees then sold the equally divided trust's assets at market value on a loan account to each of the six new trusts created. The trustees passed a resolution in 1997 effectively renouncing the right of the original trust's loan to each of the six new trusts formed. Even when the trustees subsequently were made aware that their actions were *ultra vires,* they did not reinstate the loan accounts. Key issues in ITC 1840 72 SATC 79 included: whether the donation was made under a trust and exempt from donations tax in terms of section 56(1)(*l*); if loan write-offs qualified as donations for donations tax purposes; whether disposals were gratuitous; and if void transactions had any tax implications. The case found that donations were not made in pursuance of the trust as the new trusts established were not beneficiaries of the original trust and therefore not exempt. The disposals were benevolent and gratuitous. The fact that the transactions were void did not mean they could not have had any donations tax consequences.

3.4.2.3 Beneficiaries' consent

In Potgieter & another v. Potgieter 2011. NO & others [2011] JOL 27892 (SCA) it was held that once beneficiaries have accepted benefits from a trust, all the beneficiaries are required to approve an amendment to the trust deed. Accepting benefits from a trust would occur if the beneficiaries have received distributions from the trust, vested rights in the trusts or signed the trust deed. If all the trust beneficiaries' consent to any agreement which may result in the reduction of a beneficiary's interest in a trust with a corresponding increase in another

beneficiary's interest in the same trust, a possible donation occurs for both donations tax purposes and a disposal for CGT purposes in terms of paragraph 11(1)(*a*) of the Eighth Schedule. The delivery of a movable asset or a written contract by the donor for an asset which is donated in the future is required for a valid donation. A variation in a trust beneficiary's interest in a trust should occur with a cession or amended deed of variation signed by all trust beneficiaries. Although no formalities are required for the renunciation of a right, a donation for donations tax purposes (section 55(1) of the Act) and for CGT purposes (a paragraph 11(1)(*a*) disposal) may have additional legal requirements. The beneficiaries' consent to a change in rights may therefore not constitute a VSA. Next, the elements of donations tax are examined by discussing examples of VSAs found in the literature.

3.4.2.4 Delivery of property

When a property is delivered, no written agreement is required for a donation in terms of section 5 of the General Law Amendment Act No. 50 of 1956 (the GAA). The beneficiaries' interests are seen as an asset which could either be ceded or donated (Davis *et al.*, 2024:5.6C). To establish if the beneficiaries' rights have been delivered, one must analyse each set of trustees' actions with the beneficiaries separately. According to Cameron *et al*. (2002:464), the requirements for delivery are the registration in the case of immovable property, the physical delivery in the case of movable goods, and a cession in the case of incorporeal property. On the contrary, Cameron *et al.* (2002:464) state that no formalities are required for the renunciation of a right for donations tax purposes. The delivery of a beneficiary's interest in a trust should occur with a cession or possibly a resolution of the trustees and the beneficiaries or a renunciation of a right (Cameron *et al*., 2002:464).

3.4.2.5 Executory donations

An executor contract of a donation occurs when a donor makes a promise of a donation, whilst the asset or property donated must still be delivered (Davis *et al*., 2024:2.9.2). For a valid donation from a trust, the trustee must sign an executory contract of donation in the presence of two witnesses if the assets are not delivered (section 5 of the Act of 1956). In the case of a discretionary or vested trust a cession

or donation of a trust's assets may be prohibited by the trust deed (Davis *et al*., 2024:5.6C). When a movable asset is to be delivered in the future such a donation should be reduced to writing.

3.4.2.6 Donations of contingent and vested rights

Under common law, a donation involves a measurable, free transfer of value from donor to donee for tax purposes. When beneficiaries consent to a change in vested rights, such consent may signal a donation of those vested rights, which is considered both a donation and an ordinary disposal for CGT purposes. Vested trust beneficiaries have clearly defined rights to assets and income, making such donations measurable and taxable (Van Zyl, 2019:726). In contrast, discretionary trust beneficiaries hold only contingent rights, which are dependent on trustee decisions and difficult to quantify. This difficulty in measurement of contingent rights (SARS, 2020:589, 596) significantly reduces the likelihood of contingent rights being regarded as donations for tax purposes.

3.4.3 Analysis of donations in VSA examples

The parenthesised paragraph 38 exclusion within the definition of a VSA, paragraph 38 includes donation disposals between connected persons, therefore it imperative to examine existing VSAs for any donations tax exposure. Without any examples of a VSA related to trusts in the SARS tax guides and research examples of VSAs related to trusts, the analysis of VSAs related to companies and partnerships is used to identify if these examples fit the common law definition of a donation.

3.4.3.1 Company rights issue

In the example of SARS (2020:777) a father holds two shares which comprises the entire issued share capital of a company which has a market value of R100 000. The company issues a new share to his daughter for one Rand. After the VSA the father holds two shares in the company and his market value in the company is R66 667 (R100 000 x 2/3), and his daughter holds one share which has a market value of R33 333 (R100 000 x 1/3). The father's interest in the company has

reduced by R33 333 and the daughter's value in the company has increased by R33 333, after the VSA has occurred. Under common law, a donation requires the agreement of both the donor and the donee (Estate Welch's v. CSARS 66 SATC 303).

It may be challenging to prove an agreement between a parent and child that falls within the common law guidelines for donations. Section 38(1) of the Company's Act No. 71 of 2008 (the Co Act) allows the board of directors to issue shares provided unless the company's Memorandum of Incorporation has other stipulations. Section 41(3) of the Co Act requires that if an issue of shares exceeds 30% of the class of shares before the share issue, the share issue should be approved by a special resolution of the shareholders of the company. The trustees would be required to sign a special resolution to issue the shares. If the father is a director, he must sign a resolution for issuing shares and thereby agree to the share issue. The example does not show that the daughter agreed to receive the share, which is one of the legal formalities of a donation.

3.4.3.2 Negotiated reduction in a partnership ratio

Haupt (2019:35) provides an example of a VSA in which the partners renegotiate a partnership ratio to keep partners with skill sets in a partnership (without any payment). A partner who agreed to reduce their partnership interest in Haupt's example may avoid donations tax or a paragraph 11(1)(*a*) disposal in the form of a donation, as they were compelled to do so to protect the value of their interests in the partnership. According to the Estate Welch's v. CSARS 66 SATC 303 case, if someone is forced to dispose of property without compensation and no generic element is present, no donation occurs.

3.4.3.3 Comparative analysis of VSA examples for donations

A donation is defined for donations tax purposes as any gratuitous disposal of property or any gratuitous waiver or renunciation in terms of section 55(1) of the Act. A donation for CGT is not defined in paragraph 1 of the Eighth Schedule; however, both for donations tax purposes and the timing of a disposal of a donation

for CGT purposes requires that the legal formalities of donations should be complied with. When analysing the rights issue of a VSA (see section 3.4.3.1 above) and by applying the common law definition of a donation, both the donor (the father) and donee (the daughter) should consent to the donation. There is no evidence that daughter who may be a minor child has consented to the donation therefore no agreement for a donation to take place.

The negotiation to reduce the profit-share ratio of a VSA (see section 3.4.3.2 above) was forced upon the partner to retain the skills of the partner whose profit-sharing ratio was increased. Based on the common law definition of a donation for donations tax purposes, both the rights issue and negotiation of the reduction of partnership profit-sharing arrangements may be excluded from a disposal contained in paragraph 11(1)(*a*) of the Eighth Schedule. VSA anti-tax avoidance is necessary to include both arrangements discussed above in the CGT net.

3.5 ORDINARY DISPOSALS

3.5.1 Paragraph 11(1)(*a*) to (*g*) disposals

The disposal rules are described in paragraph 11(1)(*a*) to (*g*) of the Eighth Schedule to the Act as follows:

> "Subject to subparagraph (2), a disposal is any event, act, forbearance, or operation of law which results in the creation, variation, transfer, or extinction of an asset, and includes,
> (*a*) the sale, donation, expropriation, conversion, grant, cession, exchange or any other alienation or transfer of ownership of an asset;
> (*b*) the forfeiture, termination, redemption, cancellation, surrender, discharge, relinquishment, release, waiver, renunciation, expiry, or abandonment of an asset;
> (*c*) the scrapping, loss, or destruction of an asset;
> (*d*) the vesting of an interest in an asset of a trust in a beneficiary;
> (*e*) the distribution of an asset by a company to a shareholder;
> (*f*) the granting, renewal, extension, or exercise of an option; or

(*g*) the decrease in value of a person's interest in a company, trust, or partnership as a result of a value shifting arrangement.*"*

The first sentence of paragraph 11(1) of the Eighth Schedule defines a disposal for CGT events, which can include various transactions beyond those listed in subparagraphs 11(1)(*a*) to (*g*). Any creation, change, transfer, or extinction of an asset is considered a disposal for CGT purposes and may relate to other disposals not mentioned. The use of the word "or" in paragraph 11(1) indicates that if none of the specific disposals listed in paragraphs 11(1)(*a*) to (*f*) are applicable, then paragraph 11(1)(*g*) may apply. This means that the provisions are mutually exclusive: a disposal will be classified under paragraph 11(1)(*g*) only if it does not fall within the scope of paragraphs 11(1)(*a*) to (*f*). SARS (2020:776) distinguishes between a VSA paragraph 11(1)(*g*) disposal and the remaining disposals in terms of paragraph 11(1)(*a*) to (*f*), which they call collectively ordinary disposals. The reason for identifying the ordinary disposals separately is that SARS (2020:776) states that paragraph 11(1)(*g*) VSA will only apply if the ordinary disposals do not apply. When analysing trustee's actions for a potential VSA, any trustees' action that results in an ordinary disposal would therefore exclude a VSA.

3.5.1.1 Duplication of ordinary disposals

If trust beneficiaries transfer their rights to another beneficiary without compensation, it could result in a disposal, cession, donation, or transfer under paragraph 11(1)(*a*) of the Eighth Schedule. In Potgieter & another v. Potgieter 2011. NO & others [2011] JOL 27892 (SCA), the court held that changes in beneficiary rights require approval from all trust beneficiaries. The trustees would therefore have to establish whether the beneficiaries' consent is required before changing the beneficiaries' rights to a trust's assets. The beneficiaries giving up their rights are forfeiting, surrendering, discharging, releasing, or renouncing their rights (a paragraph 11(1)(*b*) disposal). This also results in a loss in the trust's assets (paragraph 11(1)(*c*)). If the transfer to the beneficiary meets all the VSA elements, paragraph 11(1)(*g*) applies. If the trustee's action results in both a cession under paragraph 11(1)(*a*) and a VSA under paragraph 11(1)(*g*), the disposal under paragraph 11(1)(*a*) will take precedence according to SARS (2020:776). In Isaacs

v. Commissioner of Inland Revenue 16 SATC 258, it was held that the same income cannot be taxed twice. Thus, even if a disposal falls under multiple provisions of paragraph 11(1), it will only be subject to tax once, preventing double taxation of a capital gain.

3.5.1.2 Ordinary disposals CGT implication

An ordinary disposal CGT implication of a transaction resulting in the realisation of a capital gain, as determined in the Eighth Schedule to the Act, is included in taxable income in terms of section 26A of the Act. A capital gain or a capital loss upon the disposal of an asset is achieved by deducting the asset's base cost from its proceeds in terms of paragraph 3(*a*) of the Eighth Schedule to the Act. In terms of paragraph 10 of the Eighth Schedule, 80% (paragraph 10(*a*)) of the taxable portion of capital gain in the case of a trust, and 40% (paragraph 10(*a*)) of the taxable portion of a capital gain in the case of natural persons, is included in taxable income. Trustees' actions which result in ordinary disposals with CGT implications are excluded from a VSA (SARS, 2020:776).

3.5.2 Ordinary disposals applicable to trusts

SARS (2020:583) outlines various CGT consequences for trusts. Trustees can sell an unconditional asset (a paragraph 11(1)(*a*) disposal) and distribute the resulting capital gain to a beneficiary in the current or a future year of assessment. SARS (2020:616) states that vesting of an unconditional right can occur when cash or an asset is distributed to a beneficiary or a loan account is credited to the beneficiary. The loan account would be credited when a capital gain is vested in a beneficiary, by a resolution that has been passed by the trustees. Both vesting or distribution of either a capital gain or asset in or to a beneficiary will result in a paragraph 11(1)(*d*) disposal. A paragraph 11(1)(*b*) disposal would occur if the trustees added a new beneficiary to a vested trust, and the existing beneficiaries relinquish a portion of their vested rights to the new beneficiary. If the trustees invest in a company which is held as a capital investment and that goes insolvent, the beneficiaries of a vested trust would have a loss in terms of paragraph 11(1)(*c*). As paragraphs 11(1)(*e*) and (*f*) concern companies, this study will focus on the ordinary disposals outlined in

paragraphs 11(1)(*a*), (*b*), (*c*) and (*d*) -of the Eighth Schedule. When analysing trustees' actions for a possible VSA, the application of the ordinary disposal rules of paragraphs 11(1)(*a*), (*b*), (*c*) and (*d*) of the Eighth Schedule needs to be examined as they may eliminate the occurrence of a VSA.

3.5.2.1 Beneficiaries' CGT implications due to trustees' actions

A capital gain arising because of the trustees' actions is attributable to the beneficiaries in terms of paragraphs 80(1) and 80(2) of the Eighth Schedule of the Act, provided that (donations) paragraphs 68, 69, 71, and 72 do not apply. If a capital gain arises as a consequence of a trust asset that has been vested in a resident beneficiary by decision of the trustees, such capital gain must be disregarded when calculating the trust's aggregate capital gain or loss (paragraph 80(1)(*a*)); and should be included in the calculation of the beneficiary's aggregate capital gain or loss (paragraph 80(1)(*b*)). If a capital gain occurs in a trust during a tax year when a resident beneficiary has or newly acquires a vested interest in such a capital gain (but not in the asset itself), the capital gain should be ignored for calculating the trust's aggregate capital gain or loss (paragraph 80(2)(*a*)), but must be considered when calculating the beneficiary's aggregate capital gain or loss (paragraph 80(2)(*b*)).

The exclusion of events constituting donations is necessary as paragraphs 68, 69, 71, and 72 of the Eighth Schedule are anti-tax avoidance provisions that deem the capital gain resulting from a previous donation to be that of the donor or founder of the trust with no CGT implication for the beneficiary. Paragraphs 80(1) and 80(2) of the Eighth Schedule apply when a trust asset is vested in a beneficiary or when a beneficiary acquires a vested interest in the capital of a trust. The operation of the attribution rules diverges depending on whether the asset is vested in a beneficiary or whether the beneficiary holds only an unvested (contingent) interest. SARS (2020:584-586) describes the CGT implications by describing beneficiary rights as a contingent interest, prior to being vested, not having a prior vested interest or an unvested asset which would only be applicable when the trustees have the power to distribute or vest an asset in any one of the beneficiaries of the trust (see section 3.2.4.2 above). Discretionary trusts allow trustees to decide how assets are

distributed, whereas non-discretionary trusts require assets to be distributed once vested. According to SARS (2020:584-586), actions taken by trustees that have capital gains tax implications for resident beneficiaries and trusts are aligned with ordinary disposals, as shown in Table 3.1 below.

Table 3.1: Trustees actions resulting in CGT implications

	Trustees' action	Resident beneficiary's CGT implications
1.	Trustees vest a contingent interest in an asset in a resident beneficiary.	A paragraph 11(1)(e) disposal occurs, and in terms of paragraph 80(1) the capital gain is attributed to the beneficiary and taxed in the beneficiary's hands.
2.	Trustees distribute an asset to a resident beneficiary who has a vested interest in that asset.	No capital gain or loss arises in the trust since it is deemed to distribute the asset at the time of vesting (paragraph 13(1)(*a*)(iiA)).
3.	Trustees sell an asset in the current year of assessment and distribute the gain to a resident beneficiary not having a prior vested interest in the asset in the same year of assessment.	A paragraph 11(1)(a) disposal occurs, and the capital gain is attributed to the beneficiary (paragraph 80(2)) and taxed in the beneficiary's hands.
4.	Trustees sell an asset and do not distribute the gain.	Paragraph 11(1)(*a*) disposal occurs, and the capital gain is taxed in the trust.
5.	Trustees sell an asset in the current year of assessment and distribute gain in a future tax year to a resident beneficiary not having a prior vested interest in the asset.	The capital gain is taxed in the trust in the year in which the asset is disposed of. When the earlier year gain is distributed in a subsequent year, no further gain or loss should arise in the trust or the beneficiary's hands, since the receipt of the trust capital.
6.	Trustees sell an unvested asset at a loss.	A paragraph 11(1)(*a*) disposal occurs, and the capital loss is ringfenced (paragraph 39).

In Table 3.1 examples 1, 3, 4, 5 and 6 apply to discretionary trusts, as the assets are not vested in the beneficiaries. In example 1, distributing an asset with only a contingent right triggers an immediate CGT event (paragraph 11(1)(*e*) of the Eighth Schedule). Example 2 applies to a vested trust and the subsequent distribution of the trust asset to the beneficiary is not subject to CGT, because the timing of the disposal would have taken place on a date prior to the vesting date of the disposal. In example 2, if the beneficiary subsequently sells the distributed asset, the capital gain will be taxed in the hands of the beneficiary. Example 3 applies to a discretionary trust. If the trust was a vested trust the capital gain would be attributed to the beneficiary with vested rights in terms of paragraph 80(2). In example 5 the capital gain has already been taxed in prior years, and in example 6 the resulting

capital loss of the trust is ringfenced. This study focuses on whether changes to contingent or vested rights result in ordinary or VSA disposals.

3.5.2.2 CGT implications of a beneficiary's sale of rights

According to SARS (2020:586), the sale of both a contingent and vested right by a resident beneficiary will have capital gains tax implications for the resident beneficiary aligned with the ordinary disposals, as shown in Table 3.2 below.

Table 3.2: CGT implications of the sale of a contingent and vested right

Beneficiary sale of rights		Resident beneficiary's CGT implications
1.	Resident beneficiary sells contingent right.	A paragraph 11(1)(*a*) disposal occurs, and beneficiary taxed on proceeds with zero base cost. The base cost is deemed to be zero even if the beneficiary paid something for the contingent right.
2.	Resident beneficiary sells vested right.	A paragraph 11(1)(*a*) disposal occurs; beneficiary is taxed on proceeds less base cost. Base cost could be the acquisition cost or market value at date of vesting.

The disposal of both contingent and vested rights has CGT implications for resident beneficiaries. The key distinction is that the attribution rule applies solely to contingent rights, with a base cost of zero, whereas the base cost for a vested right is determined by the market value of the asset at the time it first vests in the beneficiary. The base cost of a vested right is determined by the market value at the time the trustees exercise their discretion to vest an asset in a beneficiary. Alternatively, if the assets are vested in the beneficiary in accordance with the trust deed, the base cost is equivalent to the acquisition cost incurred when the trust originally acquired the asset. The attribution rules do not apply to the sale of contingent or vested rights, as a sale of such rights is unlike the distribution of an asset to a beneficiary (paragraph 80(1) and the vesting of a capital gain in a beneficiary (paragraph 80(2) of the Eighth Schedule).

3.5.2.3 Part disposals in terms of paragraph 33

Paragraph 33(1) of the Eighth Schedule states that the base cost of a part disposal is the fraction of the market value of the part disposal divided by the market value

of the entire asset immediately before the disposal, multiplied by the base cost of the asset immediately before the disposal. Paragraph 33(3)(*b*) of the Eighth Schedule deems a non-disposal to take place where a grant, variation or cession of a right of use or occupation of an asset is provided by that person, and no proceeds is received by or accrued to the person who is granting the right of use or occupation. If a beneficiary of a trust is given the free option to occupy a property of a trust and does not pay for such occupation, no disposal would occur.

3.5.2.4 Changes of contingent and vested rights

A vested right in a trust has both a measurable base cost and market value (see section 3.5.2.2 above), whereas a contingent right has a base cost of nil (paragraph 81 of the Eighth Schedule), and the market value thereof cannot easily be measured (see section 3.4.2.6 above). When analysing trustees' actions in relation to vested rights, such actions may invoke the application of the ordinary disposal rules if the beneficiary's consent to a modification of their vested rights without receiving compensation. The applicability of these rules further depends on how the change in vested rights is affected. In such instances, paragraph 11(1)(*a*) of the Eighth Schedule refers to the cession or donation of vested rights; paragraph 11(1)(*b*) pertains to a renunciation, waiver, or abandonment of such rights; and paragraph 11(1)(*c*) addresses the loss of an asset. Where beneficiaries holding contingent rights consent to the trustees' actions without receiving any compensation, the determination of the value of an ordinary disposal becomes difficult. This is because a contingent right being subject to the trustees' absolute discretion lacks quantifiable value and certainty.

3.6 VALUE SHIFTING ARRANGEMENTS

3.6.1 VSA anti-tax avoidance paragraphs

SARS (2000:11) explained the introduction of the CGT rules in South Africa included a deemed VSA disposal, when ownership does not change but where for all intents and purposes a change in beneficial interests in a trust occurs. A change of ownership would require a change of real rights, and result in an ordinary disposal

in terms of paragraphs 11(1)(*a*) to (*d*) of the Eighth Schedule of the Act. SARS (2020:776) describes a VSA as "an anti-tax avoidance which is aimed to prevent the transfer of value from one entity to another without constituting an ordinary disposal for CGT purposes" VSAs effectively widen the CGT net by increasing the number of disposal rules.

3.6.1.1 VSA tax implication

When analysing trustees' actions which could result in a potential VSA triggering a CGT disposal, other taxes which may eliminate the possibility of a VSA also need to be examined. Firstly, the revenue or capital nature of the beneficiary's rights to the assets held in the trust should be established. If the rights are revenue in nature, then any consequence of the trustees' actions will be excluded from CGT (definition of gross income in section 1(1) of the Act). Secondly if trustees' actions result in a donation of property; a portion of the donations tax should be added to the base cost (paragraph 22 of the Eighth Schedule) where such donation also constitutes an ordinary disposal of a capital asset for CGT purpose (paragraph 11(1)(*a*)). The trustees' actions should be measured against the ordinary disposal paragraphs as the application of any of these disposal rules will preclude the occurrence of a paragraph 11(1)(*g*) disposal and a VSA (SARS, 2020:776). The timing of a disposal for VSAs in terms of paragraph 13(1)(*f*) of the Eighth Schedule is the date on which one beneficiary's interest decreases, and another beneficiary's interest increases. Finally, if the trustees' actions meet the different elements of the definition of a VSA, as defined in paragraph 1 of the Eighth Schedule, the base cost (paragraph 23(*a*)) should be deducted from the proceeds (paragraph 35(2)) to arrive at a capital gain or a loss. A resulting capital gain will be included in taxable income in terms of section 26A of the Act.

3.6.2 VSA definition

When interpreting the definition of a value-shifting arrangement (VSA) as it applies to a trust, it is necessary to analyse the five elements outlined in the definition of a VSA as defined in paragraph 1 of the Eighth Schedule. These include: (1) whether an arrangement exists; (2) whether the beneficiaries retain an interest in the trust

after the occurrence of the VSA, and whether such interest - either vested or discretionary - is required for a VSA to arise; (3) whether the beneficiaries are connected persons in relation to one another; (4) whether a change in rights and entitlements has occurred, resulting in a corresponding change in interests within the trust; and (5) the interpretive significance of the parenthesised paragraph 38 exclusion. A VSA is defined in paragraph 1 of the Eighth Schedule to the Act as follows:

> *"*Value shifting arrangement means an arrangement by which a person retains an interest in a company, trust, or partnership, but following a change in the rights or entitlements of the interest in that company, trust or partnership (other than as a result of a disposal at market value as determined before the application of paragraph 38), the market value of the interest of that person decreases and–
>
> (*a*) the value of the interest of a connected person in relation to that person held directly or indirectly in that company, trust, or partnership increases; or
> (*b*) a connected person in relation to that person acquires a direct or indirect interest in that company, trust, or partnership."

3.6.2.1 An arrangement

Section 80L of the Act defines an 'arrangement' as any transaction, operation, scheme, agreement or understanding (whether enforceable or not), including all steps therein or parts thereof, and includes any of the foregoing involving the alienation of property. In Meyerowitz v. CIR 1963 (3) SA 863(A) (25 SATC 287) it was held that a scheme could include a series of transactions, which would include agreements between trustees and beneficiaries to execute one or more transactions. Cameron *et al*. (2002:507) recommend that all the trust beneficiaries agree to any change or variation of their rights. If the beneficiaries of the trusts are minors under 18 years, their legal guardians may act on their behalf. The inclusion of the wording in the definition of an arrangement "whether enforceable or not," would include trustees' actions which are not valid in terms of the trust deed.

3.6.2.2 Retention of an interest in a trust

Retaining an interest in a company or partnership is one of the requirements of a VSA (VSA definition, paragraph 1). If a beneficiary is removed from a trust, the beneficiary no longer has an interest in the trust. The test for a beneficiary retaining an interest in a trust should pose no problems, as this can be traced to the trust deed or the latest amended trust deed (Pace & Van Der Westhuizen, 2023:B18.2). If a beneficiary no longer holds an interest in a trust, the ordinary disposal rules of the Eighth Schedule should apply. A beneficiary no longer holding an interest in a trust may have donated his interest (paragraph 11(1)(*a*), relinquished his rights in the trust (paragraph 11(1)(*b*)), or lost his rights in the trust (paragraph 11(1)(*c*)). A discretionary and vested interest in a trust is further discussed in section 3.6.2.4 below.

3.6.2.3 Connected persons

VSAs are only applicable to an arrangement between parties who qualify as “connected persons” in relation to each other for normal tax purposes (VSA definition, paragraph 1 of the Eighth Schedule). A “connected person” in relation to a natural person is defined in paragraph (*a*) of this definition in the Act as any relative of such person. Thus, if the trust beneficiaries are family to the third degree of consanguinity they would be “connected persons” to each other. Under paragraph (*b*)(i) of the definition in the Act, a "connected person" in relation to a trust will include (i) any beneficiary of the trust; and (ii) any person connected to that beneficiary. Furthermore, paragraph (*b*A) of the definition states that all beneficiaries of the same trust are considered connected persons, regardless of whether they are related. This applies for VSA purposes as well. If a new beneficiary is added to a trust, they automatically become a connected person in relation to the existing beneficiaries.

3.6.2.4 Change in rights and entitlements resulting in a change in an interest in a trust

In hybrid trusts, contingent rights are covered under discretionary trusts and vested rights under vested trusts (see sections 1.6 and 1.8.3.3, Chapter 1). SARS (2020:108) provides an example of a new contingent beneficiary being added to a trust. The beneficiaries of a discretionary trust only have a *spes* before any of the assets are vested in the beneficiaries. The existing beneficiaries' value in the trusts' assets will therefore not automatically be diluted with the adding of a new beneficiary who only has contingent rights. SARS (2020:108) also provides an exception if new beneficiaries with contingent rights are added to a discretionary trust resulting in a change in the trust's purpose, there could be a deemed disposal and paragraph 38 should be considered. An example would be if non-family members are added as beneficiaries to a family trust. This would result in a disposal between the new and old trust, by means of a donation which would be deemed to be a donation at market value.

It is important to note that the change in the market value in the trust needs to be analysed to determine if this possibly results in a VSA (VSA, definition paragraph 1 of the Eighth Schedule). The definition of a VSA requires that the parties should be connected persons, and after the change in rights and entitlements one party's market value in the trust should decrease and the other party's market value should increase, as described in sub-paragraphs (*a*) and (*b*) of the definition of a VSA. Sub-paragraph (*a*) of the definition of a VSA applies when the market value of the existing beneficiary of a trust reduces and the market value of another beneficiary of the trust increases. Sub-paragraph (*b*) of the definition of a VSA occurs when an existing beneficiary in a trust disposes a direct or indirect interest in a trust to the newly added beneficiary of a trust which results in a decrease in the interest of the existing beneficiary and an increase of the interest for the newly added beneficiary in the trust.

The key is to determine if changes in a beneficiary's rights to trust assets affect their market value in discretionary and vested trusts. Assuming that a trust is not a hybrid trust (SARS, 2020:589), assets are either not vested (discretionary trust) or vested

(vested trust). For a hybrid trust that includes assets where beneficiaries hold both contingent and vested rights, the contingent rights are analysed under discretionary trusts, while the vested rights are analysed under the rules applicable to vested trusts.

In discretionary trusts, the beneficiaries possess a contingent or conditional right, which is merely an expectancy, as described by SARS (2020:596), meaning it is an expectation that may never come to fruition. In McAlpine v. McAlpine NO and another [1997] 1 All SA 264 (A), it was held that an agreement between two brothers to transfer shares to the survivor of the first to die was invalid due to its basis on a contingent right that was not enforceable. It would be difficult to determine the market value of a beneficiary's interest in a contingent right, prior to vesting of such right in a beneficiary. Therefore, by adding a new beneficiary with contingent rights (*spes*) to either a discretionary trust or a hybrid trust, would have no impact on the existing rights of both the existing beneficiaries' contingent and vested rights. SARS (2020:841) also mentions that the base cost and market value in a discretionary trust is nil before the death of a beneficiary.

In ITC 76 (1927) 3 SATC 68(U) it was held that a contingent interest in trust funds had not accrued to the beneficiaries of a trust, which differs from a vested right to income. A vested right was described as something substantial; something which could be measured in money; something which had a present value and could be attached. From its very nature it could not have a definite present value. In the income tax sense, therefore, a vested right is an accrued right. A right in a capital asset of a vested trust will therefore also be measurable. A vested right is a certain right; the enjoyment of the right is postponed until a future date. Williams (2005:90) is of the opinion that a change in an interest or entitlement in a vested trust will result in a simultaneous change in a beneficiary's interest in a trust. By adding a new beneficiary with vested rights to a vested trust would have an impact on the existing beneficiaries' vested rights; the same would apply if a beneficiary with vested rights were added to a hybrid trust.

3.6.2.5 Parenthesised paragraph 38 exclusion

Paragraph 1of the Eighth Schedule defines a VSA as one in which a person retains an interest in a company, trust, or partnership, and a subsequent alteration of the rights or entitlements attaching to that interest causes its market value to decrease. This definition operates subject to the parenthesised paragraph 38 exclusion, which removes from the ambit of the definition any change arising solely from a disposal at market value determined prior to the application of paragraph 38. Because this exclusion qualifies the operative scope of the definition, its rationale, function, and interpretive implications require separate discussion to delineate the boundaries of value-shifting arrangements with doctrinal precision.

Paragraph 38(1)(*a*) of the Eighth Schedule applies to a disposal by way of donation, consideration not measurable in money or transactions between connected persons not at an arm's length price, and it deems such transactions to take place at market value. Beneficiaries are defined as connected persons to each other in terms of section 1(1) of the Act (see section 3.6.2.3 above), which means that the proceeds of any transactions between the beneficiaries of a trust will be deemed to take place at the market value of the asset. The exclusion of paragraph 38(1)(*a*) from the definition of a VSA, allows for the proceeds of a VSA to be measured in terms of paragraph 35(2) of the Eighth Schedule (see section 3.4.1.2 above). Paragraph 38(1)(a) therefore applies to the ordinary disposals listed in paragraphs 11(1)(*a*) to (*f*), while paragraph 35(2) refers to a VSA as defined in paragraph 1 and a disposal as referred to in paragraph 11(1)(*g*).

The alternative argument is that the parenthesised paragraph 38 exclusion would not regard a donation which is already covered under paragraph 11(1)(*a*), as a VSA, otherwise it would result in being taxed twice. However, excluding all transactions which are between connected persons not at an arm's length price would eliminate all VSAs, as the beneficiaries whose interest in a trust decreases, receive no consideration and the beneficiary whose interest in a trust increases, pays no consideration for such increase. It is clear from the definition of a VSA, in paragraph 1 of the Eighth Schedule, that a VSA constitutes a transaction not taking place at arm's length. The exclusion in the VSA definition of the parenthesised paragraph 38

exclusion is to facilitate the measurement of the proceeds from VSA disposals (excluding donations) under paragraph 35(2) of the Eighth Schedule.

3.6.3 Proceeds of a VSA

Paragraph 35(2) of the Eighth Schedule to the Act defines the proceeds of a VSA as follows:

> "The amount of the proceeds from a disposal by way of a value shifting arrangement is determined as the market value of the person's interests to which subparagraph 11(1)(*g*) applies immediately prior to the disposal less the market value of the person's interests immediately after the disposal, which amount shall be treated as having been received or accrued to that person".

After establishing the market price of the asset, the total market value of the trust's asset is multiplied by the beneficiary's percentage interest in the trust's asset to obtain the beneficiary's share in monetary terms just before and after a VSA has taken place (Williams, 2005:90). According to Honiball and Olivier (2009:157), the valuation of assets, where no open market value is available, is a subjective process and almost impossible in the case of a discretionary interest in a trust (Honiball & Olivier, 2009:158). SARS (2021:14) describes various methods to measure the market value of an asset, such as the present value of future benefits for *fiduciary*, *usufructuary* and like interests or based on the "willing buyer and seller dealing at arm's length" principle in the case of unlisted shares. SARS (2021:15) gives no specific guidance on the valuation of a beneficiary's interest in a trust. In the case of a vested interest in a trust, the time to actual delivery and enjoyment of the trust asset(s) would have to be discounted in the valuation process as in the case of a *fiduciary*, *usufruct* and like interests (SARS, 2021:14). Paragraph 31 of the Eighth Schedule defines the market value of certain assets for CGT purposes. In the case of a trust holding shares of a listed company, the market value can be obtained from the stock exchange (paragraph 31(*a*) of the Eighth Schedule), but in the case of unlisted shares, the market value of the shares would require a valuation to be performed on such shares.

The capital assets of a trust could include a variety of assets, for example fixed property and farm-land property. Paragraph 31(3) of the Eighth Schedule requires that the valuation for unlisted shares be carried out on the willing-buyer-and-willing-seller basis in the open market. SARS (2021:6,13) recommends that if the shareholding in question is a minority or majority valuation, a “dividend basis” for a minority valuation and an “earnings basis” for majority valuations of an unlisted company should apply. According to Goodall (2016:5.2), several factors such as trends, risk and growth should be considered in the valuation of company shares. Goodall (2016:5.3) argues that the discounting of either earnings per share or dividends per share could be applied as a basis for valuing shares.

An investment property may be held for capital appreciation purposes and not generate any immediate earnings or dividends, which would prohibit any earnings or dividend-based valuation of the shares of an unlisted company (Goodall, 2016:5.3). A professional property valuator may value a commercial or rental property based on the rental income and the property’s location (SARS, 2021:19). The valuators could be any of the following persons: a practising chartered accountant, practising professional accountant, the company’s auditor, a director of the company, a SARS official, a sworn appraiser, a valuation specialist, or any other specialist depending upon the composition of the company’s assets (SARS, 2021:7).

3.6.3.1 Valuation of an interest in a trust

A beneficiary’s interest in a discretionary trust may be inherently difficult to quantify, particularly where the contingent right is subject to the trustees’ absolute discretion regarding the timing, manner, and identity of beneficiaries who will receive the trust assets. SARS (2020:108) confirms the view that before vesting an asset in a beneficiary, the beneficiary only has a *spes* and that no value could be attached to such a beneficiary’s interest in a trust asset.

A vested right in a trust is a certain right; however, the time of enjoyment of these assets may be delayed until the assets are delivered to the beneficiary. In ITC 76 (1927) 3 SATC 68(U) it was held that the present value of a beneficiary’s interest in

a vested right or vested interest in a trust could be calculated. This would be achieved by discounting the future value of the asset at a required rate of return, over period until the right of enjoyment passes the beneficiary. he proceeds of a VSA can be measured in terms of paragraph 35(2) as it is possible to calculate the present value for a vested trust.

3.6.3.2 Determination of the proceeds of a VSA

The proceeds of a VSA are determined by calculating the difference between the market value of a beneficiary's interest in a trust before and after the VSA occurs. This calculation hinges on whether it is possible to assign a market value to the asset. In the case of discretionary rights to trust assets, the beneficiary's interest is considered a "*spes"* or an expectation exists that the right may never materialise, which consequently makes it unmeasurable. As a result, the proceeds of a VSA in a discretionary trust context cannot be determined in terms of paragraph 35(2) of the Eighth Schedule. However, paragraph 38(1)(*b*) states that when an asset is acquired from a connected person at less than arm's length, its initial market value is deemed to be the base cost for CGT purposes. Thus, the base cost of assets when acquired by a vested trust, or when a contingent right is vested in a beneficiary, is the initial market value at the time of acquisition. Cognisance should be taken of the fact that the market value of a vested right can fluctuate over time. Importantly, a vested interest in a vested trust is measurable in monetary terms, allowing the proceeds of a VSA occurring in a vested trust context to be determined under paragraph 35(2) of the Eighth Schedule.

3.6.3.3 Determination of the base cost of a VSA

Paragraph 20(1)(*h*)(iv) provides that the base cost of VSA must be determined under paragraph 23 which specifies the formula to be used to determine the base cost in the hands of the person whose interests have decreased. The base cost for the person who has an increase in the value of its interest in a trust (paragraph 23(*b*)(i)) or who newly acquires an interest in a trust (paragraph 23(*b*)(ii)) is determined using the formula described in paragraph 23(*a*).

The base cost of a VSA, in terms of an interest in a trust as set out in paragraph 23(*a*) of the Eighth Schedule, is determined using the formula: Y = [(A - C) x B] / A. Here, Y represents the base cost of the beneficiary's interest to be used when calculating the capital gain; A is the market value of the beneficiary's interest immediately prior to the occurrence of the VSA; B is the base cost of the beneficiary's interest immediately prior to the VSA; and C is the market value of the beneficiary's interest immediately after the VSA has taken place. This calculation allows for the accurate determination of the base cost in the context of a VSA involving trust interests.

The base cost of a discretionary right in a trust (B in the above formula) is deemed to be nil Rand in terms of paragraph 81 of the Eighth Schedule. The market value of a discretionary interest in a trust cannot be measured (see section 3.6.3.1 above), which means that both A and C in the above formula cannot be measured, and therefore the base cost (Y) of an interest in a discretionary trust in the above formula cannot be determined.

The base cost of an asset is typically determined by its market value at the time the taxpayer acquires it, in accordance with paragraph 20 of the Eighth Schedule. When a trust deed vests assets in beneficiaries upon approval by the Master of the High Court, and the trust later acquires an asset, the acquisition price becomes the base cost for the beneficiary. Alternatively, if the asset is vested in a beneficiary by a resolution passed by the trustees, the base cost of an asset acquired by donation is its market value at the time of the donation (paragraph 38(1)(*b*) of the Eighth Schedule).

Paragraph 13(1)(*a*)(iiA) of the Eighth Schedule determines the timing of a disposal of a vested interest in a trust to be the date on which the trust assets are vested in the beneficiary. The base cost of a vested interest in a vested trust (B in the above formula) is the value when the beneficiary acquires the vested interest in such a trust. The market value of a vested interest in a vested trust can be measured before or after the VSA occurs. Consequently, both A and C in the formula can be measured (see section 3.6.3.1 above), and thus, the base cost of an interest in a vested trust (Y) can also be determined.

3.6.4 Determination of the proceeds and base cost of discretionary and vested rights

The determination of the market value before and after a VSA is not feasible for discretionary trust interests associated with contingent rights (see section 3.6.3.2 above). As a result, the proceeds described in paragraph 35(2) of the Eighth Schedule relating to a beneficiary's interest is challenging to ascertain. Similarly, the formula in paragraph 23(*a*) of the Eighth Schedule, which is used to determine the base cost of a VSA (see section 3.6.3.3 above), relies on these market values; thus, it is not possible to measure the base cost for a discretionary trust interest.

Conversely, for vested interests in a trust where rights are vested (see section 3.6.3.2 above), the market value before and after a VSA can be determined. This allows for the proceeds under paragraph 35(2) of the Eighth Schedule, pertaining to a beneficiary's vested interest, to be measured. The market value and base cost of an interest in a vested trust, as required by paragraph 23(*a*), can therefore be determined, facilitating the calculation of the VSA's base cost (see section 3.6.3.3 above). The third (measurement of proceeds) and fourth (measurement of base cost) core elements for a CGT event, and therefore a VSA, are present with vested rights (see discussion section 1.1.2 in Chapter 1).

3.7 DTC'S RECOMMENDATIONS FOR TRUSTS

3.7.1 DTC's recommended tax treatment for trusts

The DTC (2018:81) recommended the following tax treatment for trusts:

> *"*Only where a trust deed confers upon its beneficiaries an indisputable and irrevocable vested right to both the capital and income of a trust, should the income, both capital and revenue, be taxed in the hands of the beneficiary. In all other cases: Revenue income must be taxed in the trust in accordance with the definition of "gross income" contained in section 1 of the Act. Capital income, generated while assets are held in trust on anything other than a vested basis, must be taxed within the trust

up to the time of vesting or disposal as defined in paragraph 11 of the Eighth Schedule to the Act".

The DTC (2018:81) recommends that beneficiaries with vested rights in capital assets or income from a trust should be taxed on the resulting gains and income. Paragraph 80(2) requires capital gains from newly acquired vested rights to be taxed in the hands of the beneficiary. Section 25B(2) deems income (other than an amount of a capital nature which is not included in gross income, or an amount contemplated in paragraph 3B of the Eighth Schedule) as taxable to the beneficiary if they hold vested rights via prior vesting or the trust deed. Paragraph 80(1) assigns capital gains from the vesting or distribution of trust assets to discretionary trust beneficiaries. Section 25B(1) treats income (other than an amount of a capital nature which is not included in gross income, or an amount contemplated in paragraph 3B of the Eighth Schedule) distributed or vested by trustees as taxable to the relevant beneficiary.

3.7.2 DTC's recommendations for discretionary and vested trusts

The DTC recommends that discretionary trusts should ringfence both revenue and capital receipts, taxing them within the trust until income or capital gains are vested or distributed to a beneficiary. When vesting occurs, the DTC suggests the trust be taxed, which negates the conduit principle. In terms of current tax laws for discretionary trusts, tax beneficiaries (not the trust) are taxed when an asset is vested or distributed to a beneficiary. In a discretionary trust, a capital gain vested in the beneficiary during the same year of assessment as it arose is attributed to the beneficiary in terms of paragraph 80(2) of the Eighth Schedule. Paragraph 80(1) of the Eighth Schedule taxes the beneficiary, not the trust, when a capital asset is vested or distributed to a beneficiary. Revenue and capital receipts from vested rights in vested trusts remain taxable to the beneficiaries. Additionally, the distribution of an asset already vested in a beneficiary in prior years of assessment does not result in any CGT consequence for the beneficiary, as discussed under section 3.5.2.1. The recommendations of the DTC (2018:81) do not change existing tax laws for vested trusts.

3.7.3 VSA contingent and vested rights: DTC's recommendations

In cases where rights are discretionary, the DTC (2018:81) recommends that capital gains tax be paid within the trust until those trust assets are formally vested in the beneficiaries. Before this vesting takes place, it might be difficult to measure the impact of a VSA (see section 3.6.3.2). If beneficiaries have clear and irrevocable rights to trust assets, any capital gains should be taxed directly in such beneficiaries' hands, as recommended by the DTC (2018:81). For these vested rights, the tax treatment remains unchanged, and the VSA rules continue to apply as before, the beneficiary is taxed on capital gains and not the trust (see section 3.5.2.1).

3.8 GENERAL ANTI-AVOIDANCE RULES AND *ALTER-EGO* TRUSTS: CONTEXTUAL BOUNDARIES OF THE STUDY

This section discusses *Alter Ego* Trusts and the General Anti-Avoidance Rules (GAAR) to highlight that, although trustees' actions in such contexts may give rise to significant tax consequences, these mechanisms fall outside the parameters of the present study and are addressed only for contextual clarity. Sections 80A to 80L of the Act, which are the GAAR rules, allow SARS to include any impermissible tax avoidance arrangement into the tax net. Understanding GAAR is important for trustees, as their actions may be subject to it. Trust deeds should be drafted to avoid GAAR implications. Section 80A of the Act defines an avoidance arrangement as impermissible if its main purpose were to obtain a tax benefit. Therefore, if a tax benefit results from the trustees' actions, GAAR may apply. Section 80L of the Act defines tax as "tax includes tax, levy or duty imposed by this Act or any other Act administered by the Commissioner", which would include capital gains tax. A tax benefit is described in section 1(1) of the Act. It includes any avoidance, postponement or reduction of any liability for tax. The definition of a tax benefit is very wide and not only includes gross income, donations tax and capital gains tax, but also includes for example estate duty which the Commissioner administers in terms of the Estate Duty Act. This would include any capital gain which would be realised if the main purpose by the trustees' actions were to avoid tax. In Meyerowitz v. CIR 1963 (3) SA 863(A) (25 SATC 287), the editorial fee income accruing to a

trust and subsequently distributed to minor beneficiaries (children of the founder) were deemed to be taxed in the founder's hands.

3.8.1 The a*lter ego* principle

In the case of Badenhorst v. Badenhorst (2006) 2 All SA 363 (SCA), the court addressed a divorce claim involving assets held in a trust. The court determined that the trust's assets were part of the estate of the spouse who had full control over the trust assets, identifying it as an *alter ego* trust. A trust deed that allows a sole trustee or a trustee with sole voting rights over the appointment of trustees or amendments to the trust deed can be considered evidence of an *alter ego* trust. Nel (2015:612) suggests that where an estate planner is both a trustee and a trust beneficiary, an independent trustee should be appointed to prevent such a trust beneficiary and trustee's actions resulting in donations tax, income tax and CGT of the trust to be included in the personal capacity of the estate planner before even considering the VSA's implications.

In Van Zyl v. Van Zyl and Others [2014] JOL 31973 (GSJ) which dealt with divorce proceedings, the court held that the trust's assets were that of the trustee as he could not show that he did not treat the trusts' assets as his *alter ego.* Having a company trustee with legal representation did not prove that the estate planner was not controlling the trust's assets for a personal benefit. The attorney's lack of decision-making involvement did not negate the trust being an *alter ego* trust.

In the case of Land and Agricultural Bank of South Africa v. Parker 2005 (2) SA 77 (SCA), the court confirmed that in instances where a trust's assets were found to be part of an estate planner's *alter ego*, the veil of the trust could be removed with serious tax consequences for the estate planner. In this study where the basic trust structures are under investigation for VSAs, it is assumed that an adequately appointed independent trustee does exist, and that the trusts' assets are not part of the estate planner's *alter ego*.

3.8.2 GAAR versus VSA

The application of GAAR is very wide and may apply to a reduction of CGT, arising from the trustees' actions. If the sole or main purpose is not to obtain a tax benefit, then the GAAR will not apply. A VSA conducted merely to obtain a tax benefit would also be subject to the GAAR. If the estate planner is a trustee of the trust, the estate planner should be able to show that the trustees' decisions and actions were not governed in isolation and not merely to obtain a tax benefit. The existence of an actively involved independent trustee is necessary to prove, otherwise this might be indicative that the estate planner is using a trust purely as a vehicle for achieving his/her own personal financial goals. This study proceeds on the basis that the estate-planning trusts under examination are not *alter-ego* trusts susceptible to GAAR.

3.9 CONCLUSION SA TRUST CONTEXT

In conclusion sections 3.1 to 3.8 above builds a comprehensive foundation for analysing trustees' actions and the existence of VSAs in the SA trust context. It delves into tax legislation, trust legislation, SARS guides, court cases, and prior research. An analysis of gross income, donations tax, and ordinary disposals implications because of the trustees' actions, aided in formulating a logical approach to analysing the occurrence of VSAs in a trust context and its related tax consequences under the Income Tax Act. If the trustees' actions result in gross income, donations tax, or ordinary disposal rules, their actions will not be subject to the anti-tax avoidance rules pertaining to VSAs. By addressing the capital nature of trust assets, beneficiaries' rights, and general anti-avoidance principles, this chapter provides sufficient information to answer research questions one to ten (section 1.5.2 of Chapter 1) and to address the research objectives (sections 1.5.1 and 1.5.1.1 of Chapter 1) in support of this research.

3.10 AN OVERVIEW OF AUSTRALIAN AND UK TRUST CGT

3.10.1 Rationale for selecting the comparative tax jurisdictions

Pace and Van der Westhuizen (2023:B2) are of the view that the English law has influenced SA trusts; however, SA trusts have also been influenced by the Roman Dutch Law which introduced concepts such as a *bewind* trust and a *stipulatio alteri* in the SA trust law. Olivier *et al.* (2023:4.3.1) highlight that UK trusts have a concept of dual ownership which is also present in SA trusts. French (2015:642) confirms that Australian trusts also have been developed from English law. To facilitate referencing global best practices and comparative analysis (mentioned in section 1.1 of Chapter 1), the foreign tax jurisdictions were selected because the research showed that only a very limited number of countries satisfy all five criteria: trust developed from English law, the use of trusts for estate-planning purposes, capital gains tax legislation, statutory value-shifting rules, and use both discretionary and non -discretionary (fixed) trusts. Olivier *et al.* (2023:8.2.1) note that estate planning in the South Africa includes estate duty and donations tax implications. It is important to check if the foreign tax jurisdictions in this study also have these taxes. The foreign tax jurisdictions selected for this study should use both discretionary and non-discretionary trusts, which are the two categories of *inter vivos* trusts selected for analysis in this study (see section 1.8.3 of Chapter 1).

3.10.2 Australian background

The CGT regime was introduced in Australia in 1985 and is regulated by the Australian Income Tax Assessment Act 1997 (the ITAA). According to the Australian Tax Office, the ATO Charter is responsible for the administration and collection of Income Tax on capital gains in Australia (ATO, 2023:1). Section 104-5 ITAA describes a value shift CGT event applicable to trusts in Australia. According to EY (2023:7), Australia does not have inheritance tax (estate duty) and gift tax (donations tax) which are important aspects in estate planning in South Africa. Burgess (2022:423) stated that fixed (vested) and discretionary trusts are used in Australia for estate planning and tax purposes. Olivier *et al*. (2023:8.2.1) highlight the goal of an estate plan as asset preservation, which includes provisions for minor

children and spouses, creditor protection, prevention of asset fragmentation, and minimising tax exposure. In Australia, inheritance tax is not applicable, but income splitting through trusts can result in lower tax rates (Burgess, 2022:423). The three types of trusts used in Australia for estate planning purposes are discretionary, fixed (Mason, 2014:1039) and fixed unit trusts (Young, 2016:455). These trusts will be analysed in this study which comprise a discretionary trust and two fixed trusts which are non-discretionary trusts.

3.10.3 The UK background

The CGT regime was introduced in the UK in 1962 and is regulated by the Taxation of Chargeable Gains Act of 1992 (the TCGA92). According to His Majesty's Revenue and Customs (HMRC), it is responsible for the administration and collection of Income Tax on capital gains, and Inheritance Tax in the UK (HMRC, 2024:GMRC Charter). In the UK, capital gains and losses are taxed according to TCGA92. Inheritance tax (estate duty) in the UK is addressed in terms of the Inheritance Tax Act 1984 (the IHTA 1984). According to EY (2023:456) the UK's gift tax and estate tax is merged into inheritance tax. The value of any donations or gifts made during a donor's lifetime is added back to the value of the estate at the time of death for the purposes of calculating inheritance tax in the UK, unlike the donations tax in the South Africa which is levied on certain donations made by a natural person during his or her lifetime (section 54 of the Act). McKie and McKie (2022:5.1) state that trusts do form an integral part of estate planning in the UK. Trusts are used to preserve and protect assets and to cater for the family needs of the estate planner (McKie & McKie, 2022:1.1). Beneficiaries in UK trusts have an equitable interest in trusts, which does not apply to SA trusts (Pace & Van Der Westhuizen, 2023:B2). There are a variety of trusts used in the UK and UK trust law is complex, for example a bare trust (Maston, 2022:2.44) in which a nominee holds the assets on behalf of someone else; and accumulation and maintenance trusts (Maston, 2022:2.49), which are special purpose trusts for minor children.

3.10.4 Comparative analysis

Australia and the UK have capital tax regimes that were implemented prior to the introduction of CGT in South Africa. Both foreign tax jurisdictions use trusts for estate planning purposes, which is the preservation of the assets or wealth protection of the estate planners' assets, and for future generations of the estate planner's family. Trusts are used for the effective tax management of a trust's assets applicable to CGT in Australia (ITAA) and the UK (TCGA92). Both Australia and the UK have VSA legalisation, and they use discretionary and non-discretionary trusts for estate planning purposes. The Australian and UK tax jurisdictions satisfied all five criteria adopted for the comparative component of this study, as outlined in sections 3.1 and 3.10.1 above.

3.11 DISCRETIONARY AND NON-DISCRETIONARY FOREIGN TRUSTS

As described under section 1.6 of Chapter 1, the focus of this study pertains to an analysis of both discretionary and non-discretionary trusts. Therefore, discretionary and non-discretionary trusts used in Australia and the UK and meet one of the selection five selection criteria for this study.

3.11.1 Australian discretionary and vested (fixed) trusts

Both discretionary and fixed trusts are discussed next.

3.11.1.1 Australian discretionary trusts

A family trust will normally have trustees, trust beneficiaries, a settlor, and an appointor (Simpson, 2019:110). Trusts are used in Australia in estate planning for asset protection and tax planning purposes (Burgess, 2018:313). Simpson (2019:121) stated that the trustees are the owners of the trust property in a discretionary trust, whilst the beneficiaries are the beneficial owners of the trust property. The trustees have the discretion to distribute the trust's assets to any one of the beneficiaries. The trustees' discretionary powers and ownership of Australian discretionary trusts are similar to South African discretionary trusts (Olivier *et al.*,

2023:5.3.1). Young (2016:455) mentioned that besides the trustee, the founder (settlor), and the beneficiary, the Australian trust must also have an appointor to the trust. The appointor's role is to appoint and remove trustees, and depending on the wording of the trust deed, the appointor's duties are normally included with the trustees' duties in South African trusts (Pace & Van der Westhuizen, 2023:6.2.4.1).

3.11.1.2. Australian fixed and fixed unit trusts (non-discretionary trusts)

In a fixed trust the beneficiaries are ascertainable, and their rights are fixed (Mason, 2014:1044), which is contrary to a discretionary trust where the trustees have the power to distribute a trust's assets to any of the beneficiaries at any time. The beneficiaries have a vested and indefeasible interest in the trust's assets or income (Ingram, 2018:32), which cannot be changed by the trustees. These trusts are classified as non-discretionary trusts as the trustees are obliged to distribute trust's asset or capital as predetermined in terms of the trust deed.

According to Chan (2018:33), fixed unit trusts work similarly to a company in which the beneficiaries' own units in the trust, like shareholders own shares in a company. The unit trust deed will provide for the trust fund to be divided into units to be held on trust for the specific unitholders according to their proportionate unit holdings, which vests a percentage of the trust fund in each of the unit holders or beneficiaries of the trust (Simpson, 2019:117). A fixed unit trust is a non-discretionary trust, and the beneficiaries have a 'proprietary right' in the equity of a fixed unit trust, according to Mason (2014:1043). This type of trust may have some similarities to collective investment schemes and/or unit trusts which are used in the South Africa (SARS, 2020:615). However, in the SA context a unit trust or collective investment scheme trust is not normally used in estate planning. Of the three trusts mentioned above, the Australian discretionary trust is the most popular type of trust used in Australia, as it offers asset protection, flexibility and the trustees have the discretion to distribute both income and capital to any of the trust beneficiaries (Simpson, 2019:110).

3.11.2 UK discretionary and non-discretionary trusts

3.11.2.1 UK discretionary trusts

Shindler and Parker (2022: A2.1) distinguish between an interest in a possession trust, which allows the trust beneficiaries a fixed proportion of income or the right of use of an asset owned by the trust, and a non-interest in a possession trust which provides the trust beneficiaries with a hope or s*pes* to the trust assets. In a discretionary trust the trustees have the power to distribute income or capital to a trust beneficiary, whilst the beneficiary only has a *spes* or hope to the trust income or capital (Shindler & Parker, 2022:A2.1), which also applies to the SA discretionary trust that was analysed in this study (Olivier *et al.*, 2023:5.3.1). Maston (2022:2.32) contrasted a discretionary trust with an in-possession trust; whereby in a discretionary trust the trustees are not obliged to distribute any income or capital to any specified trust beneficiary; and in an in-possession trust the trustees are obliged to make distributions to specified trust beneficiaries.

3.11.2.2 UK fixed trusts (non-discretionary trust)

In a fixed trust the trust beneficiaries have a fixed entitlement to the trust's income or capital (Wilson, 2019:26). If the trust beneficiaries have a present entitlement (fixed right), the trust is an in-possession trust (Maston, 2022:2.38). Shindler and Parker (2022:A2.1) state that the beneficiaries of an in-possession trust have an absolute right to the income or capital of the trust depending upon the wording of the trust deed. If the trustees have the right to withhold or distribute the income to any trust beneficiary, the trust is an accumulation trust and not a fixed trust (Wilson, 2019:26). According to the HMRC (2023a:TSEM1564), in-possession trusts are also referred to as non-discretionary trusts, as the beneficiaries' entitlements are fixed. An in-possession living trust will give the trust beneficiary the right of usage of the trust's assets during the beneficiary's lifetime (HMRC,2023a:TSEM1564). HMRC (2023b:TSEM6210) described the term "vested" in the context of trusts to indicate "that interest in the trust is already in the hands of the beneficiary, all will eventually come into the hands of the beneficiary or the beneficiary's representative when the beneficiary dies". An in-possession trust which has the capital or capital

assets vested in the beneficiaries therefore has some similarities to an SA vested trust (Olivier *et al.*, 2023:5.3.2).

3.11.3 Comparative analysis

Discretionary trusts in Australia and the UK do share similarities with SA discretionary trusts in that the trust beneficiary only has a *spes* or hope in the trust's capital or assets. The trustees of a discretionary trust in Australia and the UK are not obliged to distribute any income or capital to any specified trust beneficiary, which is the same for SA discretionary trusts, which allow the trustees to determine when and which beneficiary will receive either income or capital from a trust. The trustees of a fixed trust in Australia and the UK are obliged to distribute any income or capital to specified trust beneficiaries, which is the same for SA non-discretionary trusts. However, the Australian and UK trust law differ from the SA trust law when it comes to fixed trusts. In an Australian fixed interest unit trust, the beneficiaries hold units in the trust which represent a proportional ownership of the underlying assets held in the trust. The beneficiaries can sell their units held in the trust, which differs from SA discretionary and vested trusts. For comparison, discretionary and non-discretionary trusts from Australia and the UK were also selected for analysis in this study. An Australian and a UK discretionary trust were chosen as they resemble an SA discretionary trust. Australian fixed and fixed unit trusts were included because the "beneficiaries' rights" to income and capital are fixed, with no discretionary powers for trustees. A non-discretionary UK vested in-possession trust was selected, which gives beneficiaries an absolute right to the trust's capital or assets.

3.12 DISPOSAL RULES APPLICABLE TO FOREIGN TRUSTS

3.12.1 Australian disposal rules applicable to trusts

Section 104-5 of the ITAA describes the calculation of a capital gain for a CGT event as the result of a change of the ownership of an asset, as the difference between the proceeds and the base cost of an asset. A capital loss results when the assets' reduced base cost exceeds the proceeds of an asset. Cassidy (2004:167) states that the definition of an asset in section 1 of the ITAA includes rights and interests

in both corporeal and incorporeal objects, which include proprietary rights. Similarly, paragraph 1 of the Eighth Schedule defines a CGT asset as any right or interest in such property. According to the ATO (2006:149), CGT assets include shares, units in trusts, collectables, personal-use items, and other property such as investment real estate. The ITAA describes each specific disposal as a CGT event, instead of the general disposal rules contained in paragraph 11(1)(*a)* to (*g*) of the Eighth Schedule to the Act. Section 104-5 of the ITAA supplies a summary of CGT events, and each event is described and allocated a specific number, for example event numbers E1 to E8 relate to CGT events of trusts in Australia. Table 3.3 below compares trust-related CGT events in section 104-5 of the ITAA with ordinary disposals under paragraph 11(1) of the Eighth Schedule to the Act.

Table 3.3: CGT event comparison - trusts in Australia versus South Africa

ITAA, section 104-5 CGT events: timing of each event	**CGT disposal in terms of paragraph 11(1) of the Eighth Schedule the Act**
E1: Creating a trust over a CGT asset: trustees forming a trust and the trust receiving an asset from the founder: when trust is created.	Donation made to the trust when a trust is formed: paragraph 11(1)(*a)* disposal.
E 2: Transferring a CGT asset to a trust: trustee or founder transferring an asset to a trust: when asset transferred.	Sale at market value to the trust or a donation made to the trust: paragraph 11(1)(*a)* .
E3: Converting a trust to a unit trust: trustees converting an existing trust to a unit trust. (Unit trusts used in Australia are not used in South Africa): when trust is converted.	Creation of a new trust or a donation made to the trust: paragraph 11(1)(*a)* .
E4: Capital payment for trust interest, trustees make a capital payment to a beneficiary: when trustee makes payment.	A cash payment of previous capital capital gain which is vested in a beneficiary, will not result in a disposal (cash or currency is excluded from the definition of an asset for CGT). If cash is paid to a beneficiary to reliquish an interest in a trust: a paragraph 11(1)(*a*) disposal.
E5: Beneficiary becoming entitled to a trust asset: trustees vesting an asset in a beneficiary or when becomes absolutely entitled.	The trustees vest an asset or distribute an asset to a beneficiary of a discretionary trust: paragraph 11(1)(*d)* .
E6: Disposal to beneficiary to end income right: trustees making a disposal to a beneficiary to relinquish a right of income to a trust.	The trustees vest an asset or distribute an asset to a beneficiary of a discretionary trust: paragraph 11(1)(*d)* .
E7: Disposal to beneficiary to end capital interest: trustees making a disposal to a beneficiary to relinquish a right of capital to the trust: the time of the disposal.	The trustees buy interest in a trust and then relinquishes their right to trust capital: paragraph 11(1)(*b)* .
E8: Disposal by a beneficiary of capital interest: trustees agree to a disposal by beneficiary of his or her capital interest in a trust.	A beneficiary sells a percentage ownership in a collective scheme trust for cash: paragraph 11(1)(*a)* .

The Australian General Value Shifting Regime (the GVSR) primarily impacts CGT assets related to company and trust interests, including shares, trust units, or loans. Capital gains event K8 does highlight a “direct value shifts affecting your equity or loan interests in a company or trust” (section 104-250 and division 725 of the ITAA). Section 104-5 defines a K8 CGT direct value shifting event as direct value shifts

affecting your equity or loan interests in a company or trust, but the VSA paragraph in the Eighth Schedule does not refer to changes in loan interests in trusts. Section 7C of the Act does apply to a deemed donation if the loans to trusts are advanced at interest rates below the prescribed interest rate in the SA context. Australian GVSR contains three distinct categories of rules which are further discussed in section 3.13.1 below.

3.12.2 UK disposal rules applicable to trusts

Section 1(1) of the TCGA92 states that capital gains or chargeable gains resulting from the disposal of assets are to be computed in accordance with the TCGA92. However, it does not fully describe the meaning of a disposal as paragraph 11(1) of the Eighth Schedule to the Act does in the SA context. Loutzenhiser (2023:802) confirms that a disposal is not defined in the TCGA92. Section 21(1) of the TCGA92 defines assets and disposals as follows: “All forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not, including - (a) options, debts and incorporeal property generally, and (b) any currency other than sterling, and (c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired”, which apply to any assets held in a trust. Section 21(2)(a) of the TCGA92 refers to a disposal of an asset and circumstances which describe part-disposals without describing what is meant by the term disposal. Section 21(2)(b) of the TCGA92 refers to the disposal or part disposal of an asset, including situations where an interest or right over an asset is created by the disposal which may extend to a beneficiary’s interest in a trust. Section 29(5) of the TCGA92 includes interests or rights over assets within the scope of the UK value shifting rules, which may apply to changes in a beneficiary’s interest in a trust. UK value shifting rules are discussed under section 3.13.2 below. Table 3.4 below specific disposals contained in the TCGA92 in comparison to paragraph 11(1) disposals in the Act.

Table 3.4: CGT disposals comparison - trusts in the UK and South Africa

CGT disposals TCGA92, Part III Individuals, partnerships, trusts and collective investment schemes of Chapter II Settlements	**CGT disposal in terms of paragraph 11(1) of the Eighth Schedule the Act**
Section 71: A transfer into a settlement, whether revocable or irrevocable, constitutes a disposal of the entire property as settled property. This applies even if the transferor is a beneficiary or a trustee, including the sole trustee, under the settlement.	The transfer of property (a capital asset) to the trust that brings about a change of ownership: paragraph 11(1)(*a)*.
Section 72: On the occasion when a person becomes absolutely entitled to any settled property as against the trustee all the assets forming part of the settled property to which he becomes so entitled shall be deemed to have been disposed of by the trustee, and immediately reacquired by him in his capacity as a trustee within section 60(1), for a consideration equal to their market value.	The vesting of an interest in an asset of a trust in a beneficiary: paragraph 11(1)(*d)*.

3.12.3 Comparative analysis

The ITAA describes each disposal separately, supplying information on what should be measured, and how to measure the capital gain for each specific event (Jansen van Rensburg, 2007:295). Specific CGT events unique to Australian trusts have been labelled as events E1 to E8 in section 104-5 of the ITAA. For each of these events the timing, as well as the method for calculating the capital gain or capital loss, is provided. Unlike the Eighth Schedule to the Act which provides one set of rules for determining the capital gain (paragraph 3(*a*) of the Eighth Schedule) or the capital loss (paragraph 3(*b*) of the Eighth Schedule) effect, which should be applied to all ordinary disposals. Section 104-5 of the ITAA has 54 different CGT events which identify different disposals in Australia, each CGT event describes the calculation of a capital gain and loss separately. Paragraphs 11(1)(*a*) to (*g*) of the Eighth Schedule describe seven ordinary disposals or CGT events for CGT purposes. The determination of the proceeds (paragraph 35(2) of the Eighth Schedule) and base cost for a VSA (paragraph 23(*a*) of the Eighth Schedule) applies to all VSAs, which is considered less complex than section 104-5 of ITAA which has 54 specific descriptions of measuring value shifting in Australia.

The TCGA92 disposal rules in general are not described in detail for UK trusts. TCGA92 does highlight two disposals which are applicable to trusts, namely: in section 70 which deals with transfers of assets into settlement (trust), and in section

71 when a person becomes absolutely entitled to settled property. Section 15 of the TCGA92 describes the determination of a chargeable gain (capital gain) and section 16 of the TCGA92 describes the determination of a capital loss. These rules are applied to all types of disposals in the UK. The same approach has been adopted in South Africa whereby the Eighth Schedule to the Act also provides general rules for the determination of capital gains (paragraph 3(*a*) of the Eighth Schedule) or a capital loss (paragraph 3(*b*) of the Eighth Schedule). Sections 29(1)(a) and (b) of the TCGA92 describe the proceeds of value shifting and section 42(2)(b) the deduction of value shifting in the UK, which also uses a general rule to be applied the value shifting as in the case of paragraphs 35(2) and 23(*a*) aimed specifically at VSAs in the SA context.

The trusts' disposals of Australian and UK jurisdictions could be matched to similar disposal rules that apply to SA trusts. Both the UK and SA approach is to use general disposal rules, with general rules for measuring value shifting (UK) and VSA (in SA). Unlike the UK and SA legislation, the Australian disposal rules and the GVSR do not provide a single set of general rules for determining capital gains or losses and the components of value shifting, making the Australian system more complex. The value -shifting rules applicable to foreign trusts will be further analysed in the next section.

3.13 FOREIGN VALUE SHIFTING REGIME AND DEFINITIONS

3.13.1 Australian general value shifting regime

Chapter 3 of the ITAA outlines the GVSR, dividing it into three divisions which contain sections applicable to the different rules as follows:

- Direct value shifting for entity interests (Division 725 of the ITAA).
- Direct value shifting for created rights (Division 723 of the ITAA).
- Indirect value shifting rule (Division 727 of the ITAA).

Both the direct value shifting rule for entity interests and the indirect value shifting rule require that a company or trust control another entity. Section 727-360 of the ITAA describes the control rules for value shifting purposes for a fixed trust, whilst section 727-365 of the ITAA describes the control rules for a non-fixed trust. The GVSR focuses on group structures and value shifting between entities.

According to ATO (2006:150) describes controls rules as follows:

> "To work out if an entity controls (for value shifting purposes) a fixed trust, there are tests about the right to receive distributions of trust income or trust capital, the power to obtain the beneficial enjoyment of, or control the application of trust capital or trust income, and control over the trustees. To work out if an entity controls (for value shifting purposes) a non-fixed trust, there are tests about the extent to which the trustee is controlled, the power to obtain the beneficial enjoyment of, or control the application of trust income or capital, capacity to benefit under the trust, and the right to receive distributions of any trust income or trust capital". Therefore, both a fixed (non-discretionary) trust and a non-fixed (discretionary) trust are included in the GVSR.

In the SA context, the definition of a VSA in terms of paragraph 1 of the Eighth Schedule only requires that the parties be "connected persons" in relation to each other as defined in section 1(1) of the Act, which is less complex than the ITAA control rules as contextualised above for value shifting purposes. The approach SA VSAs follows, does not include the group control structure requirement as required by the direct value shifting for entity interest (section 725 (1) of the ITAA) and indirect value shifting rule (section 727 (1)(b) of the ITAA) of the Australian GVSR.

3.13.1.1 Direct value shifting rule for entity interests

The direct value shifts on interests are contained in division 725 of the ITAA**.** The ATO (2006:44) describes the objective of the direct value shifting rule as follows:

> "The created rights direct value shifting rule addresses the inappropriate tax outcomes that can arise where an entity creates in an associate a right out of, or over, an existing asset (the 'underlying asset') for less than market value and the market value of that asset decrease [sic] as a result. Without the created rights direct value shifting rule these arrangements could allow the creation of artificial losses through the realisation of the underlying asset at a reduced value."

Regarding the entity to have control over the associate, section 727-415 (4)(b) of the ITAA states that an associate holds a portion of the ownership or rights of a particular kind in relation to a company or trust.

The ATO (2006:149) describes an associate which is used in the GVSR as follows:

> "The tax law contains rules about when one entity is an associate of another. For example, the associates of natural persons include: their relatives; a partner in a partnership, partners and their spouses and children; the trustee of a trust that they or any of their other associates can benefit under, and companies that they and their associates (alone or together) control the majority voting interest in or sufficiently influence".

The requirement of an associate of a trust is that the trust or beneficiary should benefit from the trust and either control the majority interest or have considerable influence over the trust's interests. The definition of an associate of a trust could extend to the beneficiaries of a trust if their parents are trustees of the trust. The GVSR focuses on the later realisation of an asset at a distorted price and attempts to address this matter. The ATO's (2006:3) explanation of a direct value shifting for entity rights with the controller (Controller Trust) and associate (Associate Trust) is presented in Diagram 3.1 below.

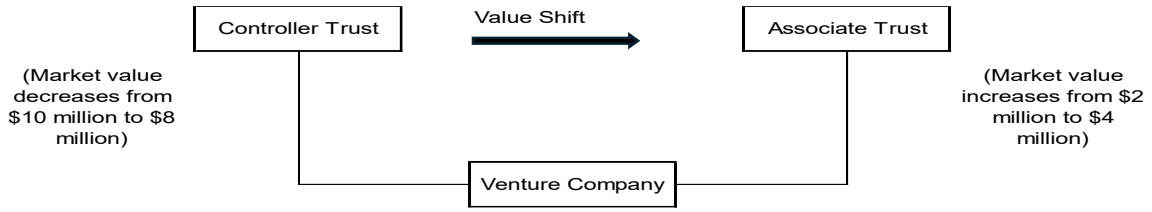


Diagram 3.1: Example of direct value shifting for entity interest
Source: ATO (2006:3) - Adapted

Controller Trust holds all ten A class shares on issue in Venture Co; these shares have a market value of $1 million each. The controller's associate trust (i.e., Associate Trust) holds all ten B class shares in the same company; these shares have a market value of $200 000 each. The Controller Trust and the Associate Trust agree to vary the rights attaching to both classes of shares, which results in the market value of the A class shares decreasing by $200 000 each, and the market value of the B class shares increasing by $200 000 each. There has been a value shift of $2 million – from the Controller Trust's shares to the Associate Trust's shares – to which the entity's interest direct value shifting rules may apply. The Controller Trust may make an assessable gain depending on the tax value of the A class shares and, in any case, tax value adjustments for the A class and B class shares may be required (ATO, 2006:3). A possible capital gain may result under the CGT events depending upon the base cost of the class A shares held by the Controller Trust. For example, if the Associate Trust subsequently disposes of the B class shares for $3 million, the base cost of $4 million will be reduced to $2 million and the capital loss will be ignored.

In the SA context, the focus of the VSA definition (paragraph 1 of the Eighth Schedule) is on the change in interest in a company or a trust resulting in the change in the market value or entitlements between connected persons as defined in section 1(1) of the Act. Although trusts are described in the above example, from the VSA definition (paragraph 1 of the Eighth Schedule), a change in the interest in a company occurs which results in a VSA between shareholders. For an interest in a trust, the change in interest would have to take place between the beneficiaries of a trust for a VSA to arise. In the above example in the SA context an automatic disposal will result in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act

in the context of a company and not of a trust. Unlike the GVSR, the base cost of the shares held by the Associate Trust in Venture Company would not be adjusted to ignore the subsequent capital loss.

3.13.1.2 Example of direct value shifting for created rights

The direct value shifts for creating rights over non-depreciable assets are contained in Division 723 of the ITAA. The example provided by the ATO (2006:3) is described below in Diagram 3.2 and then compared to the disposals in terms of the Eighth Schedule. When a rental asset is made subject to a lease agreement for a prolonged period at a lower than market value or at no rental, a value shifting may occur. The example provided in ATO (2006:4) was adapted to include trusts, and two beneficiaries of Trust X were given equal vested rights to allow for a comparison to the SA VSA.

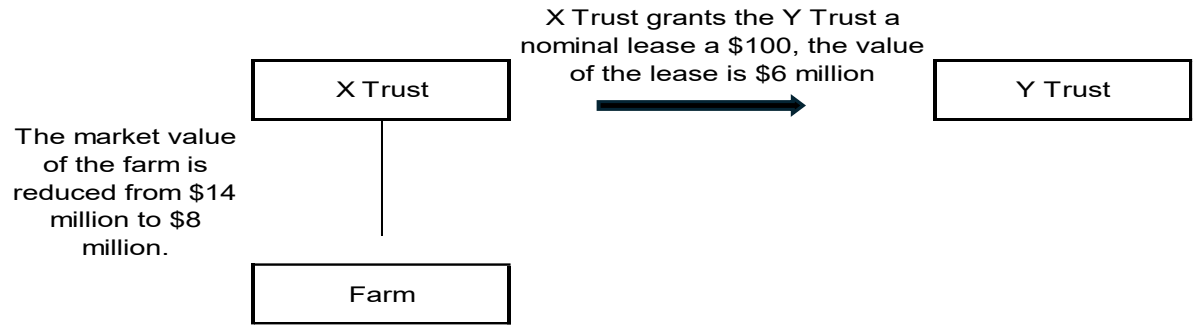


Diagram 3.2: Example of direct value shifting for created rights
Source: ATO (2006:4) Adapted

This example shows different measurements of the value shifting between the Australian GVSR and the SA VSA (paragraph 35(2) and 23(*a*) of the Eighth Schedule of the Act). The X trust owns farmland property with a cost base of $10 million and a market value of $14 million. The trustees of the X Trust grant to Y Trust (an associate) a 20-year lease for a $100 premium and no rental. The market value of the lease when granted is $6 million. The grant of the lease reduces the market value of the farmland property by $6 million. Immediately after the grant of the lease, X Trust sells the farmland property for $8 million. The created rights direct value shifting rules may apply to this arrangement to prevent a $2 million capital loss on

the disposal of the farmland property (ATO, 2006:4). X Trust's capital loss of $2 million is ignored ($8 million less $10 million) as X Trust's base cost is reduced to $8 million, resulting in no capital loss ($8 million less $8 million). Section 723-10(1)(*a*)(i) of the ITAA prevents a loss of a capital gains event of a non-depreciable asset if before the realisation of the asset, a right was created in favour of an associate, as illustrated in the example above (section 723-10(1)(*b*)(i) of the ITAA).

In the SA context, for a paragraph 11(1)(*g*) disposal under the Eighth Schedule to occur, the definition of a VSA (paragraph 1 of the Eighth Schedule) would require that Trust Y is a vested beneficiary in the farmland property held by Trust X, and the remaining vested beneficiaries in Trust X would have a reciprocal decrease in the farm. Assuming beneficiary A has a 50% vested interest in the farmland property, and beneficiary Trust Y has a 50% vested interest in the farmland property, the proceeds of the VSA would be $3 million ($14 million - $8 million) x 50%) (paragraph 35(2) of the Eighth Schedule of the Act). The base cost of the VSA would be calculated in terms of paragraph 23(*a*) of the Eighth Schedule as: [($7 million – $4 million)/7 million] x $5 = $2 142 857. The capital gain would be $857 123 ($3 000 000 – $2 142 857) (paragraph 3(*a*) of the Eighth Schedule of the Act).

Immediately after the grant of the lease, X Trust sells the farmland property for $8 million. X Trust will have a disposal in terms of paragraph 11(1)(*a*) which will result in a capital loss of $2 ($8 million - $10 million). Therefore, the tax treatment of the VSA in the SA context differs from the Australian GVSR.

3.13.1.3 Indirect value shifting rules

The indirect value shifting rules are contained in Division 727 of the ITAA. Section 727(1)(a) of the ITAA describes the indirect value shifting rules to apply to two entities under the same control or ownership conduct dealings or transactions that are neither at market value nor at arm's length. In Diagram 3.3 below the indirect value shifting rules which apply to trusts are presented.

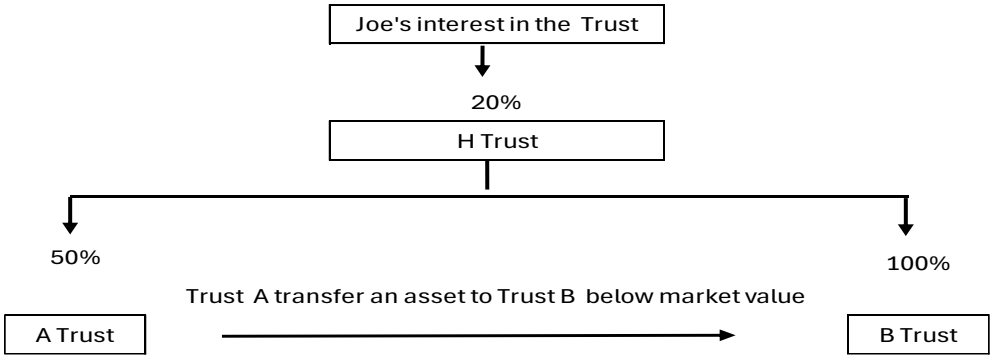


Diagram 3.3: Indirect value shifting rules

Source: ATO (2006:106)

An indirect value shift occurs when the A Trust transfers an asset (market value $1 million) to the B Trust in exchange for a payment of $100 000. The arrangement is one that has consequences under the rules, as the threshold conditions are satisfied, and no exclusion applies. Joe (an affected owner) holds one of the five units on issue in the H Trust, which in turn holds a 50% interest in the A Trust and all the units in the B Trust. The market value of Joe's interest at the time of the indirect value shifting is $90 000 [($900 000 x 20% x 100%) – ($900 000 x 20% x 50%)].

In the SA context the above transfer of the asset at $900 000 below market value from A Trust to B Trust would not meet the requirements of the VSA in terms of paragraph 1 of the Eighth Schedule of the Act, which requires an increase and corresponding decrease in market value between two connected parties in a trust. Assuming Peter (the other H Trust beneficiary) has the remaining 80% vested interest in H Trust, his market value would increase by $360 000 [($900 000 x 80% x 100%) – ($900 000 x 80% x 50%)]. Joe's vested increase would be $90 000 [($900 000 x 20% x 100%) – ($900 000 x 20% x 50%)]. Both Joe and Peter are connected persons as they are beneficiaries of the same trust (section 1(1)(*b*)(i) and (ii) of the Act. The indirect value shifting rules as described above is incomparable to the SA definition of a VSA (paragraph 1 of the Eighth Schedule). The latter is due to no increase and corresponding decrease in the interest in the market value of the trust H occurs between the beneficiaries (Joe and Peter) as required by the VSA definition under the Eighth Schedule. The transfer of the asset from Trust A to Trust B would be an ordinary disposal in terms of paragraph 11(1)(*a*) of the Eighth

Schedule. Paragraph 38(*b*) of the Eighth Schedule would also deem that the asset would be disposed of at the market value as the transaction is between connected persons and is not at an arm's length price.

According to Jansen van Rensburg (2007:295), the GVSR of Australia is more complex than a VSA as defined in the SA CGT context in terms of paragraph 1 of the Eighth Schedule to the Act. Unlike divisions 725 and 727 of the ITAA which determine specific direct or indirect value shifting events and describe the measurement of capital gains or losses in each instance, the VSA measurement of all VSAs is contained in paragraphs 35(2) (proceeds) and 23(*a*) (base cost) of the Eighth Schedule to the Act, which applies to all VSAs.

3.13.2 The UK definition of value shifting

Sections 29(1) to (5) of the TCGA92 contain the general provisions which deal with value shifting. Sections 29(2) and (3) of the TCGA92 relate to shares and rights attached to a company. Section 29(1) of the TCGA92 defines value shifting as follows:

> "Without prejudice to the generality of the provisions of this Act, as to the transactions which are disposals of assets, any transaction which under the following subsections is to be treated as a disposal of an asset—
>
> (a) shall be so treated (with a corresponding acquisition of an interest in the asset) notwithstanding that there is no consideration, and
> (b) so far as, on the assumption that the parties to the transaction were at arm's length, the party making the disposal could have obtained consideration, or additional consideration, for the disposal, shall be treated as not being at arm's length and the consideration so obtainable, or the additional consideration so obtainable added to the consideration actually passing, shall be treated as the market value of what is acquired,'' which requires that an asset is transferred between two parties for either an inadequate consideration or no consideration at all.

Section 29(1)'s definition contained in the TCGA92 has similarities to the definition of a VSA as contained in paragraph 1 of the Eighth Schedule to the Act, which requires a reciprocal increase and decrease in market value of an interest in a company, partnership or trust between connected persons as defined in section 1 of the Act. Section 29(1)(b) of the TCGA92 assumes transactions are not at arm's length, meaning parties may not act independently, which is more likely to occur when they are connected persons.

Section 29(4) of the TCGA92 applies to a value shifting of a sale and lease back of a property transaction:

> "If, after a transaction which results in the owner of land or of any other description of property becoming the lessee of the property there is any adjustment of the rights and liabilities under the lease, whether or not involving the grant of a new lease, which is as a whole favourable to the lessor, that shall be a disposal by the lessee of an interest in the property", which is not highlighted in the VSA definition contained in paragraph 1 of the Eighth Schedule of the Act.

Section 29(5) the TCGA92 extends the value shifting definition to include assets other than interests in company shares: "If an asset is subject to any description of right or restriction the extinction or abrogation, in whole or in part, of the right or restriction by the person entitled to enforce it shall be a disposal by him of the right or restriction" and may extend to beneficiaries' interest in trusts.

3.13.2.1 UK chargeable gain versus a SA capital gain calculation

HMRC (2016:CG72000) supplies an example of the calculation of the chargeable gain of a value shifting arrangement in terms of section 29(4) of the TCGA92. This example included a sale and leaseback, which has been adapted to show the calculation of the chargeable gain in the context of trust with fixed rights. Assuming that the fixed rights in an asset held in a trust is transferred from beneficiary A to B. The trust owned a vacant property which was purchased by the trust for £60 000 on the 30 June 1987. This property is fully vested in beneficiary A, and beneficiary B

has no vested rights in the vacant property. On 31 August 2015, the trustees gave the freehold interest in the property to beneficiary B subject to a 99-year lease. The rent payable under that lease was £1 per year. The Valuation Office Agency advised that, as of 31 July 2015, the value of beneficiary B 's interest in the property should be regarded as nil. The allowable expense (base cost) of the value shifting is measured in terms of section 42(2)(b) of the TCGA92. According to the Valuation Office Agency, the lease value before 31 July 2017 was £100 000. After the transfer, the lease value decreased to £30 000, resulting in a transfer of value of £70 000.

The chargeable gain attributable to beneficiary A is calculated as follows:

(i) Disposal proceeds of value transferred = £70 000

(ii) Allowable expenses= [A / (A + B)] x original costs = [£70 000 / (£70 000 + £30 000)] x £60 000 = £42 000

(iii) Chargeable gain= Value transferred - Allowable expenses = £70 000 - £42 000 = £28 000

In the SA context, the value of the proceeds will be calculated in terms of paragraph 35(2) of the Eighth Schedule to the Act, which states that the proceeds of a VSA is the difference between the market value of a connected person's reduced market value before and immediately after the VSA occurs, as described in Table 3.5 below.

Table 3.5: Proceeds of paragraph 35(2) of the Eighth Schedule

Beneficiary 's interest in the property held in the trust	**Market value before the VSA**	**Market value after the VSA**	**Proceeds of the VSA**
Beneficiary A's value in the property.	£100 000	£30 000	(£70 000)
Beneficiary B's value in the property.	£0	£70 000	£70 000

The proceeds of the VSA are the same, the HMRC (2016:CG72000) reduction in the beneficiary A's market value is used to measure the proceeds. The base cost

(allowable cost), if measured in terms of paragraph 23(*a*) of the Eighth Schedule, results in the same answer as follows:

Y = [(A - C) /A] x B = [(£100 000 - £30 000)/ £100 000] x £60 000] = £42 000

Where-(i) “Y” represents the amount to be determined;(ii) “A” is the market value of that person’s interests (beneficiary A) immediately prior to the disposal; (ii) “B” is the person’s base cost (beneficiary A) of the interests calculated immediately prior to the disposal;(iv) “C” is the market value of that person’s interests (beneficiary A) immediately after the disposal. The chargeable gain (section 1(1) of the TCGA92) and the capital gains (paragraph 3(*a*), Eighth Schedule of the Act) calculations in Table 3.6 yield the same result.

Table 3.6: UK chargeable gain versus a SA capital gain

TCGA92 section 1(1)	**Eighth Schedule paragraph 3(*a*)**	**Chargeable gain and capital gain calculation**
Value transferred	Proceeds	£70 000
Allowable expense	Base cost	£42 000
Chargeable gain	**Capital gain**	**£28 000**

The terminology does differ in the above calculation; however, the capital gain is determined in the same manner and has the same result. The calculation of the base cost of the value shifting arrangement in terms of section 42(2)((b) of the TCGA92 and paragraph 23(*a*) of the Eighth Schedule of the Act is the same. Also, the capital gain resulting from the value shift is taxed in the hands of the beneficiary whose value in the trust asset has reduced after the value shifting has occurred.

3.13.3 Comparative analysis

Australia's GVSR includes three direct value shifting rules: for (i) entity interests, (ii) created rights, and (iii) indirect value shifts. The Australian GVSR focuses on both fixed and non-fixed trusts which controlled entities or an associate to be part of the value shifting arrangement. A direct comparison between the SA VSA tax treatment

rules and the Australian GVSR is complicated by the intricate nature of the Australian measurement provisions. The SA approach to VSA events applies the general measurement rules in paragraphs 35(2) and 23(*a*) of the Eighth Schedule focusing simply on proceeds and base cost, without distinguishing between different types of value shifting. The Australian GVSR, as set out in the ITAA, imposes detailed and precise measurement requirements. These Australian rules not only determine whether an immediate capital gain is realised but can also mandate adjustments to the asset's cost base, thereby affecting future capital gains calculations.

In both the SA and the UK, the requirements of a controlled entity or an associate entity is not a requirement for the value shifting to take place. The GVSR, when applied to value shifting CGT events, do not always result in the realisation of a capital gain. In the direct value shifting entity interest example, the base cost of the asset was reduced to prevent a future capital loss. An indirect value shifting between trusts would be difficult to measure in the SA context. An indirect value shifting may result in a donation constituting a disposal in terms of paragraph 11(1)(*a*) of the Eighth Schedule in the SA context, which would preclude the occurrence of a VSA. The SA VSA will automatically result in a capital gain, despite no cash been realised. However, the Australian GVSR is considered more complex compared to the value shifting tax regimes in SA and the UK.

The UK value shifting rules are similar to the SA VSA rules, although it does not specify that the parties to the VSA are required to all be connected persons in relation to one another. The measurement of the expense (base cost) in section 42(2)((b) of the TCGA92 is the same as the measurement of the base cost in terms of paragraph 23(*a*) of the Eighth Schedule. The UK disposal rules are not detailed in TCGA92, but paragraph 11(1)(*a*) to (*g*) of the Eighth Schedule outlines them, which aids in clarifying trustees' exposure to VSAs in the SA context. Both the Australian GVSR and UK value shifting rules address value shifting when discounted rental rights over fixed property lowers the commercial property's value held in trust. For SA vested trusts, granting such rights to a beneficiary could also trigger a VSA.

3.14 SUMMARY OF THE AUSTRALIAN AND THE UK TRUST CONTEXT

In conclusion sections 3.10 to 3.13 above provided a basis for analysing trustees' actions and reviewing legislation that regulates the tax treatment of value shifting occurring in Australian and UK trusts. It discussed tax legislation, trust legislation, ATO guides, HMRC guides, and prior research on the Australian and UK trusts for the study. Firstly, background information is presented on Australian and UK CGT regulations, the use of trusts in estate planning, and applicable value shifting rules in these foreign tax jurisdictions. The text then presents a comparative analysis of discretionary (non-fixed) trusts and non-discretionary (fixed) trusts, as well as the disposal rules for trusts in the two foreign tax jurisdictions. It also examines the Australian GVSR value shifting regime and the UK definition of a value shifting arrangement, comparing these frameworks to the corresponding legislation in SA. Examples of value shifting arrangements found in the ATO and the HMRC guides were analysed and compared to the SA VSA definition. The comparative analysis clarifies key tax terms, guided interview preparation, and ensures both Australian and UK trusts were addressed according to the relevant foreign legislation. It identifies value shifting laws abroad, noting similarities and differences with VSAs' tax treatment in the SA context. By analysing GVSR and value shifting internationally in relation to SA VSAs, this chapter establishes a benchmark to facilitate the analysis of trustees' actions.

3.15 CHAPTER SUMMARY

This chapter presented a doctrinal analysis of the research problems by examining VSAs in both contingent-rights (discretionary) and vested-rights (vested) trusts within the SA context. Guided by the research questions formulated in Chapter 1 and the conceptual framework developed in Chapter 2, the analysis provided the evaluative structure for determining the extent to which the research objectives were achieved. The chapter incorporated comparative insights from the Australian GVSR and the UK's value-shifting rules which were selected (see selection rationale in section 3.10.1) to assess their potential relevance to South African VSAs, thereby establishing a comparative benchmark for evaluating trustees' actions in South African trust structures. Through this analysis, the chapter addressed and answered

the eleven research questions (section 1.5.2) and contributed directly to assessing the research objectives outlined in sections 1.5.1 and 1.5.1.1 of Chapter 1.

The next chapter will discuss the research methodology employed in the study.

CHAPTER 4

RESEARCH METHODOLOGY

4.1 INTRODUCTION TO THE RESEARCH PARADIGM AND APPROACH

After the doctrinal analysis of the trust tax legislation, SARS guides, relevant case law, and prior research discussed in Chapter 3, this chapter outlines the mixed-methods research framework, demonstrating how the integration of doctrinal and empirical methods is structured to answer the research questions and, through them, to address the primary and secondary research objectives (see section 1.5.1 of Chapter 1). This chapter outlines the preliminary literature review phase and covers the research paradigm and design (4.1), research phases (4.2), research instruments (4.3), data collection (4.4), data analysis (4.5), ethics and validity (4.6), and chapter summary (4.7). The purpose of this research is to examine and interpret VSAs within South African resident trusts, with the objective of assisting tax practitioners in identifying, analysing, and accurately determining and disclosing any capital gain arising from a VSA triggered by trustees' actions, that is, allocating the resulting VSA capital gain in the tax return of the taxpayer in whose hands it is taxable, and thereby enabling tax compliance with the trust-related obligations imposed by section 234 of the TAA.

Ataro (2020:20) compares research methodology to an athlete's preparation for the Olympics, highlighting three key aspects: (1) a plan of action; (2) a target outcome; and (3) a strategy for completion. Faryadi (2019:767) also summarised research methodology in three questions, which are outlined below and align with Ataro's perspective.

- How will the research objectives be addressed? By combining quantitative and qualitative data (Creswell, 2016:216) to support a pragmatic, integrated research approach.
- Why is this investigation being conducted? To assist tax practitioners in interpreting and correctly disclosing VSA-related capital gains in the estate-planning trust context (Faryadi, 2019:767).

- What is the study's theoretical basis? Considering the limited existing research, the foundation of this study is constructed both on the detailed doctrinal analysis conducted in Chapter 3 and on the insights of respondents and participants in Chapters 5, 6, 7 and 8. The doctrinal analysis is strengthened by a pragmatic mixed-methods approach and triangulation (Maarouf, 2019:5).

Ekere, Onoh and Ugwu (2021:118) also describe research methodology as the comprehensive plan in which the researcher identifies which methods, what types of questions and data analysis techniques to adopt to arrive at a conclusion to the research problem and the research questions that were formulated in the preliminary literature review phase. Babbie, Mouton and Voster (2014:75) use the analogy of an architectural plan as the specifications for a house being the research paradigm or research design, and the actual steps to complete the construction of the house within the specifications of the plan as the research methodology.

4.1.1 Preliminary literature review phase

According to Babbie *et al.* (2014:231) and Stack (2012:23), before commencing an online questionnaire or compiling an interview guide, it is necessary to conceptualise the research problem so that all the respondents and the participants understand the parameters of the study. Ramdhani, Ramdhani and Amin (2014:50) mention that prior to the commencement of a research project it is useful for the researcher to skim the literature and to hold discussions with experts in the field to obtain background information on the research topic and an understanding of the vocabulary or terminology used in the research area. SARS guides, academic articles and reference works of experts in the field of trusts were examined in the pre-literature review phase (Maree, Creswell, Ebersöhn, Eloff, Ferriera, Ivankova, Jansen, Nieuwenhuis, Pietersen & Plano Clark, 2019:28). The researcher with the additional assistance of university librarians found little research on VSAs in trusts. During the preliminary review stage of the study, discussions were held with Consultant 1 and Consultant 2, both prominent authors in leading South African trust reference books, with advanced legal and estate planning qualifications and 32 and 12 years of trust experience, respectively. Additionally, a third expert, a senior lecturer boasting 18 years of experience in trust taxation along with multiple

degrees (B.Com, B.Com Hons in Management Science Taxation, and an LLB cum laude), was also consulted. The insights gained through these preliminary consultations are summarised as follows:

- The tax treatment and correct disclosure of VSAs in trusts are vague and is therefore a viable topic for a PhD study in Taxation.
- The best solution would require a doctrinal analysis of the current income tax laws in South Africa.
- An approach to this research study would include a doctrinal analysis of the tax legislation, an interview and an online questionnaire to obtain insights from experts (see section 1.7.2.1 of Chapter 1) working with trusts.

The preliminary literature review phase focused on developing a conceptual framework for the study and in developing a hypothetical trust structure, allowing for an analysis of trustees' actions that could potentially result in VSAs to arise as discussed in Chapter 2.

4.1.2 Research paradigm and design

The research paradigm is the researcher's philosophical assumptions and mindset in relation to providing a response to the study's problem statement and research objectives. The paradigm surfaces the assumptions to be thought through in terms of how best to conduct the research study (see section 1.7.1.1 in Chapter 1) (Kaushik & Walsh, 2019:1). In this study, the underlying assumption was that understanding professional viewpoints required integrating participants' subjective realities with the objective legal facts necessary to address the study's scope comprehensively.

4.1.2.1 Research paradigms

Ekere *et al.* (2021:119) mention some of the research paradigm categories which include positivism, critical realism, interpretivism, post-modernism and pragmatism. A quantitative paradigm is based on positivism, and a qualitative paradigm is based

on subjectivism (Kaushik & Walsh, 2019:2). Based on the lack of research related to VSAs in trusts, it was decided to approach the research problem using a mixed-methods design: implementing an online questionnaire to gather quantitative data and conducting interviews with participants for their qualitative insights. This strategy aligns with a pragmatic research paradigm, ensuring both breadth and depth in addressing the study's research objectives (Maarouf, 2019:5). From Kivunja's (2017:27-28) explanation of the epistemology, ontology, methodology and axiology of research paradigms, the approach adopted for this study is matched to each of these philosophical underpinnings as follows:

- The epistemology of the paradigm concerns how the researcher acquires knowledge of reality - how do you know something? In this study, knowledge is drawn from purposively selected respondents and participants who contribute their professional perspectives through responses to the online questionnaire and in-depth interviews. Importantly, it should be acknowledged that the perceptions and interpretations of these experts may introduce an element of subjectivity to the study, as their viewpoints are shaped by personal experience, professional background, and individual interpretation within the parameters of the research. Thus, the epistemological stance reflects a synthesis of these subjective contributions, which are an inherent part of the study's design.

- Ontology of the paradigm refers to the assumptions the researcher makes to arrive at a meaningful answer, what constitutes reality within the study. The reality presented here is a practical blend of both qualitative and quantitative data, integrating subjective viewpoints from the respondents and participants with objective analyses. The perspectives and knowledge of respondents and participants may involve an element of subjectivity; however, these were integrated with the doctrinal analysis as described in Chapter 3. This resulted in a synthesis that combines both subjective perspectives and objective data, which serves as the basis for the research conclusions.

- The methodology is what instruments or techniques the researcher uses to collect data and to analyse the collected data; *what tools do you use to obtain the knowledge?* The mixed-methods approach best describes this study, using both quantitative data and qualitative data was therefore an appropriate design for this study, which support the doctrinal analysis of the study.

- Axiology of the paradigm are the ethical considerations the researcher applies in relation to the participants when rolling out the study.

4.1.2.2 Mixed-methods approach

Pragmatism focuses on what works and aims at solving real world problems (Kaushik & Walsh, 2019:5), ignoring the argument that quantitative and qualitative data are mutually exclusive (Kaushik & Walsh, 2019:2). Creswell (2016:216) defines a mixed-methods approach as the use of a combination of both quantitative and qualitative data in research to arrive at an integrated and optimal pragmatic approach**.** Having selected a mixed-methods approach has a bearing on both the methods of data collection and the research instruments that will be used for this study (Faryadi, 2019:773). This study uses a mixed-methods research design that combines quantitative data from a structured online questionnaire with qualitative data from in-depth interviews, alongside a doctrinal analysis of relevant tax laws, court cases, revenue guides and prior research in both the SA and foreign estate-planning context.

4.1.2.3 Convergent design

According to Creswell (2016:217), the research design, when using mixed-methods, can either be concurrent, explanatory sequential or exploratory sequential, which will affect the timing of developing the research instruments; the implementation of the online questionnaire and the interview guide; data collection; analysis of the different data sets; and concluding on the research findings. A convergent mixed-methods approach was selected so that the perspectives from the data collected from the online questionnaire, and the interviews could be merged and compared,

representing both integration and triangulation, as discussed in the next section (Creswell, 2016:217). The intention of this study is to conduct both the quantitative and the qualitative research steps simultaneously, which calls for a non-sequential parallel design (Baxter & Walker, 2019:3). The same questions or questionnaire will be used for the online questionnaire (using closed-ended questions requiring Likert score responses) and the interview guides (using open-ended questions), which allows for the convergent design.

The convergent design is also referred to as the concurrent mixed-methods design (Onwuegbuzie & Collins, 2007:292). The convergent mixed-methods design used for this study is summarised in Diagram 4.1 below (Creswell & Plano Clark, 2018:76).

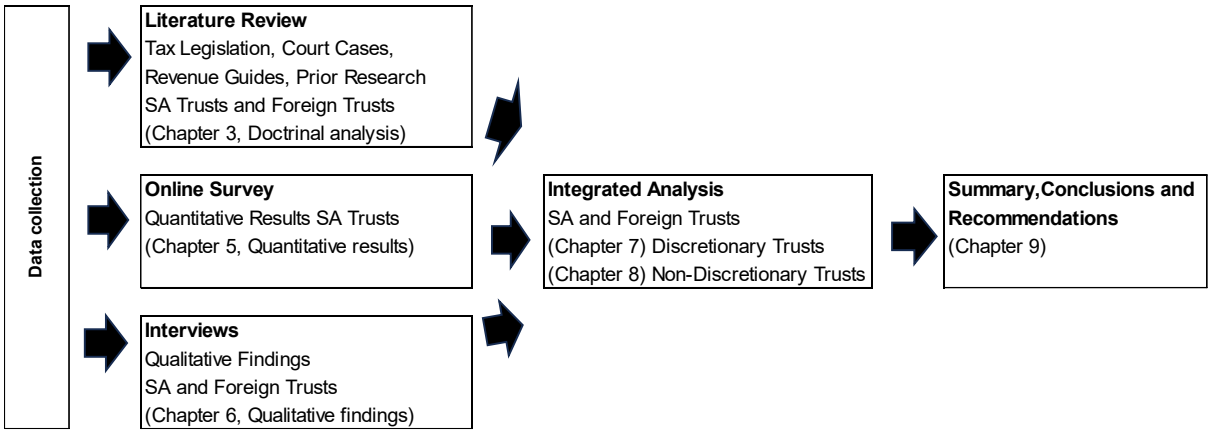


Diagram 4.1: Convergent mixed-methods design

Source: Creswell & Plano Clark (2018:76) - Adapted

The SA trusts were subject to the mixed-methods approach (Maree *et al*., 2019:331), as both an online questionnaire and interviews were conducted on the tax treatment under the Act of VSAs arising in SA resident trusts which is the focus of this study. The inclusion of foreign trusts was for comparative analysis, the qualitative findings were presented in Chapter 6 and the integrated analysis was conducted in Chapters 7 and 8.

4.1.2.4 Integration and triangulation

Integration means the combination of the quantitative and qualitative data and analysing any contradictions or relationships between the data sets to obtain a better understanding of the research topic (Creswell & Plano Clark, 2018:74). Triangulation adds to the methodological integrity of the data collected from two diverse sources and adds to the overall credibility of the study (Rahman, 2012:159). According to Dawadi, Shrestha and Giri (2021:28), triangulation is the process whereby two or more different sets of data such as online questionnaire results and interview results are compared in a mixed-methods type of study, which leads to a better understanding of the data results and an opportunity to evaluate the validity of the data. The doctrinal analysis conducted in Chapter 3 is also used in the triangulation in Chapters 7 and 8. While the questionnaire data provides measurable trends and patterns, the interviews offer nuanced insights into participants' perceptions, which at times yield inconclusive or contradictory results when compared. To address these discrepancies, the doctrinal analysis examines how specific tax provisions may undermine or eliminate the intended benefits gained from VSAs and to explain the divergence between qualitative and quantitative findings. The integration of these methods allows for a more comprehensive evaluation of the legal and practical implications of current tax frameworks applicable to VSAs.

Heale and Noble (2019:68) mention that the downside of triangulation is that it may be time consuming at times and produce conflicting results; the benefits of triangulation include that it adds to the validity of the study and mitigates the time invested in this type of study.

4.1.2.5 Motivation for using a mixed-methods approach

The research problem and the research objectives were philosophically deemed to be best responded to using pragmatism (Hall, 2020:23). Mixed methods designs have been shown to be valuable in tax research; as Pienaar (2023:54) demonstrates, combining doctrinal analysis with stakeholder perspectives

enhances the contextual depth and explanatory power of a tax PhD study. The limited availability of academic journal articles, prior research, and relevant court cases confirmed through systematic searches across multiple reputable websites, further motivated the extension of the doctrinal study to include the perceptions of respondents and participants involved in estate-planning trusts.

Aside from following the pragmatic worldview of mixed-methods, Jiang, Klein and Müller (2022:216) state that the purpose of selecting a mixed-methods approach is to strengthen the study, enhance the results and to enable the integration of the two different data sets, as briefly described below:

- To strengthen the study by corroborating the results of two independent groups of respondents and participants by means of triangulation. Any divergent findings will be analysed in detail as they may indicate uncertainty or different interpretations of the tests conducted in this study.
- To enhance the study by being complementary or complete by comparing the results of the two distinct groups.
- To link the two sets of data whereby the one group provides insights to be followed up in the second group. The convergent mixed-methods design to be adopted for this study limits the extent of integration as both the qualitative and quantitative data collection are conducted simultaneously (Onwuegbuzie & Collins, 2007:290).

4.1.2.6 Weaknesses of mixed-methods

Creswell and Plano Clark (2018:15) state that the time, the resources, and the skill to adopt a mixed-methods approach as a constraint when adopting the mixed-methods approach. Enlisting respondents and participants to participate in both the online questionnaire and the interviews was challenging due the level of expertise required and the time constraints of their professional work. To assist with this process, tax experts assisted by identifying suitable candidates with exposure to trust administration and taxation of trusts as described in section 1.7.1.2 of Chapter 1 (Faryadi, 2019:773). Hall (2020:221) mentions that integrating and drawing

inferences of quantitative and qualitative data to be a complex process, which required the guidance of qualitative data experts and a quantitative research specialist in this study. The research design adopted for the study follows on the pragmatism philosophy (Maarouf, 2019:5) and used convergent mixed-methods (Baxter & Walker, 2019:3) and triangulation to enhance the validity and the quality of the research (Jiang *et al*., 2022:216).

4.2 RESEARCH PHASES

4.2.1 Research steps or phases

The research methods describe the steps taken to conduct the study by using the different research instruments which should be articulated in a systematic manner to operationalise a meaningful study (Faryadi, 2019:770). As noted, a convergent mixed-methods design was adopted and some of the research steps or phases described below were therefore conducted simultaneously (Creswell, 2016:217). After the pre-literature or conceptual review, the SA and foreign comparative analysis were performed (see Chapter 3).

4.2.2 First phase - SA and Foreign doctrinal analysis

In the first phase a thorough and exhaustive literature review was conducted, as proposed by Hall (2020:34), over two years culminating in a research proposal, which included the formulation of the research topic and the research questions for this study. The literature review was structured to inform the research problem and the formulation of the research questions (Stack, 2012:73). A well-defined hypothetical trust structure was developed to provide both the interviewees and the online questionnaire respondents with a set of circumstances against which the trustees' actions could be measured (Schoch, 2020:246). Also, the research design and paradigms appropriate to this study were examined in the literature review, to formulate an approach and the assumptions used in this study (Kaushik & Walsh, 2019:1). The research outline had to be approved by the UNISA College of Accounting Science Research Ethics/Review Committee (CASRERC) prior to commencement of the study.

A doctrinal analysis was conducted of the tax treatment of trustees' actions resulting in a VSA, with a particular focus on the interplay between trust law and tax law under the Act and the relevant tax and trust law cases regarding trusts. The literature review included guidance from SARS Revenue Guides, which provided clarity on the application of tax rules to trusts. Additionally, the review examined relevant research from academic journals. The analysis of foreign tax and trust law required reviewing relevant legislation and revenue guides from the tax jurisdictions studied to understand the tax treatment, legal requirements, and implications of VSA provisions for trustees.

4.2.3 Second phase - research methods including research instruments

The research questionnaire was designed with questions which could aid in addressing the research objectives and in answering the research questions of this study in a structured manner (Belotto, 2018:2624). Both the questions used for the online questionnaire, and the interview guide were deduced from the context of the research questions to provide consistency and an integrated logic approach to the study (Baxter & Walker, 2019:3). All the research instruments contained both a letter of introduction and general instructions, followed by a section which captured either the online questionnaire respondents' or interview participants' biographical information before attending to the questions (Brinkman, 2009:38). The online questionnaire also included a consent section for the respondents and each of the interview participants had to sign a consent form.

4.2.3.1 Research instrument 1: Online questionnaire

An online questionnaire was developed to address the research questions using closed-ended questions with one or two open-ended questions (Hyman & Sierra, 2016:3)**.** The responses to the closed-ended questions for the online questionnaire were attached to a five-point Likert scale (Chandel, Joshi, Kale & Pal, 2015:398), varying from a 1 for "*strongly agree*" to a 5 at the opposite end of the spectrum for *"strongly disagree*". After obtaining ethical clearance from the CASRERC to conduct the study, the online questionnaire was subjected to pre-testing by academics and

experts in the field of trusts and followed by adjustments (see 4.3.4.1 to 4.3.4.5 below) based on their feedback (Malmqvist *et al*., 2019:2).

4.2.3.2 Research instrument 2: Interview guides

According to Hyman and Sierra (2016:3), open-ended questions are more ideal for interview questions as it is possible to obtain more information from open-ended questions than from closed-ended questions. The interview guides were developed to address the research questions using open-ended questions (Brinkman, 2009:34). Trust experts and academics reviewed the SA and foreign interview guides to confirm the face and content validity of the interview guides (Brinkman, 2009:46).

4.2.3.3 Ethical clearance

Approval had to be obtained from the CASRERC before commencement of the pilot study and before commencing the field work (see Appendix G). A comprehensive submission was made to the CASRERC which included, amongst others, information regarding the following: a proposal summary, risk assessment, details of the proposed research, the research methodology, data collection and ethical considerations (CASRERC Form 1, 2019). Ethical clearance to conduct the study was obtained as prescribed by the UNISA Policy on Research Ethics (the UNISA Research Ethics) (UNISA, Research Ethics Policy, 2016:6).

4.2.3.4 Pilot study

A pilot study of the online questionnaire and the SA and the foreign tax jurisdictions' interview guides were conducted to evaluate the effectiveness of the research instruments and to allow for possible improvements (Malmqvist *et al*., 2019:10). The research instruments were reviewed by academics and experts in the field of trusts (Malmqvist *et al*., 2019:5). The online questionnaire was captured on QuestionPro and evaluated several times for the logical flow, the face and content validity before being administrated to obtain the quantitative data (Ghazali, 2016:148).

4.2.4 Third phase – data collection

The data collection procedures are fully described for quantitative data in section 4.4.2.3; and qualitative data in section 4.4.3.3 below. Once the interview guide was finalised, the interviews of the leading tax experts in the field of taxation of trusts commenced to collect the qualitative data. All the recorded interviewee responses to the questions to the interview guides were verified for accuracy by SA trust experts (Faryadi, 2019:772) before they were made available to a research expert for qualitative analysis in the fourth phase of the study.

4.2.5 Fourth phase – data analysis

According to Schoch (2020:252) *a priori or* pre-coding can be used when the researcher develops codes in advance, which method was described in section 4.5.2.2 and followed during the literature review. The qualitative data were subject to manual coding with the guidance of a qualitative data expert (Linneberg & Korsgaard, 2019:22), followed by thematic content analysis of the qualitative data from the interviews (Belotto, 2018**:**2626). The data obtained from the online questionnaire by means of the online questionnaire software were analysed by a statistician to make descriptive and inferential correlations (Taherdoost, 2020:2). Triangulation was used to compare the analysis of the qualitative data with the quantitative data analysis, to strengthen the validity and the trustworthiness of the data (Heale & Noble, 2019:28).

4.2.6 Fifth phase - conclusions and recommendations

The conclusions and recommendations were made in the final phase of the study from the empirical data collected from four different sources: (1) doctrinal analysis conducted in literature review; (2) face-to-face interviews; (3) the online questionnaire of a larger group of experts; and (4) the comparative analysis from the interviews of experts of the two foreign tax jurisdictions (Babbie *et al.*, 2014:78). Some of the key steps adopted for the research methodology followed have been summarised in phases one to five above (Sönmez, 2018:2598). Next, the research instruments used in this study will be discussed.

4.3 RESEARCH INSTRUMENTS

4.3.1 Research questionnaire

The research questionnaire was designed after conducting the literature review in Chapter 3, using a structured approach to address ten research questions about SA trusts (see section 1.5.2 in Chapter 1). This method enabled direct comparison between the online questionnaire and interview guide results by employing identical questions and variables in both formats (Saldana, 2013:84; Stack, 2012:36). Structured questions ensured consistency among SA online questionnaire respondents, SA interview participants, and the foreign interview participants, with research question eleven covering foreign trusts (Maree *et al*., 2019:202).

4.3.1.1 Online questionnaire

Electronic computer online questionnaires are easy to administer and make data analysis easier (Babbie *et al*., 2014:231). Since this research entailed obtaining responses from a wider group of respondents, the first questions asked were easy questions to attract the respondents or interviewees into the survey (Maree *et al*., 2019:201). The online questionnaire comprised mainly closed-ended questions (Stack, 2012:45). The Likert scale was used for the online questionnaire, allowing the respondents a choice of uncertainty with a neutral option provided (Maree *et al.,* 2019:201). The closed-ended questions were aimed at respondents who have experience with the SA trusts covered in this study.

4.3.1.2 Interview guides

The interview guides comprised mainly of open-ended questions (Stack, 2012:45), allowing the interviewees more freedom in their responses with more detail. The open-ended questions were aimed at interviewees having more specialised knowledge of SA trusts. The interview guides used for the foreign tax jurisdictions addressed the same ten research questions as the SA research instruments and had to be adapted after the literature review in Chapter 3 to the foreign trust laws (Maree *et al.*, 2019:45). Secondly, the foreign interview guides had to be adapted

according to the capital gains tax laws prevalent in each of the foreign countries examined in this study (Jansen van Rensburg, 2007:295).

4.3.2 Thick descriptions and transferability

The correlation between the various research instruments also necessitated thick descriptions in which the exact type of trust and precise trustees' actions were fully described with the hypothetical trust in each research instrument (Stack, 2012:59). During the pilot studies it was recommended that the definitions of the two SA trusts be included in all the SA research instruments, which enhanced the comparison of both the interviews and the online questionnaires (Babbie *et al.*, 2014:277). The main objective of having thick descriptions was to provide all the respondents and interviewees with sufficient information and details to understand the two hypothetical trust structures analysed in this study (Ali, Durante, Escalante, Fábregues, Inayat & Younas, 2023:1), which permitted transferability of the results, meaning that the same questions could be accurately replicated with different respondents and participants.

4.3.2.1 SA trusts

Within the confines of this study, a simple hypothetical trust structure was first developed, and a question of seven trustees' actions was identified for the purposes of measuring the trustees' actions against the research questions identified for this study (De Koker & Williams, 2024:24.156). Watermeyer and Maitland (2022) state that, unlike companies which have all the legal requirements entrenched in the Co Act, a qualified legal professional is the draftsperson of the trust deed. In both the interview guides and the online questionnaire for either a discretionary or vested trust (non-discretionary trust), open-ended questions were included to allow the respondents to provide any other trustees' actions that they perceive could result in a VSA (Hyman & Sierra, 2016:3).

4.3.2.2 Foreign trusts

The trusts selected in the foreign tax jurisdictions should have similar characteristics to the South African trusts used in this study. One such trust is a discretionary trust, which is used in Australia (Simpson, 2019:121). The interview guide for the foreign trusts covered either discretionary trusts or fixed trusts (non-discretionary trusts). According to Simpson (2019:110), Australian trusts differ from South African trusts in that they have an additional party to the trust, which is called an appointor. The roles of the appointor are included in those of the trustees for South African trusts. Thus, in the interview questions pertaining to Australian trusts, the removal or appointment of an appointor was included with the appointment or removal of the trustees.

4.3.2.3 Trustees' actions

By providing the detailed trustees' actions or thick descriptions, the interview guide and the online questionnaire became more meaningful to the respondents and participants (Ali *et al*., 2023:7). Describing the possible changes in the vesting rights for shares was an effective manner to start the interview and useful for the online questionnaire respondents who were contacted before commencement of the survey. Tables 4.1 and 4.2 below were used to explain the trustees' actions to any of the participants and the respondents who requested clarity on the vested shareholding or vested profits before and after the trustees' actions for the hypothetical vested trust structure examined in this study (SARS, 2023b:23;47).

Table 4.1: Possible consequences of trustees' actions 1, 2, 4 & 5

Tustees' action	Vested shares before trustees' action.	Vested shares after trustees' action.
1 and 2	Beneficiaries' shares held: A 40, B 40 and C 40 shares.	Beneficiaries' shares held: A 80, B 20, and C 20 shares.
4	Beneficiaries' shares held: A 40, B 40 and C 40 shares.	Beneficiaries' shares held: A 30, B 30, C 30 and D 30 shares.
5	Beneficiaries' shares held: A 40, B 40 and C 40 shares.	Beneficiaries' shares held: A 60 and B 60 shares.

Trustees' Action 1: The trustees vest trust assets (80 shares) in beneficiary A.
Trustees' Action 2: The trustees distribute trust assets (80 shares) to beneficiary A.
Trustees' Action 4: Trustees appoint a new beneficiary to the trust.
Trustees' Action 5: Trustees remove beneficiary A from the trust.

Table 4.2: Possible consequences of trustees' action 3

Tustees' action	Vested profit before trustees' action.	Vested profit after trustees' action.
3	Beneficiaries' share of capital gain: A R 400 000, B R400 000 and C R400 000.	Beneficiaries' share of capital gain: A R800 000, B R200 000 and C R200 000.

Trustees' Action 3: The trustees increase beneficiary A's capital gain by R400 000 and reduce each beneficiary B and C's capital gain by R200 000.

4.3.2.4 Thickly described variables and fixed attributes

The attributable variables or fixed variables regarding the parties to the trust, the nature of the trust's assets and the powers and ownership details in each of the basic trust structures, as described for each of the hypothetical trust structures used in this study, are referred to by Saldaňa (2013:70) as attribute coding. The attributable or fixed variables used in the study were described in the research instruments (Babbie *et al.*, 2014:277). A thickly described hypothetical trust structure was provided for each trust type in both a tabular format and an accompanying narrative paragraph. These descriptions were presented before the statement of the research questions relating to each trust type (discretionary or vested) in all the research instruments (Ali *et al*., 2023:3).

Table 4.3 sets out the attributes, or fixed variables, applied to each hypothetical trust structure. The table is followed by narrative explanations of these variables, which were incorporated into the design of the research instruments to ensure that respondents engaged with a consistent and fully specified trust scenario across all research instruments.

Table 4.3: Attributes or fixed variables

Trustees:	Mr. X, Mrs. X and Mr. Y who is the independent trustee.
Beneficiaries:	A, B and C who are the children (blood relatives) of Mr. X and Mrs. X.
Founder:	Mr. X's father is the founder of the X Family Trust.
Trust assets:	The trust owns capital assets (120 unlisted shares in Company (Pty) Ltd) at the current market value of R15 000 per share and a base cost of R5 000 per share. The shares were bought by the trust six years ago, at a cost of R5 000 per share for investment purposes, out of the trust's own funds (not from any donated funds).
Residents:	All the natural and juristic persons mentioned above, are RSA residents, as defined in terms of section 1 of the Act.
Market value of 80 shares:	The market value of 80 of the trust's shares is R1 200 000 (80 x R15 000). The market value of the shares has been verified by the company's auditors.
Base cost of 80 shares:	The cost of 80 of the trust's shares is R400 000 (80 x R5 000).
Capital gain realised on the sale of 80 shares:	The sale of 80 shares of the trust's shares at market value results in a capital gain of R800 000 (R1 200 000 – R400 000).

- All the parties to the trusts which are the three trustees (two parents and an independent trustee), the beneficiaries (three children of the trustees) and the trust's founder (grandparent of the beneficiaries), are connected persons (section 1(1) of the Act, definition of connected persons).
- The detailed capital nature of assets held in the trust is described in the hypothetical trust structures for this study (section 1(1) of the Act, definition of gross income).
- The tax residency of the trust and all the parties are described as SA residents (section 1(1) of the Act, definition of a resident).
- The base cost of the shares or assets is given as R5 000 per share as described in paragraphs 20 to 34 of the Eighth Schedule.
- The market value of the shares or assets is given as R15 000 per share. An asset disposed of between connected persons at an inadequate value or no value is deemed to be disposed of at market value in terms of paragraph 38 of the Eighth Schedule.
- A definition of each of the SA trusts (discretionary and vested trusts) used in this study is based on the trustees' power and ownership over the trust's assets; the beneficiaries' rights and ownership over the assets held in the trust (Pace & Van der Westhuizen, 2023:B4.2) and used in estate planning; and the possible trustees' actions within the stipulations of the trust deed (Olivier *et al*., 2023:4.1.7) that could result in a VSA.
- The selected foreign hypothetical trusts were chosen to match the South African trusts, using the attributes and variables listed in Table 4.3, and are expressed in either Australian dollars or UK pounds.

4.3.3 Validity

According to Maree *et al.* (2019:261), the validity of research instruments means that the research instruments are designed in such a manner that they assess what they are supposed to evaluate. Face validity, content validity and construct validity are several types of validity tests which can be applied to research instruments before they are used in the data collection phase of a study (Maree *et al.,* 2019:262).

4.3.3.1 Face validity

Face validity can be defined as the research instrument appearing to be valid for the purposes for which it was designed (Allen *et al*., 2023:153). As such, it questions whether the research instrument is appropriate and relevant for the study for which it was designed. The reliability of the research instruments is important to ensure that the tests can be repeated by different respondents or participants (Drost, 2011:106). Accordingly, when these tests are administered to various experts, they should consistently clarify and appropriately address the research subject. Face validity differs from content validity, which focuses on the theoretical aspects of the research instruments (Allen *et al*., 2023:153). Face validity can be applied to both the online questionnaire and the interview guide (Allen *et al*., 2023:156).

4.3.3.2 Content validity

Content validity requires that the questions in the research instrument adequately address the research questions (Brinkman, 2009:46). For this reason, experts who were selected in the initial pilot studies were actively involved in the taxation of trusts. Creswell and Miller (2000:125) compare validity to a lens through which the participants interpret the questions in the research instruments. For the study to be useful, the reliability and the validity of the research instruments are important. During the pilot study aspects of the face validity and the content validity of all the research instruments used in the study were examined (Sreejesh, Mohapatra, & Anusree, 2014:156).

4.3.3.3 Construct validity

According to Maree *et al.* (2019:261), construct validity ensures that the research instruments are standardised, which may require the use of statistical techniques to measure the construct validity of the research instruments. During the pilot study the validity of the research instruments was checked relying on face and content validity. The recommendations made (see sections 4.3.4.1 to 4.3.4.5 below) during the pilot study were implemented in the research instruments to improve both the online

questionnaire and the interview guide, and to enhance the overall study (Edwards & Kinchin, 2018:3).

4.3.4 Pilot study

The pilot study also served as a good practice run to get acquainted with the questionnaire before the interviews began (Babbie *et al.*, 2014:252). The general instructions in both research instruments appeared adequate during the pilot study (Maree *et al.*, 2019:9). During the pre-testing of both the online questionnaire and the interview guide certain aspects such as the lack of adequate descriptions of the trust definitions; tax terminology; correct language; time constraints; and the sequence of the two trust types were discussed (Sreejesh *et al*., 2014:156).

4.3.4.1 Tax and trust definition

During the pilot study, the research instruments were evaluated to ensure that they were understandable to all the participants in the study (In, 2017:601). To accommodate both experts who were either tax or trust law orientated, sufficient definitions had to be included in the research instruments and are discussed next. The following thick descriptions (Ali *et al*., 2023:1) or definitions were inserted in both the online questionnaire, and the interview guides as recommended during the pilot study:

- Definition of a VSA: Paragraph 1 of the Eighth Schedule;
- Disposals: paragraphs 11(1)(*a*) to (*g*) of the Eighth Schedule;
- Definition of a donation (Estate Welch's v. CSARS 66 SATC 303*)*;
- Definition of a discretionary trust (Pace & Van der Westhuizen, 2023:B6.3.1); and,
- Definition of a vested trust (De Koker & Williams, 2024:12.19).

4.3.4.2 Terminology

The initial draft questionnaire did not adequately distinguish between a capital asset and a revenue asset (Sreejesh *et al*., 2014:158). Following the pilot study, changes were made to the description of the capital assets in the research instruments to avoid any uncertainty regarding the capital nature of the assets held in the trust structures as discussed next. The sale of trust assets, if subject to capital allowances, could result in tax implications such as the recoupment of wear and tear previously allowed as a tax deduction. The capital assets held in both trusts described as shares (which are not subject to capital allowances) were described as follows: "The shares were bought by the trust six years ago, at a cost of R5 000 per share for investment purposes, out of the trust's own funds (not from any donated funds)". In all the trustees' actions the assets were referred to as capital assets. In discussions with the respondents and the participants before the commencement of the online questionnaire and the interviews, the nature of the trust assets was discussed as a capital asset held for investment purposes (capital asset) and not as an inventory held for immediate sale (revenue asset).

4.3.4.3 Sequence of questions

As proposed by Sreejesh *et al*. (2014:156), the questions were sequenced with easier questions in the first part, leading to questions in later parts which required a greater level of concentration than the first few questions. The order in which the trusts appeared in the online questionnaire was also discussed during the pre-testing phase (Kabir, 2016:219). The trust structure which is most used in estate planning is a discretionary trust (Olivier *et al*., 2023: 5.3.1.2), followed by a vested trust. It was found best to deal with each trust structure separately in the online questionnaire, allowing respondents to omit those trust structures later in the questionnaire for which they have no working knowledge (Brinkman, 2009:49). The same sequence of trusts was used in the interview guides commencing with the discretionary trust, which is less complex than a vested trust (Maree *et al*., 2019:201). Both SA research instruments were divided into two sections discretionary trusts (section 1) and vested trusts (non-discretionary trusts) (section 2) (Maree *et al*., 2019:201). The selection criteria of the interview experts for

interviews required that the participants had a working knowledge of both trusts and would be able to answer the questions for both trust structures examined. During the pilot study of the interview guide it became evident that addressing trust structures simultaneously during the interviews saved time (Kabir, 2016:219), as the set of circumstances was the same and did not need to be repeated to cover both trust structures.

4.3.4.4 Time limit

During the pre-testing (Babbie *et al*., 2014:244), it was found that the suggested time to complete the online questionnaire and an interview was inadequate. The time to complete one of the two trusts in the online questionnaire took about fifteen minutes. The interviews also took two to three hours. Hence, the suggested times originally indicated on the research instruments had to be adjusted (Brinkman, 2009:50). Also, no time limits were set in QuestionPro, allowing respondents to answer questions at their own pace.

4.3.4.5 Sentence structure

Minor difficulties with the sentence structure of some questions were identified and rectified, such as using sentences with negative statements. Such sentences were corrected to avoid any ambiguity (Brinkman, 2009:39). In this section several types of research instruments were discussed, including aspects regarding the validity and the reliability of the study such as thick descriptions and transferability, face validity, pilot study and ethical clearance of the research instruments.

4.4 DATA COLLECTION

4.4.1 Data collection from respondents and participants

The mixed-methods approach adopted for this study allowed for the collection of quantitative data from the experts who completed the online questionnaire (the “respondents” or “respondent”), and qualitative data from the interviews (“participant” or “participants”). (Jiang *et al*., 2022:5). According to Creswell and

Creswell (2018:16), describing the data collection procedures provides insight into how the research study was conducted. The data collection and sampling procedures are discussed next.

4.4.2 Quantitative data

The quantitative data were collected in real time using QuestionPro. The respondents entered their responses on the QuestionPro survey instrument. Quantitative data are responses converted into machine readable form (Taherdoost, 2020:1). The responses to the closed-ended questions were allocated a Likert scale numerical number which can be read by a computer.

4.4.2.1 Quantitative sampling method

Purpose or expert sampling was used to gather specific information regarding the trusts under investigation for both the collection of quantitative and qualitative data (Babbie *et al.*, 2014:277). Due to the complexity of trust law and VSAs the expert sampling method was selected to choose members of professional bodies (see Table 5.5 in Chapter 5) dealing with trusts for this study (Faryadi, 2019:772). Within the various professional bodies, only professional members having a working knowledge of the trust types used were selected to participate in the study (Maree *et al*., 2019:220). Snowball sampling was used to obtain referrals to potential respondents and participants from both the online questionnaire and the interview participants (Faryadi, 2019:773).

4.4.2.2 Quantitative sample size

According to Onwuegbuzie and Collins (2007:288), a minimum sample size for non-experimental surveys is 30 respondents. Normally the sample sizes in quantitative studies are larger than in qualitative studies (Onwuegbuzie & Collins, 2007:288). All respondents were from various professional bodies and different work backgrounds (see Table 5.1 in Chapter 5) and had limited time at their disposal to participate in the online questionnaire. A sample size of 32 valid online questionnaire respondents was decided upon.

4.4.2.3 Quantitative data collection process

Using an electronic online questionnaire required less administrative work than the collection of the qualitative data as the data were captured in real time. Administering online surveys is a cost-effective way of collecting data (Nayak & Narayan, 2019:32). The only challenge was that loadshedding and sudden electronic surges prevented some of the respondents from completing the questionnaire (Nayak & Narayan, 2019:32). The process of quantitative data collection is described below (Babbie *et al.*, 2014:75).

- The online questionnaire was answered by each respondent using QuestionPro.
- The online survey programme automatically updated all responses in real time.
- The responses were saved in the Cloud. A full Excel report was saved electronically, and a hard copy printed.
- The data results were also exported in SPSS (.sav) format and sent in this format to the quantitative data research specialist with the Excel summary of all the online questionnaire results.
- Before the data were worked on by the quantitative data research specialist, the questions were manually checked by the quantitative data research specialist from the online questionnaire to SPSS (.sav) format to ensure that the questions were numbered correctly and included in the statistical analysis.

4.4.3 Qualitative data

The participants followed the questions recorded in the research interview guides (see Appendix B, C, and D). A semi-structured approach was used during the interviews to obtain additional information. For example, in both instruments it was stated that the respondents and the participants could assume that the trustees are permissible where legally possible; follow up questions could be asked during the interviews to obtain clarity from the participants and on how some of the trustees' actions could be achieved (Kabir, 2016:213). The trustees' powers and actions are governed by the trust deed (Pace & Van der Westhuizen, 2023:B5.2). It would not

be possible to list all possible trustees' actions, as some of the trustees' actions may be directly within the scope of the trust deed whilst others may be *ultra vires*. The semi structured approach also allowed for permitted probing questions regarding the flexibility of the trust deed and the possibility of *ultra vires* trustees' actions (Babbie *et al*., 2014:253).

4.4.3.1 Qualitative sampling method

Within the various professional bodies, only professional members who had at least ten years of working knowledge of both discretionary and vested trusts were included for purposes of this study (see Table 6.1 in Chapter 6). (Maree *et al*., 2019:220), which called for purposive sampling. Expert sampling was also used for the qualitative data collection, as the interviewees had to have working experience of both SA trusts covered in this study (Faryadi, 2019:772).

4.4.3.2 Qualitative sample size

According to Babbie *et al*. (2014:287), a qualitative sample size could be between five and twenty-five participants, depending on the practical circumstances such as the costs and time to perform the interviews. Onwuegbuzie and Collins (2007:288) recommend that a minimum size of three to five participants is required when conducting a case type study. The foreign tax jurisdictions were included for exploratory purposes, and only one participant was selected for each country. The criteria set for the SA experts' interviews included that they had to have working experience in all the trust structure types covered in this study, a minimum of ten years of experience in trusts and the time length of the interviews. A minimum sample size of six participants was decided upon (Babbie *et al*., 2014:287).

4.4.3.3 Qualitative data collection process: interview method

Due to the COVID-19 pandemic, some interviewees preferred to complete their responses on the interview guides remotely by typing their answers. Only one SA expert chose to do the whole interview online using Zoom. In all cases the interviewees had follow-up meetings mostly in person, online and telephonically to

confirm their answers (Perales & Ulla, 2021:1). Krouwel, Jolly and Greenfield (2019:2) state that face-to-face interviews are slightly superior to online interviews, due to a lack of spontaneity with follow-up questions when online interviews are conducted (Krouwel *et al*., 2019:2). The process of collecting qualitative data is described in detail next in section 4.4.3.4 (Babbie *et al.*, 2014:75).

4.4.3.4 Participant interviews

A total of eight participant interviews were conducted for this study of which six were SA experts, and one in each of the two foreign tax jurisdictions covered in this study. Participants 1 to 6 were SA experts in the field of trust and taxation of trusts. Participant 1 allowed a face-to-face meeting at his offices. The interview was recorded, and the transcript was sent back to him for verification. The researcher also obtained clarity on some of the responses via email messages. The transcript of his responses was sent to the researcher by email for verification purposes.

Participant 2 completed his responses on the online interview guide over a period of seven months. A four-hour face-to-face meeting was held with the expert, during which he provided the researcher with his typed electronic responses and discussed various aspects of the study, often referring to various texts and SARS guides. His responses were updated and resent to him for verification. He edited and verified the accuracy of the final interview transcript. At this point, after consultation with the supervisor, it was decided to make Part A and Part B of the interviews closed-ended questions only.

Participant 3 requested the interview guide before considering acceptance to partake in the interview. He wrote an opinion on the relationship of how the Transfer Duty Act is applicable to residential property in the various trusts used in this study. He identified that he was not fully conversant with the DTC. A face-to-face interview of two hours was held. He personally edited the transcripts of the interviews, adding for example the correct court case references and making corrections that he deemed fit.

Participant 4 requested an online interview. A media technician arranged an online Zoom meeting because the interview time would exceed the time limit for persons without special Zoom licences. Immediately upon receipt of the Zoom recording, it was transcribed by the researcher and sent to the participant for verification. The media technician informed the researcher that the recording could not be kept for an indefinite period.

Participant 5 allowed a face-to-face meeting at his offices which lasted four hours. The interview was recorded, and the transcript was sent back to him for verification. The transcript of his responses was sent to the researcher via email for verification purposes.

Participant 6 consented to a three-hour face-to-face meeting at his offices. The interview was recorded, and the transcript was sent back to him for verification. The researcher also obtained clarity on some of the answers via a phone call. The transcript of participant 6's responses was sent to the researcher by email for verification purposes.

The Australian participant 7 requested the electronic interview guide and manually wrote down all his responses in the answering spaces provided on the interview guide. The researcher and interviewee discussed the interview guide over several phone calls. The responses provided were transcribed on a Word version document of the interview guide for verification purposes. The transcript of his responses was sent to the researcher via email for verification purposes.

The UK participant 8 consented to do an online MS Teams interview. The participant requested that the interview guide be sent to him three weeks before the interview was conducted. During the interview difficulties were experienced with the screen sharing of documents. The participant's 's responses to all the research questions were audible and clear. Immediately after the interview, the participant's responses were sent to him for verification purposes. Some follow up questions were conducted by email, and the final verification of the interview responses were received from the participant.

4.4.3.5 Trustworthiness

According to Babbie *et al.* (2014:276), the trustworthiness of qualitative data requires that the data collected must be objective. This was achieved by allowing each interviewee to correct their responses which were captured on the transcripts through member checking (Creswell & Plano Clark, 2018:217). The interview responses were all transcribed on to a Word document interview guide, and each interviewee was assigned a number from one to six (Babbie *et al.*, 2014:260), to ensure that the interviewees' confidentiality was maintained.

4.4.4 Ethical requirements

The online questionnaire and the interview guides were explicit in stating that the respondents and the participations would remain anonymous as required by the UNISA Research Ethics (2016:16), and that they participate in the study on a voluntary basis without any compensation (UNISA Research Ethics, 2016:14). Both the SA and the foreign tax jurisdiction interviewees had to sign the consent form before any of the interviews could take place (UNISA FROM 1 2019 Research Application Form for conducting research on humans (the RERC Form 1), 2019:25).

4.5 DATA ANALYSIS

According to Ekere *et al*. (2021:119), when adopting a mixed-methods research design, both qualitative and quantitative data analysis should be conducted on the data collected from two different research instruments. The data analysis is discussed next.

4.5.1 Quantitative data analysis

A structured approach was adopted in the design of the online questionnaire (see section 4.3.1). The pre-coding assisted with the quantitative data analysis. The questions asked addressed the research objectives in support of answering the research questions. According to Hall (2020:162), descriptive or inferential statistics can be used in quantitative data analysis. Taherdoost (2020:3) describes the

following statistical techniques that are used in descriptive analysis: Frequency, Central Tendency, and Dispersion Techniques. The mean, median, and most representative value form part of the central tendency technique.

4.5.1.1 Quantitative descriptive and inferential analysis

Inferential statistics differ from descriptive statistics. In inferential statistics an inference is made on the entire population from the sample (White, 2003:179), whereas in descriptive statistics a frequency will for example be the average answers of the sample taken (Maree *et al*., 2019:226). The quantitative data were downloaded from the QuestionPro online survey software in both Excel and SPSS format, as the quantitative data research specialist used the SPSS software to analyse the data (UNISA RERC Form 1, 2019, 2019:5.2).

4.5.1.2 Analysis of cross tabulation findings

The data from the manual coding from the interviews were grouped into the experts who agreed or disagreed for each sub-question, which is necessary to prepare the data analysis using computer software (Pallant, 2020:11). Experts who were either indecisive or omitted were recorded on an Excel sheet in binary codes and sent to the external quantitative research expert who captured this data on the SPSS programme (Taherdoost, 2020:2). The Likert scores of one and two were grouped as agreed; Likert scores of four and five for each sub-question were grouped as disagreed from the original quantitative data imported from QuestionPro to SPSS. The Likert scores were automatically processed on SPSS.

4.5.1.3 Cross-tabulation

When using cross tabulation, the Chi-square or the Fisher's Exact test is used to evaluate the relationship between two categorical variables (Nowacki, 2017:20). The relationship between the responses of two groups can be measured by the Chi-square T-test (Pallant, 2020:110), which uses the Pearson chi-square value (the P-score) to indicate an association of the responses between the two groups in a study. According to Pallant (2020:135), the P-score indicated the linear relationship

between the independent and dependent variable varying between a negative one (-1) and a positive one (+1), with a zero (0) indicating that no relationship exists between the independent and dependent variable. When sample sizes are small the Fisher's Exact test is used to measure the relationship between the two sets of variables (two distinct groups of participants; their agreement or disagreement to each statement). Kim (2017:154) states that when more than 20% of the expected cell count is less than 5, the Fisher's Exact test is recommended. The SPSS data results showed that the Fisher's Exact test could only be used for analysis purposes. Also, in some instances, no statistics could be calculated, as the results were constant, as both the online questionnaire results and the expert interviews were the same for specific sub-questions.

4.5.1.4 Fisher's exact value and null hypothesis

If the Fisher's value cannot be calculated due to unchanging (constant) results, it is recorded as "N/A" (not applicable) in the cross-tabulation tables. When the Fisher's Exact test produces a 2-tailed P-value greater than 0.05, this indicates there is no statistically significant relationship between the two sets of variables. In other words, agreement or disagreement on each sub-question occurs independently within the groups from the online questionnaire and the expert interviews (Maree *et al*., 2019:300). Conversely, a Fisher Exact test P-value of less than 0.05 demonstrates statistical significance, meaning that the pattern of agreement or disagreement to each sub-question depends on whether the results come from the online questionnaire group or the expert group (Maree *et al*., 2019:299).

In statistical analysis, the null hypothesis is a statement that assumes there is no significant difference or relationship between the groups or variables being compared. When the Fisher Exact test produces a 2-tailed P-value greater than 0.05, the null hypothesis is accepted this means that, based on the collected data, there is no statistically significant difference between the responses of the online questionnaire participants and the expert group (Cook, Cook, & Travers, 2017:2). Conversely, if the P-value is less than 0.05, the null hypothesis is rejected, indicating that a meaningful difference exists between the groups' responses (Maree *et al*.,

2019:299). The null hypothesis serves as a baseline assumption that any observed differences are due to chance rather than a true underlying relationship.

4.5.2 Qualitative data analysis method

Content analysis is a systematic method used to interpret and organise qualitative data by classifying textual information into meaningful categories or themes. This approach allows researchers to identify patterns, trends, and relationships within large volumes of text, transforming complex responses into structured, analysable data. According to Linneberg and Korsgaard (2019:6), qualitative data analysis is the process whereby empirical data such as expert responses to open-ended interview questions are summarised into distinct categories or codes, which can then be examined in depth to draw meaningful conclusions. Content analysis was selected as the preferred method for qualitative data analysis in this study, as it enables the classification of data into categories relevant to the research focus, such as tax legislation necessary for addressing VSAs in trusts (Hall, 2020:184). Maree *et al*. (2019:126) also note that deductive coding is frequently employed alongside content analysis, enhancing its structure and interpretative power.

4.5.2.1 Deductive and inductive coding

In deductive coding one starts with preselected codes followed by a further analysis of the data into secondary data (Linneberg & Korsgaard, 2019:13). In inductive coding, the initial codes are themes that are analysed from the data or text (Linneberg & Korsgaard, 2019:12). A structured approach with *apriori coding* would favour a deductive coding approach (Saldaňa, 2013:65) and has been used in this study.

4.5.2.2 Precoding

Coding is the systematic process of analysing qualitative data and summarising or breaking down the data into categories or codes which assist with the understanding of the qualitative data been analysed (Saldaňa, 2013:9). During the literature review various aspects or areas of CGT and characteristics or components of VSAs linked

to trusts used in estate planning were identified in a process of precoding which address the core elements required for a CGT event; the core elements of CGT events (see section 1.1.2 of Chapter 1) are the existence of an asset; the asset should have a capital nature; a disposal should take place; the proceeds, base cost and value shift as defined in the definition of a VSA should be present (Saldaňa, 2013:19). Research question 1 (Part A) examines the general nature of an asset and is further divided into questions examining a beneficiary's right to a trust asset in relation to the definition of property in terms of donations tax and estate duty (Linneberg & Korsgaard, 2019:11). Research question 2 (Part B) examines if the assets in the trust will be included in gross income and therefore be excluded from the capital gains tax, by applying the seven trustees' actions to the trust structure examined. The remaining core elements of a CGT event are addressed in research questions 3 (Part C); 4 (Part D), 5 (Part E), 6 Part G), and 7 (Part H).

In Diagram 4.2 below the detailed precoding for research questions 1 (Part A) and 2 (Part B) is presented.

Core elements of CGT events		Research question		Detailed questions	Research Objectives
Nature of trust's assets	➡	1. Part A: Asset for CGT purposes?	➡	What is a capital gain or loss?	Primary and secondary 1; 2; 3; 4; 5; 6;7;8
				How to determine the capital nature of an asset"?	Primary and secondary 1; 2; 3; 4; 5; 6;7;8
				Would disposal be excluded from the Eighth Schedule?	Primary and secondary 1; 2; 3; 4; 5; 6;7;8
				Compare to Donation Tax Definition	Primary and secondary 1; 2; 3; 4; 5; 6;7;8
				Compare to Estate Duty Definition	Primary and secondary 1; 2; 3; 4; 5; 6;7;8
				Trustees action	
Capital nature	➡	2. Part B: Capital asset or revenue asset?	➡	Vest an asset in a beneficiary	Primary
				Distribute an asset to a beneficiary	Primary
				Sale of an asset and vest or distribute the gain	Secondary 1
				Appoint a beneficiary to the trust	Secondary 2
				Remove a beneficiary from a trust	Secondary 3
				Appoint a trustee to the trust	Secondary 4
				Remove a trustee from a trust	Secondary 5
				Donate a beneficiary' interest in a trust	Secondary 6
				Other trustees' actions	Secondary 7
				DTC's Report on the taxation trusts impact on VSA	Secondary 8

Diagram 4.2: Detailed precoding for research questions 1 and 2

Moving from left to right in the diagram: in the first column on the far left the various elements of a capital gain or a loss were noted or coded (Saldaňa, 2013:20). The

research questions appear in the third column, the detailed questions and trustees' actions in column five and the matching research objectives in column six. The trustees' actions are directly related to each of the research objectives, which were developed in Chapter 1 of the study, to establish if there are any other trustees' actions that could result in a VSA.

4.5.2.3 Manual coding

Wicks (2017:169) recommends computer-aided qualitative data analysis software for substantial amounts of data, and manual coding for the data analysis of smaller volumes of data. Due to the small sample sizes and the technical nature of the research, manual coding was selected for the analysis of all the interviews conducted (Linneberg & Korsgaard, 2019:22). Excel spreadsheets were used to manually code the responses of the experts to each of the interview questions; whereby similarities, differences and indifferences of each expert's answers were identified in assorted colours on the Excel sheet Saldaňa (Saldana, 2013:27). The manual coding sheets were made available to both the internal and external qualitative consultants who were satisfied with the manual coding conducted (see extract of manual coding of 1 section 1, Part A in Appendix F).

4.6 ETHICS AND VALIDITY

4.6.1 Ethical considerations

The research process was subject to the UNISA Research Ethics policy. The research proposal was approved through ethical clearance to safeguard the researcher, participants, respondents, and the discipline itself. Both the online questionnaire and the specialist interview guide research instruments were subjected to ethical clearance by UNISA's Ethical Review Committee (Lazar, Feng, & Hochheiser Lazar, 2017:473) to mitigate any risks associated with the respondents and the participants in the research, ensuring their prior consent and protecting their confidentiality (see section 4.4.4). The identification of the questionnaire respondents and the interview participants was not made known to the

external specialists, as they were assigned numbers to make them unidentifiable (UNISA Research Ethics, 2016:7).

4.6.1.1 Consent

All interviewees, both local and foreign, were required to sign UNISA-approved consent forms before interviews commenced (UNISA Ethics, 2016:14). These forms outlined that participation was voluntary, uncompensated, and confidential (Lazar *et al*., 2017:472). The online questionnaire respondents were informed of all the ethical requirements in the introduction of the online questionnaire (UNISA RERC Form 1, 2019:24).

4.6.1.2 Confidentiality

The data shared with the external experts did not contain the names of the participants in the interviews (UNISA RERC Form 1, 2019:20). The online questionnaire respondents were also identified by a numerical code generated by QuestionPro. The names of the respondents and the participants may only be made available to UNISA's research ethics committee (Parveen & Showkat, 2017:2).

4.6.1.3 Records storage

All the recorded responses of the each of SA and the foreign specialists' interviews were saved electronically, and hard copies were kept (UNISA RERC Form 1, 2019:23). Furthermore, the recorded responses of each interviewee were verified by them for accuracy purposes. The confirmation of their verification was saved electronically, and hard copies were obtained (Rowlands, 2021:2). The data storage requirements are summarised in the ethical clearance application form (UNISA RERC Form 1, 2019:23).

4.6.2 Study validity, accuracy and reliability

The analysis and corroboration of the findings from the various sources by means of triangulation were aimed at evaluating the validity of the collected data from both

the online questionnaire and the interviews (Dawadi, Shrestha & Giri, 2021:27). The triangulation analysis of the data from the online questionnaire and the interviews enhanced the credibility of the study (Schoonenboom & Johnson, 2017:110). In all cases the final responses were sent to each interviewee to confirm the correctness and accuracy of their responses via a return email (Babbie *et al.*, 2014:276) which added to the trustworthiness of the qualitative data collected.

4.6.2.1 Verification of responses

In all cases. the final responses were sent to each interviewee to confirm the correctness and accuracy of their responses via a return email (Babbie *et al.*, 2014:276), which adds to the trustworthiness of the qualitative data collected. According to Rowlands (2021:2), the verification of the experts of their responses captured via the transcripts adds to the credibility of the data.

4.6.2.2 Trustworthiness

According to Stahl and King (2020:26), trustworthiness refers to the reliability of the study. A study is regarded as dependable when other persons conducting the same test arrive at similar answers. In the research instruments thick and rich descriptions were used to describe the trust structures in detail, to allow the respondents to fully understand the context of the questions (Babbie *et al.,* 2014:277). Thick descriptions also assist to avoiding generalisations and ambiguities in the research questions (Stahl & King, 2020:21). According to Caruth (2023:113), mixed-methods allow for the corroboration or comparison of two sets of data which adds to the trustworthiness of the research findings.

4.6.2.3 Pilot study

A pilot study assists with checking the feasibility of the study and the planning and overall improvement of the study and is conducted prior to commencing with the implementation of the research instruments for the study (Lowe, 2019:117). According to Malmqvist, Hellberg, Mollas, Rose and Shevlin (2019:1), a pilot study

requires pre-testing and assessing the research instruments. All the research instruments used in this study were subjected to pilot studies.

4.6.2.4 Face validity

Face validity can be defined as the process to ensure that the research instruments are practical and properly address the purposes for which they were designed (Allen *et al.,* 2023:153). All the research instruments were scrutinised by both research experts and experts in practice before they were implemented in the field (Allen *et al.,* 2023:154). The experts' recommendations for improvement were implemented to cover the wide range of professionals who deal with trusts (Drost, 2011:106).

4.6.2.5 Triangulation

The mixed-methods approach was selected to enhance the study results by comparing the results of two independent groups of participants (Jiang *et al*., 2022:216). According to Creswell and Plano Clark (2018:219), cross-tabulation could be used to enhance the validity of quantitative and qualitative studies. Furthermore, the cross-tabulation of the findings from both independent groups of the online questionnaire and the interview results can be statistically analysed (White, 2003:179) by using either the Chi-square or the Fisher's Exact test (Nowacki, 2017:20).

4.6.2.6 Consultants' review

The services of external experts were enlisted to assist with both the quantitative and the qualitative data analysis to ensure that all data are correctly captured (UNISA, RERC Form 1, 2019:20). A third consultant reviewed whether the research methodology process was correctly followed to produce accurate and reliable results (Babbie *et al*., 2014:276). Aspects of the validity and ethical considerations of the study have been discussed in this section.

4.7 CHAPTER SUMMARY

In this chapter a research paradigm and a research approach to address the research objectives and to answer the research questions were adequately discussed and motivated. The research design, the research phases, the research instruments, the data collection, the data analysis and the ethics and validity were examined. All the logical research steps commencing from the theoretical approach adopted in this study to the final data analysis and the conclusions were discussed. Ethical factors and factors addressing the validity of the study were addressed. The three key research methodology questions are adequately addressed within this chapter and are summarised below:

Why is the investigation conducted? This research addresses the interpretative knowledge gap by examining South African trustees' actions that may lead to a VSA in resident trusts. *What* theoretical basis will be used? The theoretical basis is a doctrinal analysis of South African, Australian and UK trust-tax law, supported by statutes, revenue guidance, case law and expert insight. *How* will the objectives be met? The study employs a pragmatic; convergent mixed methods approach. Data will be gathered through an online questionnaire and interview guide administered to the respondents and participants, the empirical findings from these tools will then be tri-angulated with the doctrinal analysis for greater accuracy. In the next chapter the quantitative data results are provided for the SA trusts.

CHAPTER 5

QUANTITATIVE RESULTS FOR THE ONLINE QUESTIONNAIRE ON TRUSTS

5.1 INTRODUCTION

This chapter presents the quantitative results generated through the survey-based empirical component of the study, drawing on data obtained from the online questionnaire. The online questionnaire for SA trusts was administered via QuestionPro, with the survey link distributed to potential respondents. Responses were captured in real time and securely stored in the cloud (Ball, 2019:413). Although thirty respondents were initially targeted due to professional constraints (Delice, 2010:2008), thirty-four individuals participated, and thirty-two completed the questionnaire. Each respondent was assigned a random eight-digit code, and no personal identifiers such as names or email addresses were collected, thereby ensuring confidentiality in accordance with UNISA's research ethics requirements (UNISA Research Ethics, 2016:15). The results are summarised using descriptive statistics and are presented solely as results, without interpretation or analysis in this Chapter. The analytical evaluation of these results is undertaken in Chapters 7 and 8. The findings reported here are organised to address the research questions formulated in Chapter 1 and to demonstrate progress toward achieving the study's research objectives, thereby maintaining clear methodological and conceptual alignment with the overarching purpose of the research. This chapter covers the following sections: online respondents demographics (5.2); online questionnaire instrument (5.3); presentation of the online questionnaire results (5.4); discretionary trusts (5.5); and vested trusts (non-discretionary trusts) (5.6). This chapter presents the online questionnaire results of SA trusts, with further analysis provided in Chapters 7 (discretionary trusts) and 8 (non-discretionary trusts).

5.2 ONLINE RESPONDENTS' DEMOGRAPHICS

The same demographic categories from the SA expert and foreign expert interviews were used in the online questionnaire. Both qualitative and quantitative data collection used expert sampling as described in section 4.4.2.1 of Chapter 4. Unlike

the interviewees, online questionnaire respondents were drawn from a larger pool and did not need at least ten years' trust experience or knowledge of both trust types. Demographics are included to show that respondents are professionals familiar with trusts. Tables 5.1 to 5.7 present the demographics of the SA online questionnaire respondents.

5.2.1 Gender demographics

Respondents were asked to specify their gender, and their responses are summarised in Table 5.1 below.

Table 5.1: Gender demographics

	Sub-category	Count	Percent
1	Female	8	23,53%
2	Male	26	76,47%
3	Neutral	0	0,00%
	Total	**34**	**100%**

Most of the respondents were males (76.47%), whilst a small percentage were females (23.53%).

5.2.2 Current position demographics

Respondents were requested to indicate their current work capacity in the seven sub-categories provided in the online questionnaire. Their responses are summarised in Table 5.2 below.

Table 5.2: Current position demographics

	Sub-category	Count	Percent
1	Academic	6	17,65%
2	Partner/Director in private practice	14	41,18%
3	Specialist/Consultant	5	14,71%
4	Manager	7	20,58%
5	Team member	0	0,00%
6	Government/Public official	1	2,94%
7	A combination of the above or other than the above	1	2,94%
	Total	**34**	**100%**

Most of the respondents (94.12%) indicated that they were at managerial level or above. Also, more than half of the respondents (55.89%) were either at partner or at director and/or specialist consultant level, meaning they are the most senior persons within their respective organisations. A small percentage of the respondents (20.59%) indicated that they were at managerial level.

5.2.3 Work environment demographics

Respondents were requested to indicate their current work environment, in the four sub-categories provided in the online questionnaire. Their responses are summarised in Table 5.3 below.

Table 5.3: Work environment demographics

	Sub-category	Count	Percent
1	Internationally Affiliated	2	5,88%
2	National Firm	2	5,88%
3	Small to Medium Sized Firm	22	64,71%
4	Outside Practice	8	23,53%
	Total	**34**	**100%**

Most respondents (76.47%) comprising sub-categories 1 to 3, are currently in practice. Of the 34 respondents, a small proportion (23.53%) were from outside practice. Most of the respondents (64.71%) of the sample population were from small- and medium-sized firms. Both a LexisNexis Review on the legal profession carried out in 2016 and the SAICA (2023) Membership Web Stats also confirm that most of their members in practice are from small- to medium-sized firms. According to the LexisNexis LSSA Review (2016:5), most legal firms (82.5%) are sole practitioners in South Africa. The SAICA (2023) Membership Web Stats report that in January 2023 indicated that most practitioners (77.8%) worked in small- to medium-sized firms, and the majority (56.89%) of the total number of members are practicing as sole practitioners.

5.2.4 Work experience demographics

Respondents were requested to indicate their current work experience by selecting the appropriate number of work years' interval, in the four sub-categories provided to them. Their responses are summarised in Table 5.4 below.

Table 5.4: Work experience demographics

	Sub-category	Count	Percent
1	0 to 2 years	4	11,76%
2	3 to 5 years	9	26,47%
3	6 to 10 years	8	23,53%
4	10 years or more	13	38,24%
	Total	**34**	**100%**

Most respondents of sub-categories 3 and 4 (61.77%) have more than six years of experience. In category 2 (26.47%), a small percentage of respondents indicated that they have at least three years of experience in working with trusts. A small percentage of the respondents (11.76%), that have qualified recently participated in the study and have less than two years of experience working with trusts.

5.2.5 Professional affiliation demographics

Respondents were requested to indicate their current professional affiliations with the seven professional bodies, with an additional category for the SARS in-house specialist, from the eight sub-categories provided in the online questionnaire. It was discovered when conducting the expert sampling (Faraydi, 2019:772) that it was more effective to approach potential respondents directly in their personal capacity, than to send out survey requests to any organisations such as the professional bodies, universities, or professional firms. SARS in-house trust specialists were requested to participate in the online questionnaire, and no responses were received to these invitations. Their responses are summarised in Table 5.5 below.

Table 5.5: Professional affiliation demographics

	Sub-category	Count	Percent
1	South African Institute of Chartered Accountants	16	47,06%
2	Legal Practice Council	8	23,53%
3	South African Institute of Professional Accountants	4	11,76%
4	South African Institute of Tax Practitioners	1	2,94%
5	Institute of Certified Financial Planners	0	0,00%
6	South African Revenue Service Officials	0	0,00%
7	Fiduciary Institute of South Africa	0	0,00%
8	A combination of the above or other than the above	5	14,71%
	Total	**34**	**100%**

Members of all the above eight sub-categories were approached to participate in the online questionnaire. A diversified group of respondents from the different professional bodies participated in the online questionnaire, with the two largest groups being members of SAICA (2023) (47.06%), and members of the Legal Practice Council (23.53%). The tax component was also well represented (61.76%) as sub-categories 1, 3 and 4 of the respondents, who were affiliated to professional bodies that work in the tax field. The respondents that indicated that they were from either a combination of the above or other than the above represented a small group (14.71%) of the respondents. On closer inspection they were from Academia, Investment Consulting, and the Judiciary. Although members of the Fiduciary Institute of South Africa and the Institute of Certified Financial Planners did not participate in the online questionnaire, they were included in the specialist expert interviews. Members from all seven professional bodies selected for this study participated in either in the online questionnaire or expert's interviews of this study. Due to the small number of respondents in each sub-category, it was decided not to provide any descriptive statistics of the professional affiliations of respondents.

5.2.6 Trustee exposure

Respondents were requested to indicate if they are currently acting as trustees for any trusts. Their responses are summarised in Table 5.6 below.

Table 5.6: Demographics of respondents currently acting as a trustee

	Sub-category	Count	Percent
1	Yes, currently acting as a trustee	18	52,94%
2	No, not currently not acting as a trustee	16	47,06%
	Total	**34**	**100%**

Slightly more than half of the respondents (52.94%) indicated that they are currently acting as trustees, which means that they should have the normal experience of the administrative aspects of trusts.

5.2.7 Types of trust exposure

Respondents were requested to indicate they have a working knowledge or not for a discretionary and vested trust. Their responses are summarised in Table 5.7 below.

Table 5.7: Work exposure to types of trusts

Trust type	Discertionary Trusts (Section 1)		Vested TustS (Section 2)	
Sub-category	**Count**	**Percent**	**Count**	**Percent**
Have a working knowledge of Discretionary or Vested Trusts	31	91,18%	24	70,59%
Do not a have working knowledge of Discretionary or Vested Trusts	3	8,82%	10	29,41%
Total	**34**	**100%**	**34**	**100%**

Most of the respondents (91.18%) were familiar with a discretionary trust and completed Section 1 of the questionnaire. This was anticipated, and for this reason discretionary trusts were placed in Section 1 at the beginning of the online questionnaire. Any of the respondents who indicated that they had no working knowledge of a discretionary trust, were automatically taken to the vested trust. A fair number (70.59%) of the respondents proceeded to complete Section 2 for vested trusts. The overall demographics indicate that respondents are professionals, are from a work environment that has exposure to trusts, with most of them having exposure to discretionary trusts. Two of the respondents who did not sufficiently complete section 1 of the online questionnaire were ignored in the data analysis. Those respondents who indicated that they had no working knowledge of a vested trust were automatically stopped from completing section 2 of the online questionnaires.

5.3 ONLINE QUESTIONNAIRE INSTRUMENT

The online questionnaire (Appendix A) consisted of two sections, discretionary trusts (Section 1) and vested trusts (Section 2). Each section included ten parts (Parts A to J), with a total of fifty-two sub-questions for each section. The study used a convergent mixed-methods design (Caruth, 2013:114), and identical sub-questions were presented in both the online questionnaire and the expert interviews. Parts A to J align with the first ten research questions developed for the SA online questionnaire and serve as headings in each section.

5.3.1 Research questions

Part (A) Do beneficiaries' rights or interests in trust assets constitute "property" for purposes of section 55(1) of the Income Tax Act and section 3(2) of the Estate Duty Act, and an "asset" for the purposes of paragraph 1 of the Eighth Schedule given that the CGT definition of "asset" incorporates "property" and is the disposal of such rights excluded from the section 1(1) gross-income definition, which does not define "asset" (Research question 1)?

Part (B) Do any of the actions taken by the trustees, as mentioned in the primary and secondary research objectives 1 to 8, result in gross income and income tax (excluding capital gains) implications, and should they therefore be excluded from a VSA (Research question 2)?

Part (C) Do any of the selected trustees' actions mentioned in the primary and secondary research objectives 1 to 8 result in donations tax, and should they therefore by implication be excluded from a VSA (Research question 3)?

Part (D) Do any of the selected trustees' actions mentioned in the primary and secondary research objectives 1 to 8 result in a paragraph 11(1)(*a*) to (*d*) ordinary disposal of the Eighth Schedule to the Act, and should they therefore be excluded from a VSA (Research question 4)?

Part (E) Are the beneficiaries' interests in a trust, as referred to in the definition of a "VSA" in paragraph 1 of the Eighth Schedule to the Act, considered to be a capital asset for CGT purposes pertaining to trust beneficiaries in discretionary or vested trusts (Research question 5)?

Part (F) How are proceeds and base costs of a VSA quantified in a trust context? Are there examples of VSAs related to trusts, companies, or partnerships in the SARS guides that can provide guidance in determining the value to be placed on a VSA in a trust context (Research question 6)?

Part (G) Do any of the trustees' actions mentioned in the research objectives meet the definition of paragraph 1 of the VSA and does it fall within paragraph 11(1)(*g*) of the Eighth Schedule of the Act (Research question 7)?

Part (H) Do any of the trustees' actions not mentioned in the primary and secondary research objectives 1 to 7 constitute a VSA (Research question 8)?

Part (I) What are the implications for trustees' actions if the recommendations of the DTC's Report on the Feasibility of Wealth Tax in South Africa (DTC, 2018:81) in relation to VSAs are implemented in South Africa on VSAs (Research question 9)?

Part (J) Are there any additional relevant comments which may be applicable to VSAs in trusts (Research question 10)?

5.4 PRESENTATION OF THE ONLINE QUESTIONNAIRE RESULTS

The results of the online questionnaire are presented separately as follows: discretionary trust (Section 1) and vested trust (Section 2), which is the same order in which the questions appeared in the online questionnaire (Appendix A). The results of the questionnaire and the discussions are presented in the same sequence as how the sub-questions appeared in the questionnaire for each part. Each sub-question was presented in the form of a statement in the online questionnaire. Respondents were requested to indicate if they agreed or disagreed with each statement, on a Likert scale ranging from strongly agree (1) to strongly disagree (5) as follows:

1: Strongly agree
2: Moderately agree
3: Uncertain
4: Moderately disagree
5: Strongly disagree

Only two parts of the online questionnaire had open-ended questions. Respondents were requested to provide an additional example of trustees' actions that they

perceived could also result in a VSA (Part H) and any additional comments (Part J) in the dialogue boxes provided in the online questionnaire. The results of the online questionnaire are presented in descriptive statistics tables showing the percentages from the data collected, and the mean for each sub-question as calculated by SPSS software (Taherdoost, 2020:3). The overall mean of specifically combined sub-questions is also provided when meaningful similarities exist within each part of the questionnaire. The results tables for each part of the online questionnaire (Appendix A) parts A to I (excluding part H) and the descriptive statistics from SPSS are provided. The descriptive results are presented in each table using sub-questions as a heading, aggregating “strongly” and “moderately” agreed responses (scores 1 and 2) as “Agreed,” and “strongly” and “moderately” disagreed (scores 4 and 5) as “Disagreed”. Neutral responses (score 3) are labelled “Neutral”. Each part concludes with a summary of its respective results. Open-ended questions (parts H and J) are summarized narratively.

5.5 DISCRETIONARY TRUST RESULTS

The results for the discretionary trust (Section 1 of Appendix A) are presented next.

5.5.1 Part A: Nature of a trust’s assets

How is the nature of a trust’s assets determined, and are there any similarities in the definition of assets or property for income tax, donations tax, CGT, and estate duty purposes (Research question 1)? The respondents had to agree or disagree with each separate statement below, which examines the nature of an asset. The results to all the sub-questions for part A are summarised in Table 5.8 below.

Table 5.8: Descriptive results for a discretionary trust (Part A)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
1.1 The disposal of a capital asset of a discretionary trust could result in either a capital gain or a capital loss.	100%	0%	0%	0%	0%	32	1
1.2 The revenue or capital nature of a discretionary trust's assets or proceeds of such trust's assets can be ascertained by the tests developed in case law.	100%	0%	0%	0%	0%	32	1
1.3 A capital asset of a discretionary trust for capital gains purposes, would be the same as an revenue asset for income tax purposes.	3,1%	3,1%	6,3%	0%	87,5%	32	4.66
1.4 Capital assets of a discretionary trust for capital gains purposes, would also be the same as property for donations tax purposes.	81,3%	9,3%	6,3%	0%	3,1%	32	1.34
1.5 Capital assets of a discretionary trust for capital gains purposes, would the same as property for estate duty purposes.	78,1%	9,3%	6,3%	0%	6,3%	32	1.47
Overall mean for the Part A (questions 1.1; 1.2; 1.4 and 1.5).							**1.20**

5.5.1.1 Disposal of an asset

The disposal of a capital asset of a discretionary trust could either result in a capital gain or a loss (Section 1, Part A: 1.1). All the respondents (100%) were satisfied that the disposal of a capital asset would either result in a capital gain or a loss. The mean score for this question was 1, which indicates that all the respondents agreed with this statement.

5.5.1.2 Capital nature of an asset

The revenue or capital nature of a discretionary trust's assets or proceeds of such trust's assets can be ascertained by the tests developed in case law (Section 1, Part A: 1.2). All the respondents (100%) were satisfied that the revenue and capital nature of an asset can be determined with the tests for capital developed in South African case law over the years. The mean score for this question was 1, which indicates that all the respondents agreed with this statement.

5.5.1.3 Capital asset compared to a revenue asset

A capital asset of a discretionary trust for capital gains tax purposes would be the same as a revenue asset for income tax purposes (Section 1, Part A: 1.3). Most respondents (87.5%) indicated that they disagreed with the statement that a capital asset is the same as a revenue asset. A small percentage of respondents (6.2%) agreed with the statement. A small number of the respondents (6.3%) were neutral.

The mean score for this question was 4.66, which indicates that most of the respondents disagreed with this statement.

5.5.1.4 Capital gains asset compared to a donations tax property

Capital assets of a discretionary trust for capital gains tax purposes would also be similar to property for donations tax purposes (Section 1, Part A: 1.4). Most of the respondents (90.6%) indicated that they agreed that a capital asset for CGT purposes would be similar to property for donations tax purposes. A small percentage of the respondents (6.3%) were neutral. The mean score for this question was 1.34, which indicates that most of the respondents agreed with this statement.

5.5.1.5 Capital gains asset compared to an estate duty property

Capital assets of a discretionary trust for capital gains tax purposes would be similar to property for estate duty purposes (Section 1, Part A: 1.5). Most of the respondents (87.4%) indicated that they agreed with the statement that a capital asset for CGT purposes is similar to property for estate duty purposes. A small percentage of the respondents (6.3%) disagreed with the statement, and a small percentage of the respondents (6.3%) were neutral. The mean score for this question was 1.47, which indicates that most of the respondents agreed with this statement. When calculating the overall mean score for section A (questions 1.1, 1.2, 1.4 and 1.5), the low mean score of 1.20 indicates that most of the respondents agreed with these four statements. Question 1.3 was not included in the overall mean score as the expected mean for this question was to be strongly disagree and would have reduced the overall average mean.

5.5.1.6 Summary of the results (Section 1, Part A)

The following is a summary of the results for discretionary trusts for Part A:

- The mean score of 1 indicates that a disposal of capital asset would either result in a capital gain or a loss.

- The mean score of 1 indicates that the revenue and capital nature of an asset can be determined with the tests for capital developed in South African case law over the years.
- The mean score of 4.66 indicates that a capital asset is different from a revenue asset.
- The mean score of 1.34 indicates that a capital asset for CGT purposes would be similar to property for donations tax purposes.
- The mean score of 1.47 indicates that a capital asset for CGT purposes is similar to property for estate duty purposes.
- The overall mean score for this section was 1.20, which indicates that most of the respondents agreed with all the statements (statements 1.1, 1.2, 1.4 and 1.5) in this section. (Question 1.3 was excluded to avoid distorting the overall mean score, as its expected result differed from the other questions .)

5.5.2 Part B: Income tax (excluding capital gains) implications

Do any of the selected trustee's actions result in any income tax implications (excluding the Eighth Schedule)? (Research question 2). The respondents had to agree or disagree that the trustees' actions below would be excluded from the Eighth Schedule of the Act. The results to all the sub-questions for part B are summarised in Table 5.9 below.

Table 5.9: Descriptive results for a discretionary trust (Part B)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
2.1 The trustees vest the trust's capital assets (80 shares) in beneficiary A.	9,4%	0%	0%	3,1%	87,5%	32	4,59
2.2 The trustees distribute the trust's capital assets (80 shares) to beneficiary A.	15,6%	3,1%	0%	0%	81,3%	32	4,34
2.3 The trustees sell trust capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A.	12,5%	3,1%	0%	0%	84,4%	32	4,41
2.4 Adding a new beneficiary to the trust.	3,1%	3,1%	0,0%	3,1%	90,7%	32	4,75
2.5 Removing beneficiary A from the trust.	3,1%	3,1%	3,1%	0,0%	90,7%	32	4,72
2.6 Appointing a new trustee to the trust	0%	0%	0%	0%	100%	32	5,00
2.7 Removing a trustee from the trust.	0%	0%	0%	0%	100%	32	5,00
Overall Part B mean score (questions 2.1 to 2.7)							**4,69**

5.5.2.1 Vesting an asset

The trustees vest capital assets (80 shares) in beneficiary A (Section 1, Part B: 2.1). Most respondents (90.6%) indicated that they disagreed with the statement that the vesting of a capital asset from a discretionary trust in a beneficiary would result in an income tax (excluding capital gains) implication. A small percentage of the respondents (9.4%) agreed with the statement that the vesting of an asset would have an income tax (gross income) implication. The mean score for this question was 4.59, which indicates that most of the respondents disagreed with this statement.

5.5.2.2 Distributing an asset

The trustees distribute capital assets (80 shares) to beneficiary A (Section 1, Part B: 2.2). Most of the respondents (81.3%) indicated that they disagreed with the statement that the distribution of a capital asset from a discretionary trust to a beneficiary would result in an income tax (excluding capital gains) implication. A small percentage of the respondents (18.7%) agreed with the statement that vesting an asset would have an income tax (gross income) implication. The mean score for this question was 4.34, which indicates that most of the respondents disagreed with this statement.

5.5.2.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at the market value of (R1 200 000) and immediately vests or distributes the capital gain (R800 000) to beneficiary A (Section 1, Part B: 2.3). Most of the respondents (84.4%) indicated that they disagreed with the statement that the sale of a capital asset, followed by the immediate vesting or distribution of a capital gain to a discretionary trust beneficiary would result in an income tax (excluding capital gains) implication. A small percentage of the respondents (15.6%) agreed with the statement that vesting an asset would have an income tax (gross income) implication. The mean score for this question was 4.41, which indicates that most of the respondents disagreed with this statement.

5.5.2.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 1, Part B 2.4). Most of the respondents (93.8%) disagreed that the adding of a new beneficiary to a discretionary trust would result in an income tax (excluding capital gains) implication, while a small percentage of the respondents agreed with this statement. The mean score for this question was 4.75, which indicates that most of the respondents disagreed with this statement. The high mean score of 4.75 also indicates that most of the respondents disagreed that a gross income tax implication will arise when a discretionary beneficiary is added to a discretionary trust.

5.5.2.5 Removing a beneficiary

Removing beneficiary, A from the trust (Section 1, Part B: 2.5). Most of the respondents (90.7%) indicated that they disagreed with the statement that the removal of a beneficiary from a discretionary trust would result in an income tax (excluding capital gains) implication. The mean score for this question was 4.72, which indicates that most of the respondents disagreed with this statement.

5.5.2.6 Appointing a trustee

Appointing a trustee to the trust (Section 1, Part B, 2.6). All the respondents (100%) indicated that they disagreed with the statement that the appointment of a new trustee to a discretionary trust would result in an income tax (excluding capital gains) implication. The mean score for this question was 5, which indicates that all the respondents disagreed with this statement.

5.5.2.7 Removing a trustee

Removing a trustee from the trust (Section 1, Part B:2.7). All the respondents (100%) indicated that they disagreed with the statement that the removal of a trustee from a discretionary trust would result in an income tax (excluding capital gains) implication. The mean score for this question was 5, which indicates that all the respondents disagreed with this statement. The overall mean score for the

statements (2.1 to 2.7 of the online questionnaire) in this section was 4.69, which indicates that most of the respondents disagreed that the seven trustees' actions addressed in these statements will result in a gross income implication.

5.5.2.8 Summary of the results (Section 1, Part B)

The following is a summary of the results regarding the seven trustees' actions addressed:

- The mean scores for vesting (4.59) or for distributing (4.34) a capital asset in, or to a discretionary beneficiary indicate that no income tax (excluding capital gains) implication would occur.
- The mean score (4.41) for when a capital asset is sold, and the resultant capital gain is either vested in or distributed to a discretionary beneficiary indicates that no income tax (excluding capital gains) implication would occur.
- The mean scores when a new discretionary beneficiary is added (4.75) to or removed (4.72) from a discretionary trust indicate that no income tax (excluding capital gains) implication would occur.
- The mean scores when a trustee is appointed to (5) or removed (5) from a discretionary trust indicate that no income tax (excluding capital gains) implication would occur.
- The overall mean score of 4.69 indicates that no income tax (excluding capital gains) implication will arise from the seven trustees' actions assessed in this section.

5.5.3 Part C: Donations tax implications

Do any of the selected trustee's actions or consent of the beneficiaries result in any donations tax implications (Research question 3)? Respondents had to agree or disagree with the first four specific statements in Part C, which address donations in general. Respondents had to agree or disagree that the last seven statements (trustees' actions) would result in donations tax implications. The results to all the sub-questions for Part C are summarised in Table 5.10 below.

Table 5.10: Descriptive results for a discretionary trust (Part C)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
3.1.1 If beneficiaries donate a discretionary interest, from one beneficiary to another beneficiary, donations tax could be applicable.	3,2%	12,9%	3,2%	6,5%	74,2%	31	4.35
3.1.2 If the trustees donate a discretionary interest from one beneficiary to another beneficiary, without the consent of the beneficiaries, donations tax could be applicable.	3,2%	6,5%	6,5%	12,9%	70,9%	31	4.42
3.1.3 If a donation of a discretionary interest from one beneficiaries to another beneficiary at full market value, a disposal in terms of paragraph of 11(1)(*a*) of the Eighth Schedule would occur.	12,9%	12,9%	6,5%	6,5%	61,2%	31	3.9
3.1.4 if a donation of a discretionary interest from one beneficiaries to another beneficiary at an inadequate value, a disposal in terms of paragraph of 11(1)(*g*) of the Eighth Schedule would occur.	12,9%	3,2%	6,5%	3,2%	74,2%	31	4.23
3.2.1 The trustees vest capital assets (80 shares) in beneficiary A.	9,7%	0%	0%	0%	90,3%	31	4.61
3.2.2 The trustees distribute capital assets (80 shares) to beneficiary A.	16,1%	0%	0%	0%	83,9%	31	4.35
3.2.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	16,1%	0%	0%	0%	83,9%	31	4.35
3.2.4 Adding a new beneficiary to the trust.	3,2%	3,2%	0%	0%	93,6%	31	4.77
3.2.5 Removing beneficiary A from the trust.	0%	3,2%	0%	6,5%	90,3%	31	4.84
3.2.6 Appointing a new trustee to the trust.	0%	0%	0%	0%	100%	31	5
3.2.7 Removing a trustee from the trust.	0%	0%	0%	0%	100%	31	5
Overall Part C mean score (questions 3.2.1 to 3.2.7)							**4.70**

5.5.3.1 Donating a discretionary interest with consent

If beneficiaries donate a discretionary interest from one beneficiary to another beneficiary, donations tax could be applicable (Section 1, Part C: 3.1.1). Most of the respondents (80.7%) indicated that they disagreed with the statement that a donation of a discretionary interest in a trust from one beneficiary to another beneficiary would result in donations tax implications. A small percentage of respondents (16.1%) agreed with this statement. Also, a small number of the respondents (3.2%) were neutral in relation to this statement. The mean score for this question was 4.35, which indicates that most of the respondents disagreed with this statement.

5.5.3.2 Donating a discretionary interest without consent

If the trustees donate a discretionary interest from one beneficiary to another beneficiary, without the consent of the beneficiaries, donations tax could be applicable (Section 1, Part C: 3.1.2). Most of the respondents (83.8%) indicated that they disagreed with the statement that a donation of a discretionary interest in a trust from one beneficiary to another beneficiary, without the consent of the beneficiaries, would result in donations tax implications. A small percentage of the

respondents (9.7%) agreed with the statement. Also, a small number of the respondents (6.5%) were neutral in relation to this statement. The mean score for this question was 4.42, which indicates that most of the respondents disagreed with this statement.

5.5.3.3 Donating a discretionary interest result in a paragraph 11(1)(*a*) disposal

If a donation of a discretionary interest from one beneficiary to another beneficiary is made at full market value, a disposal in terms of paragraph of 11(1)(*a*) of the Eighth Schedule would occur (Section 1, Part C: 3.1.3). Most of the respondents (67.7%) indicated that they disagreed with the statement that a donation of a discretionary interest in a trust from one beneficiary to another beneficiary for no consideration in return (deemed to be made at full market value) would result in a paragraph 11(1)(*a*) disposal. A small percentage of the respondents (25.8%) agreed with this statement. Also, a small number of the respondents (6.5%) were neutral in relation to this statement. The mean score for this question was 3.9, which indicates that most of the respondents disagreed with this statement.

5.5.3.4 Donating a discretionary interest result in a paragraph 11(1)(*g*) disposal

A donation of a discretionary interest from one beneficiary to another beneficiary at an inadequate consideration would result in a disposal in terms of paragraph 11(1)(*g*) of the Eighth Schedule (Section 1, Part C: 3.1.4). Most of the respondents (77.4%) indicated that they disagreed with the statement that a donation of a discretionary interest in a trust from one beneficiary to another beneficiary at an inadequate consideration, would result in a paragraph 11(1)(*g*) disposal. A small percentage of the respondents (16.1%) agreed with this statement. Also, a small number of the respondents (6.5%) were neutral in relation to this statement. The mean score for this question was 4.23, which indicates that most of the respondents disagreed with this statement.

5.5.3.5 Vesting an asset

The trustees vest capital assets (80 shares) in beneficiary A (Section 1, Part C: 3.2.1). Most of the respondents (90.3%) indicated that they disagreed with the statement that the vesting of a capital asset in a beneficiary would result in donations tax implications. A small percentage of the respondents (9.7%) agreed with the statement. The mean score for this question was 4.61, which indicates that most of the respondents disagreed with this statement.

5.5.3.6 Distributing an asset

The trustees distribute capital assets (80 shares) to beneficiary A (Section 1, Part C: 3.2.2). Most of the respondents (83.9%) indicated that they disagreed with the statement that the distribution of a capital asset to a beneficiary would result in donations tax implications. A small percentage of the respondents (16.1%) agreed with this statement. The mean score for this question was 4.35, which indicates that most of the respondents disagreed with this statement.

5.5.3.7 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000) and immediately vest or distribute the capital gain (R800 000) to beneficiary A (Section 1, Part C: 3.2.3). Most of the respondents (83.9%) indicated that they disagreed with the statement that the sale of a capital asset, and the subsequent vesting or distribution of the resultant capital gain in or to a beneficiary, would result in donations tax implications. A small percentage of the respondents (16.1%) agreed with the statement. The mean score for this question was 4.35, which indicates that most of the respondents disagreed with this statement.

5.5.3.8 Adding a beneficiary

Adding a new beneficiary to the trust (Section 1, Part C: 3.2.4). Most of the respondents (93.6%) indicated that they disagreed with the statement that the adding of a new discretionary beneficiary to a discretionary trust would result in

donations tax implications. A small percentage of the respondents (6.4%) agreed with the statement. The mean score for this question was 4.77, which indicates that most of the respondents disagreed with this statement.

5.5.3.9 Removing a beneficiary

Removing beneficiary, A from the trust (Section 1, Part C: 3.2.5). Most of the respondents (96.8%) indicated that they disagreed with the statement that the removal of a discretionary beneficiary from a discretionary trust would result in donations tax implications. A small percentage of the respondents (3.2%) agreed with the statement. The mean score for this question was 4.84, which indicates that most of the respondents disagreed with this statement.

5.5.3.10 Appointing a trustee

Appointing a trustee to the trust (Section 1, Part C: 3.2.6). All the respondents (100%) indicated that they disagreed with the statement that the appointment of a new trustee to a discretionary trust would result in donations tax implications. The mean score for this question was 5, which indicates that all the respondents disagreed with this statement.

5.5.3.11 Removing a trustee

Removing a trustee from the trust (Section 1, Part C: 3.2.7). All the respondents (100%) indicated that they disagreed with the statement that the removal of a trustee from a discretionary trust would result in donations tax implications. The mean score for this question was 5, which indicates that all the respondents disagreed with this statement. The overall mean score for the statements (3.2.1 to 3.2.7 of the online questionnaire) in this section was 4.70, which indicates that most of the respondents disagreed that the seven trustees' actions examined in this study will result in a donations tax implication.

5.5.3.12 Summary of the results for a discretionary trust (Section 1, Part C)

The following is a summary of the results for a discretionary trust for Part C:

- The mean score of 4.35 indicates that a donation of a discretionary interest in a trust from one beneficiary to another beneficiary which indicates that the respondents are of the view that it would not result in donations tax implications.
- The mean score of 4.42 indicates that a donation of a discretionary interest in a discretionary trust from one beneficiary to another beneficiary, without the consent of the beneficiaries, would not result in donations tax implications.
- The mean score of 3.90 indicates that a donation of a discretionary interest in a discretionary trust from one beneficiary to another beneficiary at full market value, would not result in a paragraph 11(1)(*a*) disposal.
- The mean score of 4.23 indicates that a donation of a discretionary interest in a discretionary trust from one beneficiary to another beneficiary at an inadequate consideration would not result in a paragraph 11(1)(*g*) disposal.
- The mean scores for vesting (4.61) or for distributing (4.35) a capital asset in, or to a discretionary beneficiary, indicate that no donations tax implications would occur.
- The mean score of 4.35 when a capital asset is sold, and the resultant capital gain that is either vested in or distributed to a discretionary beneficiary, indicates that no donations tax implication would occur.
- The mean scores when a discretionary beneficiary is added to (4.77) or removed from (4.84) a discretionary trust indicate that no donations tax implications would occur.
- The mean scores when a trustee is appointed to (5) or removed from (5) a discretionary trust indicate that no donations tax implications would occur.
- The overall mean score of 4.70 indicates that no donations tax implications will arise from the seven trustees' actions assessed (statements 3.2.1 to 3.2.7 of the online questionnaire) in this section.

5.5.4 Part D: Ordinary disposal implications

Do any of the selected trustee's actions fall under paragraph 11(1)(*a*) to (*f*) of the Eighth Schedule? (Research question 4). The respondents had to agree or disagree that the seven trustees' actions below would result in a paragraph 11(1)(*a*) to (*f*) disposal of the Eighth Schedule. The results of all the statements for part D are summarised in Table 5.11 below.

Table 5.11: Descriptive results for a discretionary trust (Part D)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
4.1 The trustees vest capital assets (80 shares) in beneficiary A.	93,6%	3,2%	0%	0%	3,2%	32	1.16
4.2 The trustees distribute capital assets (80 shares) to beneficiary A.	96,8%	3,2%	0%	0%	0%	32	1.03
4.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	93,5%	6,5%	0%	0%	0%	31	1.26
4.4 Adding a new beneficiary to the trust.	3,2%	3,2%	6,5%	0%	87,1%	31	4.65
4.5 Removing beneficiary A from the trust.	3,2%	3,2%	6,5%	0%	87,1%	32	4.65
4.6 Appointing a new trustee to the trust.	3,2%	0,0%	3,2%	0%	93,6%	32	4.81
4.7 Removing a trustee from the trust.	3,2%	0,0%	3,2%	0%	93,6%	32	4.81
Overall Part D mean score (questions 4.1 to 4.3)							**1.15**
Overall Part D mean score (questions 4.4 to 4.7)							**4.73**

5.5.4.1 Vesting an asset

The trustees' vested capital assets (80 shares) in beneficiary A (Section 1, Part D: 4.1). Most of the respondents (96.8%) agreed with the statement that a paragraph 11(1)(*a*) to (*f*) disposal would occur when a capital asset is vested in a beneficiary of the trust. Only 3.2% of the respondents disagreed with this statement. The mean score for this question was 1.16, which indicates that most of the respondents agreed with this statement.

5.5.4.2 Distributing an asset

The trustees distribute capital assets (80 shares) to beneficiary A (Section 1, Part D: 4.2). All the respondents (100%) agreed with the statement that a paragraph 11(1)(*a*) to (*f*) disposal would occur when a capital asset is distributed to a beneficiary of the trust. The mean score for this question was 1.03, which indicates that all the respondents agreed with this statement.

5.5.4.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000) and immediately vests or distributes the capital gain (R800 000) to beneficiary A (Section 1, Part D: 4.3). All the respondents (100%) agreed with the statement that a paragraph 11(1)(*a*) to (*f*) disposal would occur when a capital asset is sold, and the resultant capital gain is subsequently vested or distributed to a beneficiary. The mean score for this question was 1.26, which indicates that all the respondents agreed with this statement.

5.5.4.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 1, Part D: 4.4). Most of the respondents (87.1%) indicated that they disagreed with the statement that the adding of a new discretionary beneficiary to a discretionary trust would result in a paragraph 11(1)(*a*) to (*f*) disposal. A small percentage of respondents (6.4%) agreed with the statement. Also, a small number of the respondents (6.5%) were neutral in relation to this statement. The mean score for this question was 4.65, which indicates that most of the respondents disagreed with this statement.

5.5.4.5 Removing a beneficiary

Removing beneficiary, A from the trust (Section 1, Part D: 4.5). Most of the respondents (87.1%) indicated that they disagreed with the statement that the removal of a discretionary beneficiary from a trust would result in a paragraph 11(1)(*a*) to (*f*) disposal. A small percentage of the respondents (6.4%) agreed with the statement. Also, a minority of the respondents (6.5%) were neutral regarding this statement. The mean score for this question was 4.65, which indicates that most of the respondents disagreed with this statement.

5.5.4.6 Appointing a trustee

Appointing a new trustee to the trust (Section 1, Part D: 4.6). Most of the respondents (93.6%) indicated that they disagreed with the statement that the

appointment of a new trustee to a discretionary trust would result in a paragraph 11(1)(*a*) to (*f*) disposal. Also, a small number of the respondents (3.2%) agreed with the statement. A small percentage of the respondents (3.2%) were neutral regarding this statement. The mean score for this question was 4.81, which indicates that most of the respondents disagreed with this statement.

5.5.4.7 Removing a trustee

Removing a trustee from the trust (Section 1, Part D: 4.7). Most of the respondents (93.6%) indicated that they disagreed with the statement that the removal of a trustee from a discretionary trust would result in a paragraph 11(1)(*a*) to (*f*) disposal. A small minority of the respondents (3.2%) agreed with the statement, while a small percentage of the respondents (3.2%) were neutral in relation to this statement. The mean score for this question was 4.81, which indicates that most of the respondents disagreed with this statement. The overall mean score for the first three statements (4.1 to. 4.3) in this section was 1.15, which indicates that most of the respondents agreed that the trustees' actions will result in a paragraph 11(1)(*a*) to (*f*) disposal. The overall mean score for the last four statements (4.4 to 4.7) in this section was 4.81, which indicates that most of the respondents disagreed that the trustees' actions will result in a paragraph 11(1)(*a*) to (*f*) disposal.

5.5.4.8 Summary of the results for a discretionary trust (Section 1, Part D)

The following is a summary of the results for a discretionary trust for Part D:

- The mean scores for vesting (1.16) or for distributing (1.03) a capital asset in, or to a discretionary beneficiary, indicate that a paragraph 11(1)(*a*) to (*f*) disposal would occur.
- The mean score of 1.26 when a capital asset is sold, and the resultant capital gain is either vested in or distributed to a discretionary beneficiary, indicates that a paragraph 11(1)(*a*) to (*f*) disposal would occur.

- The mean scores when a discretionary beneficiary is added to (4.65) or removed from (4.65) a discretionary trust indicate that a paragraph 11(1)(*a*) to (*f*) disposal would not occur.
- The mean scores when a trustee is appointed to (4.81) or removed from (4.81) a discretionary trust indicate that no paragraph 11(1)(*a*) to (*f*) disposal would occur.
- The overall mean score of 1.15 for the first three statements indicates that a paragraph 11(1)(*a*) to (*f*) disposal will arise from the trustees' actions (statements 4.1 to 4.3 of the online questionnaire) in this section.
- The overall mean score of 4.73 for the last four questions in this section indicates that no paragraph 11(1)(*a*) to (*f*) disposal will arise from the trustees' actions (statements 4.4 to 4.7 of the online questionnaire) in this section.

5.5.5 Part E: Beneficiaries' interest in a trust

Are the beneficiaries' interest in a trust, as described in the definition of a VSA in paragraph 1 of the Eighth Schedule, considered to be a capital asset of the beneficiary for capital gains tax purposes, in each of the two types of trusts examined in this study, namely: a discretionary or a vested trust? (Research question 5). The respondents had to agree or disagree that the disposal of a discretionary interest in a discretionary trust would result in a capital gain or loss. The results to the sub-statement for part E are summarised in Table 5.12 below.

Table 5.12: Descriptive results for a discretionary trust (Part E)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
5.1 A disposal of discretionary interest in a trust's capital asset by a beneficiary, could result in a capital gain or a capital loss for the beneficiary.	76,7%	6,7%	0%	3,3%	13,3%	30	1.7

5.5.5.1 Discretionary interest in a trust

A disposal of discretionary interest in a trust's capital asset by a beneficiary could result in a capital gain or loss for the beneficiary (Section 1, Part E: 5.1). Most of the respondents (83.4%) indicated that they agreed with the statement that the disposal

of a discretionary beneficiary's interest in a discretionary trust could be considered a capital asset of the beneficiary for CGT purposes. A small number of the respondents (16.6%) disagreed with the statement. The mean score for this question was 1.7, which indicates that most of the respondents agreed with this statement.

5.5.5.2 Summary of the results for a discretionary trust (Section 1, Part E)

The mean score was 1.7, indicating that a discretionary beneficiary's interest in a trust could be a capital asset for CGT purposes.

5.5.6 Part F: Measuring a VSA

What is meant by "value shifting"? How is it measured in the context of trusts, and how are the proceeds and base cost determined in a VSA? (Research question 6). The respondents had to agree or disagree that the various components of calculating a capital gain or loss for a VSA as defined in paragraphs 35(2) (proceeds) and 23 (base cost) of the Eighth Schedule, are present for the trustees' actions assessed in this study. The results to the sub-statement for part F are summarised in Table 5.13 below.

Table 5.13: Descriptive results for a discretionary trust (Part F)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
6.1 The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	63,3%	23,3%	0%	3,4%	10,0%	30	1.73
6.2 A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	20%	3,3%	0%	6,7%	70%	30	4.03
6.3 The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets before any of the seven trustees' actions mentioned previously can be measured.	86,7%	3,3%	0%	3,3%	6,7%	30	1.4
Overall Part F mean score (questions 6.1 to 6.3)							**2.39**

5.5.6.1 Measuring the market value of a VSA

The market value of each of the beneficiaries' interests (beneficiaries A, B, and C) in the underlying trust assets, before and after any of the seven trustees' actions

mentioned previously can be measured (Section 1, Part F: 6.1). Most of the respondents (86.6%) indicated that they agreed with the statement that the market value of a beneficiary's interest in the underlying assets of a discretionary trust can be measured before the trustees' actions take place. A small percentage of the respondents (13.4%) disagreed with the statement. The mean score for this question was 1.73, which indicates that most of the respondents agreed with this statement.

5.5.6.2 Measuring a value shift of a VSA

A possible reduction in the market value of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust assets before and after any of the seven trustees' actions mentioned previously can be measured (Section 1, Part F: 6.2). Most of the respondents (76.7%) indicated that they disagreed with the statement that a reduction in the market value of a beneficiary's interest in the underlying assets of a discretionary trust can be measured after the trustees' actions have taken place. A small percentage of the respondents (23.3%) agreed with the statement. The mean score for this question was 4.03, which indicates that most of the respondents disagreed with this statement.

5.5.6.3 Measuring the base cost of a VSA

The base cost of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust assets before any of the seven trustees' actions mentioned previously can be measured (Section 1, Part F: 6.3). Most of the respondents (90%) indicated that they agreed with the statement that the base cost of a beneficiary's interest in the underlying assets of a discretionary trust can be measured before the trustees' actions have taken place. A small percentage of the respondents (10%) disagreed with the statement. The mean score for this question was 1.40, which indicates that most of the respondents agreed with this statement. The overall mean score for the statements in this section was 2.39, which indicates that most of the respondents agreed with these statements.

5.5.6.4 Summary of the results for a discretionary trust (Section 1, Part F)

The following is a summary of the results regarding a beneficiary's interest in the underlying assets of a discretionary trust:

- The market value of a beneficiary's interest in the underlying assets of a trust can be measured before the trustees' actions have taken place, as indicated by the mean score of 1.73 obtained.
- The reduction in the market value of a beneficiary's interest in the underlying assets of a discretionary trust cannot be measured after the trustees' actions have taken place, as is evident from the mean score of 4.03 obtained.
- The base cost of a beneficiary's interest in the underlying assets of a discretionary trust can be measured before the trustees' actions have taken place, as indicated by the mean score of 1.40 obtained.

5.5.7 Part G: Value shifting disposal implications

Do any of the selected trustees' actions meet the definition of a VSA, and does it fall under paragraph 11(1)(*g*) of the Eighth Schedule? (Research question 7). The respondents had to agree or disagree that the seven trustees' actions below would result in a paragraph 11(1)(*g*) disposal of the Eighth Schedule. The results to all the sub-statements for part G are summarised in Table 5.14 below.

Table 5.14: Descriptive results for a discretionary trust (Part G)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
7.1 The trustees vest capital assets (80 shares) in beneficiary A.	13,3%	3,3%	0%	6,7%	76,7%	30	4.30
7.2 The trustees distribute capital assets (80 shares) to beneficiary A.	16,7%	3,3%	0%	6,7%	73,3%	30	4.17
7.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gian (R800 000) to beneficiary A.	6,7%	6,7%	0%	6,7%	79,9%	30	4.47
7.4 Adding a new beneficiary to the trust.	0%	3,3%	3,3%	3,3%	90,1%	30	4.80
7.5 Removing beneficiary A from the trust.	0%	0%	3,3%	3,3%	93,4%	30	4.90
7.6 Appointing a new trustee to the trust.	0%	0%	3,3%	3,3%	93,4%	30	4.90
7.7 Removing a trustee from the trust.	0%	0%	3,3%	3,3%	93,4%	30	4.90
Overall Part G mean score (questions 7.1 to 7.7)							**4.63**

5.5.7.1 Vesting an asset

The trustees vest capital assets (80 shares) in beneficiary A (Section 1, Part G: 7.1). Most of the respondents (83.4%) disagreed with the statement that a paragraph 11(1)(*g*) disposal would occur when a capital asset is vested in a beneficiary of a discretionary trust. A small percentage of the respondents (16.6%) agreed with this statement. The mean score for this question was 4.3, which indicates that most of the respondents disagreed with this statement.

5.5.7.2 Distributing an asset

The trustees distribute capital assets (80 shares) to beneficiary A (Section 1, Part G: 7.2). Most of the respondents (80%) disagreed with the statement that a paragraph 11(1)(*g*) disposal would occur when a capital asset is distributed to a beneficiary of a discretionary trust. A small percentage of the respondents (20%) agreed with this statement. The mean score for this question was 4.17, which indicates that most of the respondents disagreed with this statement.

5.5.7.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000) and immediately vests or distributes the capital gain (R800 000) to beneficiary A (Section 1, Part G: 7.3). Most of the respondents (86.6%) disagreed with the statement that a paragraph 11(1)(*g*) disposal would occur when a capital asset is sold, and the resultant capital gain is subsequently vested in or distributed to a beneficiary. A small percentage of the respondents (13.4%) agreed with this statement. The mean score for this question was 4.47, which indicates that most of the respondents disagreed with this statement.

5.5.7.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 1, Part G: 7.4). Most of the respondents (93.4%) indicated that they disagreed with the statement that the adding of a new discretionary beneficiary to a discretionary trust would result in a

paragraph 11(1)(*a*) to (*f*) disposal. A small percentage of the respondents (3.3%) agreed with the statement, while 3.3% of the respondents were neutral in relation to this statement. The mean score for this question was 4.80, which indicates that most of the respondents disagreed with this statement.

5.5.7.5 Removing a beneficiary

Removing beneficiary, A from the trust (Section 1, Part G: 7.5). Most of the respondents (96.7%) indicated that they disagreed with the statement that the removal of a discretionary beneficiary from a discretionary trust would result in a paragraph 11(1)(*g*) disposal. A small percentage of the respondents (3.3%) were neutral in relation to this statement. The mean score for this question was 4.90, which indicates that most of the respondents disagreed with this statement.

5.5.7.6 Appointing a trustee

Appointing a new trustee to the trust (Section 1, Part G: 7.6). Most of the respondents (96.7%) indicated that they disagreed with the statement that the appointment of a new trustee to a discretionary trust would result in a paragraph 11(1)(*g*) disposal. A small percentage of the respondents (3.3%) were neutral regarding this statement. The mean score for this question was 4.90, which indicates that most of the respondents disagreed with this statement.

5.5.7.7 Removing a trustee

Removing a trustee from the trust (Section 1, Part G: 7.7). Most of the respondents (96.7%) indicated that they disagreed with the statement that the removal of a trustee from a discretionary trust would result in a paragraph 11(1)(*g*) disposal. A small percentage of the respondents (3.3%) were neutral regarding this statement. The mean score for this question was 4.90, which indicates that most of the respondents disagreed with this statement. The overall mean score for the first seven statements (4.1 to. 4.7 of the online questionnaire) in this section was 4.63, which indicates that most of the respondents disagreed that the seven trustees' actions examined in this study, will result in a paragraph 11(1)(*g*) disposal.

5.5.7.8 Summary of the results for a discretionary trust (Section 1, Part G)

The following is a summary of the results for a discretionary trust for Part G:

- The mean scores for vesting (4.30) or for distributing (4.17) a capital asset, in or to a discretionary beneficiary, indicate that a paragraph 11(1)(*g*) disposal would not occur.
- The mean score of 4.47 when a capital asset is sold, and the resultant capital gain is either vested in or distributed to a discretionary beneficiary, indicates that a paragraph 11(1)(*g*) disposal would not occur.
- The mean scores when a discretionary beneficiary is added to (4.80) or removed from (4.90) a discretionary trust indicate that a paragraph 11(1)(*g*) disposal would not occur.
- The mean scores when a trustee is appointed to (4.90) or removed from (4.90) a discretionary trust indicate that no paragraph 11(1)(*g*) disposal would occur.
- The overall mean score of 4.63 indicates that no paragraph 11(1)(*g*) disposal will arise from the trustees' actions outlined in sections 4.1 to 4.7 of the online questionnaire.

5.5.8 Part H: Other trustees' actions

Do any other possible trustees' actions not mentioned in the main research objective or secondary research objectives (1) to (4) constitute a VSA? (Research question 8). Respondents were requested to discuss and provide detailed examples of any other trustees' actions (excluding the seven trustees' actions examined in the previous sections and donations of discretionary interests between beneficiaries) for a discretionary trust that may result in a VSA in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act. Their responses were as follows:

- The trustees, with full permission, donate assets to third parties that are not officially connected as per the Act, but in real life has some connection to the beneficiaries.

- One respondent indicated that he has not seen it in practice, but that there is a possibility that, when a private company issue shares to another party other than the trust for a nominal consideration and this course of action is ratified by the trustees of the trust (representing the trust), it may result in a VSA.
- A discretionary interest in the trust structure provided is a 'hope' and cannot result in a VSA before vesting has taken place.

5.5.9 Part I: The DTC's recommendations implications

What are the implications of the DTC's recommendations on VSAs? (Research question 9). The respondents had to agree or disagree with a specific statement on the DTC's recommendations, followed by seven statements on whether the trustees' actions below would result in a paragraph 11(1)(*g*) disposal of the Eighth Schedule if the DTC's recommendations on trusts would be implemented. The results to all the statements for part G are summarised in Table 5.15 below.

Table 5.15: Descriptive results for a discretionary trust (Part I)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
9.1 The DTC Recommendations on trusts recommends that a discretionary trust's income or capital income, should be taxed in the trust, effectively negating the attribution rules of taxing any taxable income or capital income in the hands of the beneficiaries of a discretionary trust, before any trust asset or income is vested or distributed to the beneficiary.	83,9%	3,2%	0%	0%	12,9%	30	1.55
9.2.1 The trustees vest trust's capital assets (80 shares) in beneficiary A.	10,0%	3,3%	3,3%	6,7%	76,7%	29	4.37
9.2.2. The trustees distribute trust's capital assets (80 shares) to beneficiary A.	6,9%	6,9%	3,4%	6,9%	75,9%	30	4.38
9.2.3 The trustees sell trust assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	6,7%	3,3%	3,3%	10%	76,7%	30	4.47
9.2.4 Adding a new beneficiary to the trust.	0,0%	0,0%	3,4%	6,9%	89,7%	29	.
9.2.5 Removing beneficiary A from the trust.	0,0%	0,0%	6,7%	6,7%	86,6%	30	4.80
9.2.6 Appointing a new trustee to the trust.	0,0%	0,0%	6,7%	6,7%	86,6%	30	4.80
9.2.7 Removing an existing trustee from the trust.	0,0%	0,0%	6,7%	6,7%	86,6%	30	4.80
Overall Part I mean score (questions 9.2.1 to 9.2.7)							4.64

5.5.9.1 Understanding of the DTC's recommendations

The DTC's recommendations on trusts indicate that a discretionary trust's income or capital income should be taxed in the trust, effectively negating the attribution rules of taxing any taxable income or capital income in the hands of the beneficiaries

of a discretionary trust, before any trust asset or income is vested or distributed to a trust beneficiary (Section 1, Part I: 9.1.) Most of the respondents (87.1%) agreed with the statement that if the DTC's recommendations for discretionary trusts were implemented, the attribution rules of the trust's income or capital gain to a trust's beneficiary would be negated. A small percentage of the respondents (12.9%) disagreed with this statement. The mean score for this question was 1.55, which indicates that most of the respondents agreed with this statement.

5.5.9.2 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 1, Part I: 9.2.1). Most of the respondents (83.4%) disagreed with the statement that a paragraph 11(1)(*g*) disposal would occur when a capital asset is vested in a beneficiary of a discretionary trust. A small percentage of the respondents (13.3%) agreed with this statement. The mean score for this question was 4.37, which indicates that most of the respondents disagreed with this statement.

5.5.9.3 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 1, Part I: 9.2.2). Most of the respondents (82.8%) disagreed with the statement that a paragraph 11(1)(*g*) disposal would occur when a capital asset is distributed to a beneficiary of a discretionary trust. A small number of the respondents (13.8%) agreed with this statement. The mean score for this question was 4.38, which indicates that most of the respondents disagreed with this statement.

5.5.9.4 Sale of an asset and vesting or distributing the capital gain

The trustees sell trust assets (80 shares) at market value (R1 200 000) and immediately vests or distributes the capital gain (R800 000) to beneficiary A (Section 1, Part I: 9.2.3). Most of the respondents (86.7%) disagreed with the statement that a paragraph 11(1)(*g*) disposal would occur when a capital asset is sold, and the resultant capital gain is subsequently vested or distributed to a beneficiary. A small number of the respondents (10%) agreed with this statement. The mean score for

this statement was 4.47, which indicates that most of the respondents disagreed with this statement.

5.5.9.5 Adding a beneficiary

Adding a new beneficiary to the trust (Section 1, Part I: 9.2.4). Most of the respondents (96.6%) indicated that they disagreed with the statement that the adding of a new discretionary beneficiary to a discretionary trust would result in a paragraph 11(1)(*a*) to (*f*) disposal. A small percentage of the respondents (3.4%) were neutral regarding this statement. The mean score for this question was 4.86, which indicates that most of the respondents disagreed with this statement.

5.5.9.6 Removing a beneficiary

Removing beneficiary, A from the trust (Section 1, Part I: 9.2.5). Most of the respondents (93.3%) indicated that they disagreed with the statement that the removal of a discretionary beneficiary from a discretionary trust would result in a paragraph 11(1)(*g*) disposal. A small percentage of the respondents (6.7%) were neutral regarding this statement. The mean score for this question was 4.80, which indicates that most of the respondents disagreed with this statement.

5.5.9.7 Appointing a trustee

Appointing a new trustee to the trust (Section 1, Part I: 9.2.6). Most of the respondents (93.3%) indicated that they disagreed with the statement that the appointment of a new trustee to a discretionary trust would result in a paragraph 11(1)(*g*) disposal. A small percentage of the respondents (6.7%) were neutral regarding this statement. The mean score for this question was 4.80, which indicates that most of the respondents disagreed with this statement.

5.5.9.8 Removing a trustee

Removing an existing trustee from the trust (Section 1, Part I: 9.2.7). Most of the respondents (93.3%) indicated that they disagreed with the statement that the

removal of a trustee from a discretionary trust would result in a paragraph 11(1)(*g*) disposal. A small percentage of the respondents (6.73%) were neutral regarding this statement. The mean score for this question was 4.80, which indicates that most of the respondents disagreed with this statement. The overall mean score for the first seven statement (9.2.1 to 9.2.7 of the online questionnaire) in this section was 4.64, which indicates that most of the respondents disagreed that the trustees' actions will result in a paragraph 11(1)(*g*) disposal.

5.5.9.9 Summary of the results for a discretionary trust (Section 1, Part I)

The following is a summary of the results for a discretionary trust for Part I:

- The mean score of 1.55 indicates that if the DTC's recommendations are implemented for a discretionary trust, both capital gains and income arising from the trust's asset will be taxed in the hands of the trust which differs from the case prior to the implementation of the DTC's recommendations.
- The mean scores for vesting (4.37) or for distributing (4.38) a capital asset in or to a discretionary beneficiary, indicate that a paragraph 11(1)(*g*) disposal would not occur.
- The mean score of 4.47 when a capital asset is sold, and the resultant capital gain is either vested in or distributed to a discretionary beneficiary, indicates that a paragraph 11(1)(*g*) disposal would not occur.
- The mean scores when a discretionary beneficiary is added (4.86) or removed (4.80) to or from a discretionary trust indicate that a paragraph 11(1)(*g*) disposal would not occur.
- The mean scores when a trustee is appointed to (4.80) or removed from (4.80) a discretionary trust indicate that no paragraph 11(1)(*g*) disposal would occur.
- The overall mean score of 4.64 indicates that no paragraph 11(1)(*g*) disposal will arise from the seven trustees' actions (statements 9.2.1 to 9.2.7 of the online questionnaire) examined in this section.

5.5.10 Part J: Other comments

Respondents were requested to provide any additional comments regarding this study on Value Shifting Arrangements pertaining to a discretionary or a vested trust (Research question 10) (Section 1, Part J: 9.2.10)**.** One respondent commented that discretionary rights are not real rights, but contingent rights, and therefore less likely to result in a VSA.

5.6 VESTED TRUSTS

The results for the vested trust (Section 2 of Appendix A) are presented next.

5.6.1 Part A: Nature of a trust's assets

How is the nature of trusts' assets determined, and are there any similarities in the definition of assets or property for income tax, donations tax, CGT, and estate duty purposes? (Research question 1). The respondents had to agree or disagree with each separate statement below, which examined the nature of an asset. The results to all the statements for part A are summarised in Table 5.16 below.

Table 5.16: Descriptive results for a vested trust (Part A)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
1.1 The disposal of a capital asset of a vested trust could result in either a capital gain or loss.	95,8%	0,0%	0,0%	0,0%	4,2%	24	1.17
1.2 The revenue or capital nature of a vested trust's assets or proceeds of such trust's assets can be ascertained by the tests developed in case law.	91,7%	0,0%	0,0%	0,0%	8,3%	24	1.33
1.3 A capital asset of a vested trust for capital gains purposes, would be the same as a revenue asset for income tax purposes.	4,2%	0,0%	0,0%	0,0%	95,8%	24	4.83
1.4 Capital assets of a vested trust for capital gains tax purposes, would be the same as property for donations tax purposes.	87,5%	4,2%	0,0%	0,0%	8,3%	24	1.38
1.5 Capital assets of a vested trust for capital gains tax purposes, would be the same as property for estate duty purposes.	83,3%	4,2%	4,2%	0,0%	8,3%	24	1.46
Overall mean for the section A (questions 1.1, 1.2, 1.4 and 1.5).							1.33

5.6.1.1 Disposal of an asset

The disposal of a capital asset of a vested trust could result in either a capital gain or a loss (Section 2, Part A: 1.1). Most of the respondents (95.8%) indicated that they agreed that the disposal of a capital asset would either result in a capital gain or a loss. A small percentage of the respondents (4.2%) disagreed with the statement. The mean score for this question was 1.17, which indicates that most of the respondents agreed with this statement.

5.6.1.2 Capital nature of an asset

The revenue or capital nature of a vested trust's assets or the proceeds of such trust's assets can be ascertained by the tests developed in case law (Section 2, Part A: 1.2). Most of the respondents (91.7%) indicated that they agreed that the revenue and capital nature of an asset can be determined with the tests for capital developed in South African case law over the years. A small percentage of the respondents (8.3%) disagreed with the statement. The mean score for this question was 1.33, which indicates that most of the respondents agreed with this statement.

5.6.1.3 Capital asset compared to a revenue asset

A capital asset of a vested trust for capital gains tax purposes would be the same as a revenue asset for income tax purposes (Section 2, Part A: 1.3). Most of the respondents (95.8%) indicated that they disagreed with the statement that a capital asset is the same as a revenue asset. A small percentage of the respondents (4.2%) agreed with the statement. The mean score for this question was 4.83, which indicates that most of the respondents disagreed with this statement.

5.6.1.4 Capital gains asset compared to a donations tax property

Capital assets of a vested trust for capital gains tax purposes would be similar to property for donations tax purposes (Section 2, Part A: 1.4). Most of the respondents (91.7%) indicated that they agreed that a capital asset for CGT purposes would be similar to property for donations tax purposes. A small percentage of the

respondents (8.3%) disagreed with the statement. The mean score for this question was 1.38, which indicates that most of the respondents agreed with this statement.

5.6.1.5 Capital gains asset compared to an estate duty property

Capital assets of a vested trust for capital gains tax purposes would be similar to property for estate duty purposes (Section 2, Part A: 1.5). Most of the respondents (87.5%) indicated that they agreed with the statement that a capital asset for CGT purposes would be similar property for estate duty purposes. A small percentage of the respondents (4.2%) had a neutral viewpoint, while a small percentage of the respondents (8.3%) disagreed with the statement. The mean score of 1.46 indicates that most of the respondents agreed with this statement. The mean score for these statements (1.1, 1.2, 1.4 and 1.5 of the online questionnaire) was 1.33, which indicate that most of the respondents agreed with these statements.

5.6.1.6 Summary of the results for a vested trust (Section 2, Part A)

The following is a summary of the results for a vested trust for Part A:

- The mean score of 1.17 indicates that a disposal of a capital asset would either result in a capital gain or a loss.
- The mean score of 1.33 indicates that the revenue and capital nature of an asset can be determined with the tests for capital developed in South African case law over the years.
- The mean score of 4.83 indicates that most of the respondents disagreed that a capital asset is the same as a revenue asset.
- The mean score of 1.38 indicates that a capital asset for CGT purposes would be similar to property for donations tax purposes.
- The mean score of 1.46 indicates that a capital asset for CGT purposes is similar to property for estate duty purposes.
- The overall mean score for statements 1.1, 1.2, 1.4 and 1.5 was 1.33, which indicates that most of the respondents agreed with all four statements.

5.6.2 Part B: Income tax (excluding capital gains) implications

Do any of the selected trustees' actions result in any income tax (excluding capital gains) implications (Research question 2)? The respondents had to agree or disagree that the trustees' actions below would result in gross income and be excluded from the Eighth Schedule. The results to all the statements for Part B are summarised in Table 5.17 below.

Table 5.17: Descriptive results for a vested trust (Part B)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
2.1 The trustees vest capital assets (80 shares) in beneficiary A.	4,2%	0%	0%	4,2%	91,6%	24	4.79
2.2 The trustees distribute capital assets (80 shares) to beneficiary A.	4,2%	0%	0%	0%	95,8%	24	4.96
2.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	4,2%	0%	0%	0%	95,8%	24	4.88
2.4 Adding a new beneficiary to the trust.	0%	0%	0%	0%	100%	24	5.00
2.5 Removing beneficiary A from the trust.	0%	4,2%	0,0%	0%	95,8%	24	4.88
2.6 Appointing a new trustee to the trust.	0%	0%	0%	0%	100%	24	5.00
2.7 Removing a trustee from the trust.	4,2%	0%	0%	0%	95,8%	24	4.83
Overall mean for the section B (question 2.1 to 2.7).							**4.90**

5.6.2.1 Vesting an asset

The trustees vest capital assets (80 shares) in beneficiary A (Section 2, Part B: 2.1). Most of the respondents (95.8%) indicated that they disagreed with the statement that the vesting of a capital asset from a vested trust in a beneficiary would result in gross income and income tax (excluding capital gains) implications for the beneficiary. A small percentage of the respondents (4.2%) agreed with the statement that the vesting an asset would have gross income and income tax (excluding capital gains) implications. The mean score for this question was 4.79, which indicates that most of the respondents disagreed with this statement.

5.6.2.2 Distributing an asset

The trustees distribute capital assets (80 shares) to beneficiary A (Section 2, Part B: 2.2). Most of the respondents (95.8%) indicated that they disagreed with the statement that the distribution of a capital asset from a vested trust to a beneficiary

would result in gross income and income tax (excluding capital gains) implications for the beneficiary. A small percentage of the respondents (4.2%) agreed with the statement that the vesting of an asset would have an income tax (gross income) implication. The mean score for this question was 4.96, which indicates that most of the respondents disagreed with this statement.

5.6.2.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000) and immediately vests or distributes the capital gain (R800 000) to beneficiary A (Section 2, Part B: 2.3). Most of the respondents (95.8%) indicated that they disagreed with the statement that the sale of a capital asset of a vested trust, followed by the immediate vesting or distribution of a capital gain to a vested trust beneficiary would result in gross income and income tax (excluding capital gains) implications for the beneficiary. A small percentage of the respondents (4.2%) agreed with the statement that the vesting of an asset would have an income tax (gross income) implication. The mean score for this statement was 4.88, which indicates that most of the respondents disagreed with this statement.

5.6.2.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 2, Part B: 2.4). All the respondents (100%) disagreed that the adding of a new vested beneficiary to a vested trust would result in a gross income implication for the beneficiary. The mean score for this statement was 5, which indicates that all the respondents disagreed with this statement.

5.6.2.5 Removing a beneficiary

Removing beneficiary A from the trust (Section 2, Part B: 2.5). Most of the respondents (95.8%) indicated that they disagreed with the statement that the removal of a beneficiary from a vested trust would result in gross income and income tax (excluding capital gains) implications. A small percentage of the respondents (4.2%) agreed with the statement that the removal of a vested

beneficiary from a trust would have an income tax (gross income) implication. The mean score for this statement was 4.88, which indicates that most of the respondents disagreed with this statement.

5.6.2.6 Appointing a trustee

Appointing a trustee to the trust (Section 2, Part B: 2.6). All the respondents (100%) indicated that they disagreed with the statement that the appointment of a new trustee to a vested trust would result in gross income and income tax (excluding capital gains) implications. The mean score for this statement was 5, which indicates that all the respondents disagreed with this statement.

5.6.2.7 Removing a trustee

Removing a trustee from the trust (Section 2, Part B: 2.7). Most of the respondents (95.8%) indicated that they disagreed with the statement that the removal of a trustee from a vested trust would result in a gross income implication. A small percentage of the respondents (4.2%) agreed with the statement that the removal of a trustee from a vested trust would have gross income and income tax (excluding capital gains) implications. The mean score for this statement was 4.83, which indicates that most of the respondents disagreed with this statement. The overall mean score for the questions in this section was 4.90, which indicates that most of the respondents disagreed that the trustees' actions will result in a gross income implication.

5.6.2.8 Summary of the results for a vested trust (Section 2, Part B)

The following is a summary of the results for a vested trust for Part B:

- The mean scores for vesting (4.79) or for distributing (4.96) a capital asset, in or to a beneficiary, indicate strongly that no gross income and income tax (excluding capital gains) implications would occur.

- The mean score of 4.88 when a capital asset is sold, would be excluded from gross income and the resultant capital gain is either vested or distributed in or to a beneficiary, be taxed within the provisions of the Eighth Schedule to the Act.
- The mean scores when a beneficiary is added (5) or removed (4.88) to or from a vested trust indicate that no gross income and income tax (excluding capital gains) implications would occur.
- The mean scores when a trustee is appointed (5) or removed (4.83) to or from a vested trust indicate strongly that no gross income and income tax (excluding capital gains) implications would occur.
- The overall mean score of 4.90 for statements 2.1 to 2.7 indicates strongly that no gross income and income tax (excluding capital gains) implications will arise from the seven trustees' actions assessed in this section.

5.6.3 Part C: Donations tax implications

Do any of the selected trustees' actions or consent of the beneficiaries result in any donations tax implications? (Research question 3). Respondents had to agree or disagree with the first four specific statements in Part C, which addressed donations in general. Respondents had to agree or disagree that the last seven statements (trustees' actions) would result in donations tax implications. The results to all the statements for Part C are summarised in Table 5.18 below.

Table 5.18: Descriptive results for a vested trust (Part C)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
3.1.1 If beneficiaries donate a vested interest, from one beneficiary to another beneficiary, donations tax could be applicable.	87,5%	8,3%	0,0%	0,0%	4,2%	24	1.25
3.1.2 If the trustees donate a vested interest from one beneficiary to another beneficiary, without the consent of the beneficiaries, donations tax could be applicable.	29,2%	16,7%	20,8%	12,5%	20,8%	24	2.79
3.1.3 If a donation of a vested interest from one beneficiary to another beneficiary happens at full market value, a disposal in terms of paragraph of 11(1)(*a*) of the Eighth Schedule would occur.	91,6%	4,2%	0,0%	0,0%	4,2%	24	1.21
3.1.4 if a donation of a vested interest from one beneficiary to another beneficiary happens at an inadequate value, a disposal in terms of paragraph of 11(1)(*g*) of the Eighth Schedule would occur.	20,8%	8,3%	16,7%	12,5%	41,7%	24	3.46
3.2.1 The trustees vest capital assets (80 shares) in beneficiary A.	83,3%	4,2%	0,0%	0,0%	12,5%	24	1.54
3.2.2 The trustees distribute capital assets (80 shares) to beneficiary A.	83,3%	4,2%	0,0%	0,0%	12,5%	24	1.54
3.2.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	70,8%	12,5%	4,2%	0,0%	12,5%	24	1.71
3.2.4 Adding a new beneficiary to the trust.	58,3%	25,0%	4,2%	0,0%	12,5%	24	1.83
3.2.5 Removing beneficiary A from the trust.	70,8%	16,7%	0,0%	0,0%	12,5%	24	1.67
3.2.6 Appointing a new trustee to the trust.	0,0%	0,0%	0,0%	0,0%	100,0%	24	5.00
3.2.7 Removing a trustee from the trust.	4,2%	0,0%	0,0%	0,0%	95,8%	24	4.83
Overall mean for Part C (questions 3.2.1 to 3.2.5)							**1.66**
Overall mean for Part C (questions 3.2.6 and 3. 2.7)							**4.92**

5.6.3.1 Donating a vested interest with consent

If beneficiaries donate a vested interest from one beneficiary to another beneficiary, donations tax could be applicable (Section 2, Part C: 3.1.1). Most of the respondents (95.8%) indicated that they agreed with the statement that a donation of a vested interest in a vested trust from one beneficiary to another beneficiary would result in donations tax implications. A small percentage of the respondents (4.2%) disagreed with the statement. The mean score for this statement was 1.25, which indicates that most of the respondents agreed with this statement.

5.6.3.2 Donating a vested interest without consent

If the trustees donate a vested interest from one beneficiary to another beneficiary, without the consent of the beneficiaries, donations tax could be applicable (Section 2, Part C: 3.1.2). Most of the respondents (45.9%) indicated that they agreed with the statement that a donation of a vested interest in a trust from one beneficiary to another beneficiary without the consent of the beneficiaries would result in donations tax implications. A smaller percentage of respondents (33.3%) disagreed with the statement. Furthermore, some of the respondents (20.8%) were neutral regarding this statement. The mean score for this statement was 2.79, which indicates that most of the respondents agreed with this statement.

5.6.3.3 Donating a vested interest paragraph 11(1)(*a*) disposal

If a donation of a vested interest from one beneficiary to another beneficiary occurs at full market value, a disposal in terms of paragraph 11(1)(*a*) of the Eighth Schedule would occur (Section 2, Part C: 3.1.3). Most of the respondents (95.8%) indicated that they agreed with the statement that a donation of a vested interest in a vested trust from one beneficiary to another beneficiary at full market value, would result in a paragraph 11(1)(*a*) disposal. A small percentage of the respondents (4.2%) disagreed with the statement. The mean score for this statement was 1.21, which indicates that most of the respondents agreed with this statement.

5.6.3.4 Donating a vested interest paragraph 11(1)(*g*) disposal

If a donation of a vested interest from one beneficiary to another beneficiary occurs at an inadequate consideration, a disposal in terms of paragraph of 11(1)(*g*) of the Eighth Schedule would occur (Section 2, Part C: 3.1.4). Most of the respondents (54.2%) indicated that they disagreed with the statement that a donation of a vested interest in a vested trust from one beneficiary to another beneficiary at an inadequate consideration, would result in a paragraph 11(1)(*g*) disposal. A small percentage of the respondents (16.7%) agreed with the statement, while some of the respondents (29.1%) were neutral regarding this statement. The mean score for this question was 3.46, which indicates that most of the respondents disagreed with this statement.

5.6.3.5 Vesting an asset

The trustees vest capital assets (80 shares) in beneficiary A (Section 2, Part C: 3.2.1). Most of the respondents (87.5%) indicated that they agreed with the statement that a vesting of a capital asset in a beneficiary would result in donations tax implications. A small percentage of the respondents (12.5%) disagreed with the statement. The mean score for this statement was 1.54, which indicates that most of the respondents agreed with this statement.

5.6.3.6 Distributing an asset

The trustees distribute capital assets (80 shares) to beneficiary A (Section 2, Part C: 3.2.2). Most of the respondents (87.5%) indicated that they agreed with the statement that the distribution of a capital asset to a beneficiary would result in donations tax implications. A small percentage of the respondents (12.5%) disagreed with the statement. The mean score for this question was 1.54, which indicates that most of the respondents agreed with this statement.

5.6.3.7 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000) and immediately vests or distributes the capital gain (R800 000) to beneficiary A (Section 2, Part C: 3.2.3). Most of the respondents (83.3%) indicated that they agreed with the statement that a sale of a capital asset, and the subsequent vesting or distribution of the resultant capital gain in or to a beneficiary, would result in donations tax implications. A small percentage of the respondents (12.5%) disagreed with the statement, while a small number of the respondents (4.2%) were neutral regarding this statement. The mean score for this statement was 1.71, which indicates that most of the respondents agreed with this statement.

5.6.3.8 Adding a beneficiary

Adding a new beneficiary to the trust (Section 2, Part C: 3.2.4). Most of the respondents (83.3%) indicated that they agreed with the statement that the adding of a new vested beneficiary to a vested trust would result in donations tax implications. A small percentage of the respondents (12.5%) disagreed with the statement, while a small number of the respondents (4.2%) were neutral regarding this statement. The mean score for this question was 1.83, which indicates that most of the respondents agreed with this statement.

5.6.3.9 Removing a beneficiary

Removing beneficiary, A from the trust (Section 2, Part C: 3.2.5). Most of the respondents (87.5%) indicated that they agreed with the statement that the removal of a discretionary beneficiary from a vested trust would result in donations tax implications. A small percentage of the respondents (12.5%) disagreed with the statement. The mean score for this statement was 1.67, which indicates that most of the respondents strongly agreed with this statement.

5.6.3.10 Appointing a trustee

Appointing a new trustee to the trust (Section 2, Part C: 3.2.6). All the respondents (100%) indicated that they disagreed with the statement that the appointment of a new trustee to a vested trust would result in donations tax implications. The mean score for this statement was 5, which indicates that all the respondents disagreed with this statement.

5.6.3.11 Removing a trustee

Removing a trustee from the trust (Section 2, Part C: 3.2.7). Most of the respondents (95.8%) indicated that they disagreed with the statement that the removal of a trustee from a vested trust would result in donations tax implications. A small percentage of the respondents (4.2%) agreed with the statement. The mean score for this statement was 4.83, which indicates that most of the respondents disagreed with this statement. The overall mean score for the first five statements specifically related to the trustees' actions (3.2.1 to 3.2.5 of the online questionnaire) in this section was 1.66, which indicates that most of the respondents agreed that the trustees' actions will result in a donations tax implication in relation to these statements. The overall mean score for the last two statements specifically related to the trustees' actions (3.2.6 and 3.2.7) in this section was 4.92, which indicates that most of the respondents disagreed that the trustees' actions will result in a donations tax implication for these two trustees' actions.

5.6.3.12 Summary of the results for a vested trust (Section 2, Part C)

The following is a summary of the results for a vested trust for Part C:

- The mean score of 1.25 indicates that a donation of a vested interest in a vested trust from one beneficiary to another beneficiary would result in donations tax implications.

- The mean score of 2.79 indicates that a donation of a vested interest in a vested trust, from one beneficiary to another beneficiary, without the consent of the beneficiaries, would result in donations tax implications.
- The mean score of 1.21 indicates that a donation of a vested interest in a vested trust from one beneficiary to another beneficiary at full market value would result in a paragraph 11(1)(*a*) disposal.
- The mean score of 3.46 indicates that a donation of a vested interest in a vested trust from one beneficiary to another beneficiary at an inadequate consideration would not result in a paragraph 11(1)(*g*) disposal.
- The mean scores for vesting (1.54) or for distributing (1.54) a capital asset (which would require a change in vesting rights), in or to a beneficiary, indicate that a donations tax implication would occur.
- The mean score of 1.71 when a capital asset is sold, and the resultant capital gain is either vested or distributed in or to a beneficiary (which would require a change in vesting rights), indicates that a donations tax implication would occur.
- The mean scores when a vested beneficiary is added to (1.83) or removed from (1.67) a vested trust indicates that a donations tax implication would occur.
- The mean scores when a trustee is appointed to (5) or removed from (4.83) a vested trust indicate that no donations tax implication would occur.
- The overall mean score of 1.66 indicates that no donations tax implications will arise from the trustees' actions (3.2.1 to 3.2.5) assessed in this section.
- The overall mean score of 4.92 indicates that no donations tax implications will arise from the trustees' actions (3.26 and 3.27) assessed in this section.

5.6.4 Part D: Ordinary disposal implications

Do any of the selected trustees' actions fall under paragraph 11(1)(*a*) to (*f*) of the Eighth Schedule (Research question 4)? The respondents had to agree or disagree that the seven trustees' actions below would result in a paragraph 11(1)(*a*) to (*f*) disposal of the Eighth Schedule. The results to all the statements for part D are summarised in Table 5.19 below.

Table 5.19: Descriptive results for the vested trust (Part D)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
4.1 The trustees vest capital assets (80 shares) in beneficiary A.	95,8%	4,2%	0,0%	0,0%	0,0%	24	1.04
4.2 The trustees distribute capital assets (80 shares) to beneficiary A.	87,5%	8,3%	0,0%	0,0%	4,2%	24	1.25
4.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	91,7%	8,3%	0,0%	0,0%	0,0%	24	1.08
4.4 Adding a new beneficiary to the trust.	79,2%	12,5%	0,0%	0,0%	8,3%	24	1.46
4.5 Removing beneficiary A from the trust.	70,8%	8,3%	0,0%	4,2%	16,7%	24	1.88
4.6 Appointing a new trustee to the trust.	0,0%	0,0%	0,0%	0,0%	100,0%	24	5.00
4.7 Removing a trustee from the trust.	4,2%	0,0%	0,0%	0,0%	95,8%	24	4.83
Overall Part D mean score (questions 4.1 to 4.5)							**1.34**
Overall Part D mean score (questions 4.6 and 4.7)							**4.92**

5.6.4.1 Vesting an asset

The trustees vest capital assets (80 shares) in beneficiary A (Section 2, Part D: 4.1). All the respondents (100%) agreed with the statement that a paragraph 11(1)(*a*) to (*f*) disposal would occur when a capital asset is vested (resulting in a change of vesting rights) in a beneficiary of a vested trust. The mean score for this question was 1.04, which indicates that most of the respondents agreed with this statement.

5.6.4.2 Distributing an asset

The trustees distribute capital assets (80 shares) to beneficiary A (Section 2, Part D:4.2). Most of the respondents (95.8%) agreed with the statement that a paragraph 11(1)(*a*) to (*f*) disposal would occur when a capital asset is distributed (resulting in a change of vesting rights) to a beneficiary of a vested trust. A small percentage of the respondents (4.2%) disagreed with this statement. The mean score for this statement was 1.25, which indicates that most of the respondents agreed with this statement.

5.6.4.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000) and immediately vests or distributes the capital gain (R800 000) to beneficiary A (Section 2, Part D: 4.3). All the respondents (100%) agreed with the statement that a paragraph 11(1)(*a*) to (*f*) disposal would occur when a capital asset is sold, and

the resultant capital gain is subsequently vested or distributed (resulting in a change of vesting rights) to a beneficiary. The mean score for this statement was 1.08, which indicates that most of the respondents agreed with this statement.

5.6.4.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 2, Part D: 4.4). Most of the respondents (91.7%) indicated that they agreed with the statement that the adding of a new vested beneficiary to a vested trust would result in a paragraph 11(1)(*a*) to (*f*) disposal. A small percentage of the respondents (8.3%) disagreed with the statement. The mean score for this statement was 1.46, which indicates that most of the respondents agreed with this statement.

5.6.4.5 Removing a beneficiary

Removing beneficiary, A from the trust (Section 2, Part D: 4.5). Most of the respondents (79.1%) indicated that they agreed with the statement that the removal of a trustee from a vested trust would result in a paragraph 11(1)(*a*) to (*f*) disposal. A small percentage of the respondents (20.9%) disagreed with the statement. The mean score for this statement was 1.88, which indicates that most of the respondents agreed with this statement.

5.6.4.6 Appointing a trustee

Appointing a new trustee to the trust (Section 2, Part D: 4.6). All the respondents (100%) indicated that they disagreed with the statement that the appointment of a new trustee to a vested trust would result in a paragraph 11(1)(*a*) to (*f*) disposal. The mean score for this statement was 5, which indicates that all the respondents disagreed with this statement.

5.6.4.7 Removing a trustee

Removing a trustee from the trust (Section 2, Part D: 4.7). Most of the respondents (95.8%) indicated that they disagreed with the statement that the removal of a trustee from a vested trust would result in a paragraph 11(1)(*a*) to (*f*) disposal. A small percentage of the respondents (4.2%) agreed with the statement. The mean score for this question was 4.83, which indicates that most of the respondents disagreed with this statement. The overall mean score for the first five statements (4.1 to 4.5 of the online questionnaire) in this section was 1.34, which indicates that most of the respondents agreed that these trustees' actions will result in a paragraph 11(1)(*a*) to (*f*) disposal. The overall mean score for the last two statements (4.6 to 4.7) in this section was 4.92, which indicates that most of the respondents disagreed that the trustees' actions will result in a paragraph 11(1)(*a*) to (*f*) disposal.

5.6.4.8 Summary of the results for a vested trust (Section 2, Part D)

The following is a summary of the results for a vested trust for Part D:

- The mean scores for vesting (1.04) or for distributing (1.25) a capital asset (resulting in a change of vesting rights) in, or to a vested beneficiary, indicate that a paragraph 11(1)(*a*) to (*f*) disposal would occur.
- The mean score of 1.08 when a capital asset is sold, and the resultant capital gain is either vested in or distributed to a discretionary beneficiary (resulting in a change of vesting rights), indicates that a paragraph 11(1)(*a*) to (*f*) disposal would occur.
- The mean scores when a vested beneficiary is added to (1.46) or removed from (1.88) a vested trust indicate that a paragraph 11(1)(*a*) to (*f*) disposal would occur.
- The mean scores when a trustee is appointed to (5) or removed from (4.83) a vested trust, indicate that a paragraph 11(1)(*a*) to (*f*) disposal would not occur.
- The overall mean score of 1.34 for the first five statements, indicates that a paragraph 11(1)(*a*) to (*f*) disposal will arise from the trustees' actions (statements 4.1 to 4.5 of the online questionnaire) in this section.

- The overall mean score of 4.92 indicates that no paragraph 11(1)(*a*) to (*f*) disposal will arise from the trustees' actions as outlined in statements 4.6 and 4.7 of the online questionnaire in this section.

5.6.5 Part E: Beneficiaries' interest in a trust

Are the beneficiaries' interests in a trust as described in the definition of a VSA considered to be a capital asset of the relevant beneficiary for capital gains tax purposes, in each of the types of trusts examined in this study, namely: a discretionary and vested trust? (Research question 5). The respondents had to agree or disagree that the disposal of a discretionary interest in a vested trust would result in a capital gain or a loss. The results to the statements for part E are summarised in Table 5.20 below.

Table 5.20: Descriptive results for a vested trust (Part E)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
5.1 A disposal of a vested interest in a trust's capital asset by a beneficiary, could result in capital gain or a capital loss for the beneficiary.	95,8%	4,2%	0,0%	0,0%	0,0%	24	1.04

5.6.5.1 Vested interest in a trust

A disposal of vested interest in a trust's capital asset by a beneficiary could result in a capital gain or a loss for the beneficiary (Section 2, Part E: 5.1). All the respondents (100%) indicated that they agreed with the statement that a vested beneficiary's interest in a vested trust could be considered a capital asset of the beneficiary for CGT purposes. The mean score for this statement was 1.04, which indicates that most of the respondents agreed with this statement.

5.6.5.2 Summary of the results for a vested trust (Section 2, Part E)

- The mean score obtained was 1.04, indicating that a vested beneficiary's interest in a trust could be a capital asset for CGT purposes.

5.6.6 Part F: Measuring a VSA

What is meant by "value shifting," how is it measured in the context of trusts, and how are the proceeds and base cost determined in a VSA? (Research question 6). The respondents had to agree or disagree that the various components of calculating a capital gain or a loss for a VSA, as defined in paragraphs 35(2) (proceeds) and 23 (base cost) of the Eighth Schedule, are present for the trustees' actions assessed in this study. The results to the statements for part F are summarised in Table 5.21 below.

Table 5.21: Descriptive results for a vested trust (Part F)

Statement	Response percentage 1 = Agree; 3 = Neutral; 5 = Disagree					Total Respondents	Mean
	1	2	3	4	5		
6.1 The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	95,8%	4,2%	0%	0%	0%	24	1.04
6.2 A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	87,5%	8,3%	0%	0%	4,2%	24	1.25
6.3 The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before any of the seven trustees' actions mentioned previously can be measured.	91,7%	8,3%	0%	0%	0%	24	1.08
Overall Part F mean score (questions 6.1 to 6.3)							**1.13**

5.6.6.1 Measuring the market value of a VSA

The market value of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust assets before and after any of the seven trustees' actions mentioned previously can be measured (Section 2, Part F: 6.1). All the respondents (100%) indicated that they agreed with the statement that the market value of a beneficiary's interest in the underlying assets of a vested trust can be measured before the trustees' actions take place. The mean score for this statement was 1.04, which indicates that most of the respondents agreed with this statement.

5.6.6.2 Measuring the value shift of a VSA

A possible reduction in the market value of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust assets before and after any of the seven trustees' actions mentioned previously can be measured (Section 2, Part F: 6.2). Most of the respondents (95.8%) indicated that they agreed with the statement that a reduction in the market value of a beneficiary's interest in the underlying assets of a vested trust can be measured after the trustees' actions have taken place. A small percentage of the respondents (4.2%) disagreed with the statement. The mean score for this statement was 1.25, which indicates that most of the respondents agreed with this statement.

5.6.6.3 Measuring the base cost of a VSA

The base cost of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust assets before any of the seven trustees' actions mentioned previously can be measured (Section 2, Part F: 6.3). All the respondents (100%) indicated that they agreed with the statement that the base cost of a beneficiary's interest in the underlying assets of a vested trust can be measured before the trustees' actions have taken place. The mean score for this statement was 1.08, which indicates that most of the respondents agreed with this statement. The overall mean score for the statements (6.1 to 6.3 of the online questionnaire) in this section was 1.13, which indicates that most of the respondents agreed with these three statements.

5.6.6.4 Summary of the results for a vested trust (Section 2, Part F)

The following is a summary of the results for a vested trust for Part F:

- The mean score was 1.04, which indicates that the market value of a beneficiary's interest in the underlying assets of a vested trust can be measured before the trustees' actions have taken place.

- The mean score was 1.25, which indicates that the reduction in the market value of a beneficiary's interest in the underlying assets of a vested trust can be measured after the trustees' actions have taken place.
- The mean score was 1.08, which indicates that the base cost of a beneficiary's interest in the underlying assets of a vested trust can be measured before the trustees' actions have taken place.
- The overall mean score for the statements in this part was 1.13, which indicates that most of the respondents agreed with these statements.

5.6.7 Part G: Value shifting disposal implications

Do any of the selected trustees' actions meet the definition of a VSA, and does it fall under paragraph 11(1)(*g*) of the Eighth Schedule (Research question 7)? The respondents had to agree or disagree that the seven trustees' actions below would result in a paragraph 11(1)(*g*) disposal of the Eighth Schedule. The results to all the statements for part G are summarised in Table 5.22 below.

Table 5.22: Descriptive results for a vested trust (Part G)

Statement	Response percentage					Total Respondents	Mean
	1 = Agree; 3 = Neutral; 5 = Disagree						
	1	2	3	4	5		
7.1 The trustees vest capital assets (80 shares) in beneficiary A.	25,0%	4,2%	0,0%	8,3%	62,5%	24	3.79
7.2 The trustees distribute capital assets (80 shares) to beneficiary A.	20,8%	4,2%	0,0%	8,3%	66,7%	24	3.96
7.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	25,0%	4,2%	0,0%	8,3%	62,5%	24	3.79
7.4 Adding a new beneficiary to the trust.	25,0%	12,5%	0,0%	12,5%	50,0%	24	3.50
7.5 Removing beneficiary A from the trust.	4,2%	0,0%	0,0%	20,8%	75,0%	24	4.63
7.6 Appointing a new trustee to the trust.	0,0%	0,0%	0,0%	0,0%	100,0%	24	5.00
7.7 Removing a trustee from the trust.	4,2%	0,0%	0,0%	0,0%	95,8%	24	4.83
Overall Part G mean score (questions 7.1 to 7.5)							3.93
Overall Part G mean score (questions 7.6 and 7.7)							4.92

5.6.7.1 Vesting an asset

The trustees vest capital assets (80 shares) in beneficiary A (Section 2, Part G: 7.1). Most of the respondents (70.8%) disagreed with the statement that a paragraph 11(1)(*g*) disposal would occur when a capital asset is vested (which would require a change in vesting rights) in a beneficiary of a vested trust. Some respondents

(29.2%) agreed with this statement. The mean score for this statement was 3.79, which indicates that most of the respondents disagreed with this statement.

5.6.7.2 Distributing an asset

The trustees distribute capital assets (80 shares) to beneficiary A (Section 2, Part G: 7.2). Most of the respondents (75%) disagreed with the statement that a paragraph 11(1)(*g*) disposal would occur when a capital asset is distributed (which would require a change in vesting rights) to a beneficiary of a vested trust. Some of the respondents (25%) agreed with this statement. The mean score for this statement was 3.96, which indicates that most of the respondents disagreed with this statement.

5.6.7.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell a trust's capital assets (80 shares) at market value (R1 200 000) and immediately vests or distributes the capital gain (R800 000) to beneficiary A (Section 2, Part G: 7.3). Most of the respondents (70.8%) disagreed with the statement that a paragraph 11(1)(*g*) disposal would occur when a capital asset is sold, and the resultant capital gain is subsequently vested or distributed (which would require a change in vesting rights) to a beneficiary. Some of the respondents (29.2%) agreed with this statement. The mean score for this statement was 3.79, which indicates that most of the respondents disagreed with this statement.

5.6.7.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 2, Part G: 7.4). Most of the respondents (62.5%) indicated that they disagreed with the statement that the adding of a new vested beneficiary to a vested trust would result in a paragraph 11(1)(*g*) disposal. A few of the respondents (37.5%) agreed with the statement. The mean score for this statement was 3.5, which indicates that most of the respondents disagreed with this statement.

5.6.7.5 Removing a beneficiary

Removing beneficiary, A from the trust (Section 2, Part G: 7.5). Most of the respondents (95.8%) indicated that they disagreed with the statement that the removal of a vested beneficiary from a vested trust would result in a paragraph 11(1)(*g*) disposal. A small number of the respondents (4.2%) agreed with the statement. The mean score for this statement was 4.63, which indicates that most of the respondents disagreed with this statement.

5.6.7.6 Appointing a trustee

Appointing a trustee to the trust (Section 2, Part G: 7.6). All the respondents (100%) indicated that they disagreed with the statement that the appointment of a new trustee to a vested trust would result in a paragraph 11(1)(*g*) disposal. The mean score for this statement was 5, which indicates that all the respondents disagreed with this statement.

5.6.7.7 Removing a trustee

Removing a trustee from the trust (Section 2, Part G: 7.7). Most of the respondents (95.8%) indicated that they disagreed with the statement that the removal of a trustee from a vested trust would result in a paragraph 11(1)(*a*) to (*f*) disposal. A small number of the respondents (4.2%) agreed with the statement. The mean score for this statement was 4.83, which indicates that most of the respondents disagreed with this statement. The overall mean score for the first five statements (7.1 to. 7.5 of the online questionnaire) in this section was 3.93, which indicates that most of the respondents disagreed that the trustees' actions will result in a paragraph 11(1)(*g*) disposal. The overall mean score for statements 7.6 and 7.7 in this section was 4.92, which indicates that most of the respondents disagreed that these trustees' actions will result in a paragraph 11(1)(*g*) disposal.

5.6.7.8 Summary of the results for a vested trust (Section 2, Part G)

The following is a summary of the results for a vested trust for Part G:

- The mean scores for vesting (3.79) or for distributing (3.96) a capital asset (which would require a change in vesting rights) in, or to a beneficiary, indicate that a paragraph 11(1)(*g*) disposal would not occur.
- The mean score of 3.79 when a capital asset is sold, and the resultant capital gain is either vested or distributed (which would require a change in vesting rights) in or to a vested beneficiary, indicates that a paragraph 11(1)(*g*) disposal would not occur.
- The mean scores when a vested beneficiary is added to (3.50) or removed from (4.63) a vested trust indicate that a paragraph 11(1)(*g*) disposal would not occur.
- The mean scores when a trustee is appointed to (5) or removed from (4.83) a vested trust indicate that no paragraph 11(1)(*g*) disposal would occur.
- The overall mean score of 3.93 for the trustees' actions in sections 7.1 to 7.5 of the online questionnaire indicates that no paragraph 11(1)(*g*) disposal will arise.

5.6.8 Part H: Other trustees' actions

Respondents were requested to discuss and provide detailed examples of any other trustees' actions (excluding the seven trustees' actions examined in the previous sections and donations of vested interests between beneficiaries) for a vested trust that may result in a VSA in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act (Research question 8).

The following are the responses of the respondents pertaining to Section 2, Part H of the online questionnaire regarding other trustees' actions:

- If an additional child is born and automatically added as a beneficiary in a vested trust, it will be interesting to see if a VSA will take place.
- The donation and the subsequent vesting of the additional 40 shares to beneficiary A in the trust structure provided will result in paragraphs 11(1)(*a*) or (*b*) disposals if the beneficiary's consent is seen as a donation or

relinquishment of a right. The same applies when beneficiaries are added or removed from the vested trust. If paragraphs 11(1)(*a*) and (*b*) are not applicable, then a paragraph 11(1)(*g*) disposal might take place.

- When the trustees' actions are carried out with a cession or donation, paragraphs 11(1)(*a*) to 11(1)(*f*) disposals can occur; when it takes place with an amendment of the trust deed it will result in a VSA taking place in terms of paragraph 11(1)(*g*).
- If the trustees vary the trust deed, this action may create a VSA.

5.6.9 Part I: The DTC's recommendations implications

What are the implications of the DTC's recommendations on VSAs (Research question 9)? The respondents had to agree or disagree with a specific question on the DTC's recommendations, followed by seven questions on whether the trustees' actions below would result in a paragraph 11(1)(*g*) disposal of the Eighth Schedule if the DTC's recommendations on trusts were implemented. The results to all the statements for part G are summarised in Table 5.23 below.

Table 5.23: Descriptive results for a vested trust (Part I)

Statement	Response percentage 1 = Agree; 3 = Neutral; 5 = Disagree					Total Respondents	Mean
	1	2	3	4	5		
9.1 If the above DTC Recommendations were to be implemented, beneficiaries of vested trusts (with the indisputable and irrevocable vested right to a trust's taxable income or capital income), would be taxed on taxable income and capital income from such trusts, as was the case prior to the implementation of DTC's recommendations.	95,8%	4,2%	0,0%	0,0%	0,0%	24	1.04
9.2.1 The trustees vest trust's capital assets (80 shares) in beneficiary A.	8,3%	4,2%	0,0%	0,0%	87,5%	24	4.54
9.2.2. The trustees distribute trust's capital assets (80 shares) to beneficiary A.	4,2%	4,2%	0,0%	0,0%	91,6%	24	4.71
9.2.3 The trustees sell trust assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	8,3%	4,2%	0,0%	0,0%	87,5%	24	4.54
9.2.4 Adding a new beneficiary to the trust.	20,8%	0,0%	0,0%	0,0%	79,2%	24	4.38
9.2.5 Removing beneficiary A from the trust.	4,2%	8,3%	0,0%	4,2%	83,3%	24	4.54
9.2.6 Appointing a new trustee to the trust.	0,0%	0,0%	0,0%	0,0%	100,0%	24	5.00
9.2.7 Removing an existing trustee from the trust.	4,2%	0,0%	0,0%	0,0%	95,8%	24	4.83
Overall Part I mean score (questions 9.2.1 to 9.2.5)							4.54
Overall Part I mean score (questions 9.2.6 and 9.2.7)							4.92

5.6.9.1 Understanding of the DTC's recommendations

If the above DTC's recommendations were to be implemented, beneficiaries of vested trusts (with the indisputable and irrevocable vested right to a trust's taxable

income or capital income) would be taxed on the taxable income and capital income from such trusts, as was the case prior to the implementation of the DTC's recommendations (Section 2, Part I: 9.1.). Most of the respondents (100%) agreed with the statement that the beneficiaries would still be taxed on the income and capital gains in a vested trust if the vested beneficiaries have an irrevocable right to such income if the DTC's recommendations were implemented. The mean score for this statement was 1.04, which indicates that most of the respondents agreed with this statement.

5.6.9.2 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 2, Part I: 9.2.1). Most of the respondents (87.5%) disagreed with the statement that a paragraph 11(1)(*g*) disposal would occur when a capital asset is vested (which would require a change in vesting rights) in a beneficiary of a vested trust. A small number of the respondents (12.5%) agreed with this statement. The mean score for this statement was 4.54, which indicates that most of the respondents disagreed with this statement.

5.6.9.3 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 2, Part I: 9.2.2). Most of the respondents (91.6%) disagreed with the statement that a paragraph 11(1)(*g*) disposal would occur when a capital asset is distributed (which would require a change in vesting rights) to a beneficiary of a vested trust. A small percentage of the respondents (8.4%) agreed with this statement. The mean score for this statement was 4.71, which indicates that most of the respondents disagreed with this statement.

5.6.9.4 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's assets (80 shares) at market value (R1 200 000) and immediately vests or distributes the capital gain (R800 000) to beneficiary A (Section 2, Part I: 9.2.3). Most of the respondents (87.5%) disagreed with the statement that

a paragraph 11(1)(*g*) disposal would occur when a trust's capital asset is sold, and the resultant capital gain is subsequently vested in or distributed to (which would require a change in vesting rights) a beneficiary. A small number of the respondents (12.5%) agreed with this statement. The mean score for this statement was 4.54, which indicates that most of the respondents disagreed with this statement.

5.6.9.5 Adding a beneficiary

Adding a new beneficiary to the trust (Section 2, Part I: 9.2.4). Most of the respondents (79.2%) indicated that they disagreed with the statement that the adding of a new discretionary beneficiary to a vested trust would result in a paragraph 11(1)(*a*) to (*f*) disposal. A small percentage of the respondents (20.8%) agreed with the statement. The mean score for this statement was 4.38, which indicates that most of the respondents disagreed with this statement.

5.6.9.6 Removing a beneficiary

Removing beneficiary, A from the trust (Section 2, Part I: 9.2.5). Most of the respondents (87.5%) indicated that they disagreed with the statement that the removal of a vested beneficiary from a vested trust would result in a paragraph 11(1)(*g*) disposal. A small percentage of the respondents (12.5%) agreed with the statement. The mean score for this statement was 4.54, which indicates that most of the respondents disagreed with this statement.

5.6.9.7 Appointing a trustee

Appointing a new trustee to the trust (Section 2, Part I: 9.2.6). All the respondents (100%) indicated that they disagreed with the statement that the appointment of a new trustee to a vested trust would result in a paragraph 11(1)(*g*) disposal. The mean score for this statement was 5, which indicates that all the respondents disagreed with this statement.

5.6.9.8 Removing a trustee

Removing an existing trustee from the trust (Section 2, Part I: 9.2.7). Most of the respondents (95.8%) indicated that they disagreed with the statement that the removal of a trustee from a vested trust would result in a paragraph 11(1)(*g*) disposal. A small percentage of the respondents (4.2%) agreed with this statement. The mean score for this statement was 4.83, which indicates that most of the respondents disagreed with this statement. The overall mean score for the first five statements (9.2.1 to. 9.2.5) in this section was 4.54, which indicates that most of the respondents disagreed that the trustees' actions will result in a paragraph 11(1)(*g*) disposal.

5.6.9.9 Summary of the results for a vested trust (Section 2, Part I)

The following is a summary of the results for a vested trust for Part I:

- The mean score of 1.04 indicates that if the DTC's recommendations are implemented for a vested trust, both capital gains and income arising from the trust's asset will be taxed in the hands of the beneficiaries as the case prior to the implementation of the DTC's recommendations.
- The mean scores for vesting (4.54) or for distributing (4.71) a capital asset (which would require a change in vesting rights) in, or to a discretionary beneficiary, indicate that a paragraph 11(1)(*g*) disposal would not occur.
- The mean score of 4.54 when a capital asset is sold, and the resultant capital gain is either vested or distributed (which would require a change in vesting rights) in, or to discretionary beneficiary, indicates that a paragraph 11(1)(*g*) disposal would not occur.
- The mean scores when a new vested beneficiary is added to (4.38) or removed from (4.54) a vested trust indicate that a paragraph 11(1)(*g*) disposal would not occur.
- The mean scores when a trustee is appointed to (5) or removed from (4.83) a vested trust indicate that no paragraph 11(1)(*g*) disposal would occur.

- The overall mean score of 4.54 indicates that no paragraph 11(1)(*g*) disposal will arise from the trustees' actions as outlined in sections 9.2.1 to 9.2.5 of the online questionnaire in this section.
- The overall mean score of 4.92 indicates that no paragraph 11(1)(*g*) disposal will arise from the trustees' actions as outlined in sections 9.2.6 to 9.2.7 of the online questionnaire in this section.

5.6.10 Part J: Additional comments

The respondents were requested to provide any additional comments regarding a vested trust that may result in a VSA occurring (Research question 10). The following additional comments were provided by them (Section 1, Part I: 9.1):

- For a donation to be triggered in terms of paragraph 11(1)(*a*), an additional beneficiary needs to be added to the vested trust. When a beneficiary is removed from a vested trust, no value shifting can apply, as no interest is retained in the trust by the beneficiary removed.
- When assuming a cession or donation amongst the existing beneficiaries which triggers the normal disposal rules, no value shifting will occur.
- If the trustees' actions are in conjunction with the actions of the beneficiary, which are a donation or a cession, a paragraph 11(1)(*a*) disposal will be applicable; otherwise, a VSA will be applicable.
- If a transfer of a vested right in the form of a cession or donation occurs, a paragraph 11(1)(*a*) disposal will apply. If paragraph 11(1)(*a*) does not apply, a paragraph 11(1)(*g*) disposal may apply.

5.7 SUMMARY

This chapter addressed the key topics outlined, including online respondents' demographics, the online questionnaire instrument, the presentation of the online questionnaire results, discretionary trusts, and vested (non-discretionary) trusts. The findings demonstrate that a reduction in the beneficiary's interest in a vested trust before and after a VSA is more likely to occur than in the case of a beneficiary's

interest in a discretionary trust. A reduction in a beneficiary's' interest in a discretionary trust is difficult to measure, whereas a reduction of a beneficiary's interest in a vested trust can be measured. All research questions which also focused on other income tax implications under the Act which may preclude a VSA were comprehensively addressed within this chapter. In the next chapter, the interviews conducted with trust experts will be presented and discussed.

CHAPTER 6

QUALITATIVE FINDINGS FOR SA AND FOREIGN TRUST EXPERTS

6.1 INTRODUCTION

This chapter presents the qualitative findings derived from the interview-based component of the study. The data were prepared through manual coding to organise and classify participant responses; however, no interpretive analysis is undertaken at this stage. The analytical evaluation of the coded data is conducted in Chapters 7 and 8. The findings are presented descriptively and are structured to address the research questions formulated in Chapter 1 and to demonstrate the extent to which the study's research objectives have been advanced, thereby ensuring methodological and conceptual coherence with the overarching purpose of the research. Creswell and Plano Clark (2018:221) define a convergent mixed methods design as one where qualitative and quantitative methods are used simultaneously, as discussed under section 1.7.1.2 of Chapter 1 and detailed in section 4.1.2.3 of Chapter 4. This chapter discusses qualitative findings from interviews conducted with participants who each have at least thirty years' experience in trusts and the taxation of trusts. Six South African participants (P1 to P6), along with one Australian participant (P7) and one UK participant (P8), were interviewed; all identities remain confidential according to UNISA's research ethics guidelines (UNISA Research Ethics, 2016:15). This chapter includes the following sections: SA participant interview demographics (6.2); SA interview guides (6.3); presentation of the SA interview results (6.4); SA discretionary trusts (6.5); SA vested trusts (non-discretionary trusts) (6.6); foreign participant interview demographics (6.7); presentation of the foreign interview results (6.8); and foreign trusts research results (6.9). The chapter provides the interview findings for both SA and foreign trusts, with further analysis available in Chapters 7 (discretionary trusts) and 8 (non-discretionary trusts).

6.2 SA TRUST PARTICIPANTS DEMOGRAPHICS

The same demographics that were used for the SA participant interviews and the foreign participants were used in the online questionnaire. Expert sampling was used for both the qualitative and quantitative data collection as described in section 4.4.3.1 of Chapter 4. The SA participants selected for the interviews were selected based on a criterion of at least ten years of experience of the tax treatment of trust transactions , and a working experience of both a discretionary and vested (non-discretionary) trusts, which distinguishes them from the online questionnaire respondents who did not have to meet this criterion. The SA participants' demographics in Table 6.1 below only summarises those sub-categories which are applicable to the participants interviewed.

Table 6.1: SA participants' demographics

Category	Sub-categories	P1	P2	P3	P4	P5	P6
1.Gender	Male	Yes	Yes	Yes	Yes	Yes	Yes
2.Current position	Partner/Director in private practice	-	-	-	Yes	Yes	Yes
	Specialist/ Consultant	Yes	Yes	Yes	-	Yes	Yes
3.Work environment	National firm	Yes	-	-	-	-	Yes
	Small to medium sized firm	-	Yes	Yes	Yes	Yes	-
4.Trust years' experience	More than 10 years	Yes	Yes	Yes	Yes	Yes	Yes
5.Professional affiliations	Legal Practice Council	Yes	Yes	-	Yes	Yes	-
	South African Institute of Professional Accountants	-	-	Yes	-	-	-
	South African Institute of Tax Practitioners	-	Yes	-	Yes	Yes	-
	Fiduciary Institute of South Africa	-	-	-	-	Yes	-
	Certified Institute of Financial Planners of South Africa	-	-	-	-	-	Yes
6.Working knowledge of trust types	Discretionary trusts	Yes	Yes	Yes	Yes	Yes	Yes
	Vested trusts	Yes	Yes	Yes	Yes	Yes	Yes
7.Trusteeship	Currently acting as a trustee	Yes	-	Yes	Yes	Yes	Yes

All the participants interviewed for the SA interviews were male. Their current work positions indicate that five of the six participants are specialists or consultants. Three of the participants are directors or partners in private practices. Each one of the six experts have been working with trusts for at least 10 years. The actual average years of experience in income tax treatment of trust transactions would be over 30 years per participant, which means as a group they have a combined total of over 180 years of exposure to the taxation of trusts. Regarding the participants' current work environment, they have all indicated that they are in either a national

or a small to medium sized firm, which does indicate previous professional experience in large international affiliated firms for at least two of the six SA participants. Their professional affiliations vary between four different professional bodies, and three of the six SA participants have indicated that they have more than one professional designation. Four of the six participants belong to professional bodies which cater for tax professionals, namely the SAIPA and the SAIT. Five of the participants are fully acquainted with the drafting of trust documents and amendments to the trust deeds in practice. All the participants met the requirement of having working knowledge of discretionary and vested trusts. Five of the six participants are currently acting as trustees of trusts, which provides them with first-hand knowledge on all the practical aspects of family trusts.

6.3 SA INTERVIEW GUIDE

The development of the interview guides began with an analysis of legislation pertaining to trust and tax law, as detailed in Chapter 3. Before implementation, the guides underwent pilot testing (see section 4.3.4 of Chapter 4), and ethical clearance was secured for all research instruments, including the interview guides. The guide comprises two distinct sections: section 1 pertains to discretionary trusts, and section 2 addresses vested trusts (see Appendix B). As outlined in section 4.1.2.3 of Chapter 4, a convergent mixed-methods approach was adopted for this study, enabling results from both the online questionnaire and participant interviews to potentially validate each other; identical questions were posed to both participant groups (Maree *et al*., 2019:345). Each section of the interview guide (Sections 1 to 3) contains ten parts, each addressing specific research questions as follows:

Part A: Are the beneficiaries' rights or interest to or in a trust asset regarded as an asset in terms of the underlying definitions of an "asset" or "property" in section 1(1) of the Act (Gross Income), section 55(1) of the Act (Donations Tax), section 3(2) of the Estate Duty Act (Estate Duty) or Paragraph 1 of the Eighth Schedule (CGT) (Research question 1)?

Part B: Do any of the actions taken by the trustees, as mentioned in the primary and secondary research objectives 1 to 7, result in gross income and income tax

(excluding capital gains) implications, and should they therefore be excluded from a VSA (Research question 2)?

Part C: Do any of the selected trustees' actions mentioned in the primary and secondary research objectives 1 to 7 result in donations tax, and should they therefore by implication be excluded from a VSA (Research question 3)?

Part D: Do any of the selected trustees' actions mentioned in the primary and secondary research objectives 1 to 7 result in a paragraph 11(1)(*a*) to (*d*) ordinary disposal of the Eighth Schedule to the Act, and should they therefore be excluded from a VSA (Research question 4)?

Part E: Are the beneficiaries' interests in a trust, as referred to in the definition of a VSA in paragraph 1 of the Eighth Schedule to the Act, considered to be a capital asset for capital gains tax purposes pertaining to trust beneficiaries in discretionary or vested trust (Research question 5)?

Part F: How are proceeds and base costs of a VSA measured in a trust context? Are there examples of VSAs related to trusts, companies, or partnerships in the SARS guides that can provide guidance in determining the value to be placed on a VSA in a trust context (Research question 6)?

Part G: Do any of the trustees' actions mentioned in the research objectives meet the definition of a VSA, and does it fall under paragraph 11(1)(*g*) of the Eighth Schedule of the Act (Research question 7)?

Part H: Do any of the trustees' actions not mentioned in the primary and secondary research objectives 1 to 6 constitute a VSA (Research question 8)?

Part I: What are the implications for trustees' actions if the recommendations of the DTC's Report on the Feasibility of Wealth Tax in South Africa (DTC, 2018:81) in relation to VSAs are implemented in South Africa on VSAs (Research question 9)?

Part J: Are there any additional relevant comments which may be applicable to VSAs in trusts (Research question 10)?

6.4 PRESENTATION OF THE INTERVIEW FINDINGS

The findings of the interviews are presented separately in this chapter under the following sections: Section 6.5: discretionary trusts (section 1 of the interview guide) and section 6.6: vested trusts (section 2 of the interview guide) (Appendix B). The findings of the interviews and discussions are presented in the same sequence as the sub-questions appeared in the interview guide. Each sub-question was presented in the form of a statement: the participants were requested to provide commentary explaining whether they agreed or disagreed with each statement. A total of fifty-one sub-questions for each trust type were discussed with the participants during the interviews. After being interviewed on the two trusts, the participants discussed a total of one hundred and two questions. At the back of each question the reference to the interview guide was provided. The first numerical number indicates the section of the interview guide (1, discretionary trusts and 2, vested trusts), which is followed by the parts of the interview guide (part A to part J) that can be traced to the research questions in section 1.5.2 of Chapter 1. The last number indicates the exact sub-question for each part in the interview guide.

6.5 DISCRETIONARY TRUST FINDINGS

The findings for the discretionary trust (Section 1 of Appendix B) are presented next.

6.5.1 Part A: Nature of a trust's assets

How is the nature of a trust's assets determined, and are there any similarities in the definition of assets or property for income tax, donations tax, CGT, and estate duty purposes (Research question 1)?

6.5.1.1 Disposal of an asset

The disposal of a capital asset of a discretionary trust could result in either a capital gain or a loss (Section 1, Part A: 1.1). All the participants agreed that a capital gain or a loss will result from the disposal of a capital asset from a discretionary trust if the “proceeds” are not equal to the base cost of the asset. In a discretionary trust, the trustees have ownership of the trust’s assets, which vest in the trustees. The trustees have control over the trust’s assets. The discretionary beneficiaries only have a personal right against the trustees, regarding the trust’s assets. A disposal of a capital asset from a discretionary trust, at a capital gain will be taxed in terms of section 26A of the Act. The four elements for a capital gain or a loss should be present, which are a capital asset, a disposal of capital asset, a measurable base cost, and the proceeds of the asset.

In a discretionary trust, any distribution of the trust’s assets to any of the beneficiaries is at the discretion of the trustees, which leaves the discretionary beneficiary with only a personal right against the trustees and no real rights over the trust’s assets. All the participants mentioned that a “discretionary interest” in a trust is a mere hope or a contingent right or an expectation or a *spes* from the beneficiaries’ perspective. A discretionary interest in a trust is merely a contingent right of the beneficiary, until such a time the trustees vest the trust’s asset in a beneficiary. A discretionary interest has a zero-base cost for CGT purposes and can be subject to CGT, if the beneficiary receives any consideration for such discretionary interest. The definition of an asset for CGT purposes is wide enough to include a discretionary interest in a trust as an asset.

6.5.1.2 Capital nature of an asset

The revenue or capital nature of a discretionary trust’s assets or proceeds of such trust assets can be ascertained by the tests developed in case law (Section 1, Part A: 1.2). All the participants agreed that the revenue and capital nature of an asset held in a discretionary trust can be ascertained by case law. Besides case law, legislation also defines the differences between revenue and capital assets. During the interviews reference was made to some court cases, which dealt with the capital

and revenue nature of an asset, (Natal Estates Ltd. v. CIR (1975 (A)), which found that the company had changed a revenue asset into a capital asset, because of the taxpayer's actions. Also, the example of the tree and the fruit, as alluded to in the case of CIR v. Visser (1937 TPD), where a tree is regarded as the capital asset and the fruit as the revenue asset. None of the participants had any contrary views to the findings in these cases.

6.5.1.3 Capital asset compared to a revenue asset

The definition of a capital asset of a discretionary trust for CGT purposes would be the same as an asset for income tax purposes (before any disposal or deemed disposal in terms of the Eighth Schedule to the Act) (Section 1, Part A: 1.3). Five of the participants disagreed, and one remained uncertain, that a discretionary trust's capital asset is the same as a revenue asset. One participant was uncertain if a revenue asset was the same as a capital asset, and the participant therefore chose to be neutral on this question. The sale of an asset cannot be both revenue and capital in nature at the same time. Revenue assets are included in gross income, and capital assets are included in income in terms of section 26A of the Act. When discussing if a person receives money for a discretionary interest, then the difference between the amount received and a base cost of zero will be the capital gain. The Eighth Schedule sets the base cost at a nil value.

6.5.1.4 Capital gains asset compared to a donations tax property

Capital assets of a discretionary trust for capital gains tax purposes, would also be considered as property for donations tax purposes (Section 1, Part A: 1.4). All the participants agreed that a discretionary trust's asset for capital gains tax purposes could be akin to property for donations tax purposes. Property is any right "in or to" property, movable or immovable, corporeal, or incorporeal for donations tax purposes. A discretionary interest would be included in the definition of property for donations tax purposes, although a discretionary interest is only a personal right. The definition of an "asset" for CGT purposes is similarly worded as the definition of property for donations tax purposes. In all discussions the example of a farmland property as the possible capital asset of the farmer and his harvested crop of maize

as a revenue asset, was discussed. For farmland property only 70% of the market value of the farm is used for donations tax purposes, and 100% of the value to determine the proceeds in a CGT calculation. When the trustees vest a discretionary asset in a beneficiary, a disposal for CGT purposes will occur; at the same time, the vesting of the discretionary asset in a beneficiary could be considered a donation for donations tax purposes. The vesting of the discretionary asset in a beneficiary is exempt from donations tax in terms of section 56(1)(i) of the Act.

6.5.1.5 Capital gains asset compared to property for estate duty purposes

Capital assets of a discretionary trust for capital gains tax purposes would also be considered similar to property for estate duty purposes (Section 1, Part A: 1.5). All the participants agreed that an asset for capital gains tax purposes could be akin to property for estate duty purposes, if one would compare the same capital asset held by a discretionary trust and a natural person. A discretionary interest in a trust is a *spes* or a contingent right, which is excluded from the estate of a natural person in most instances. Case law has interpreted a discretionary interest in a trust as a mere hope or contingent right which is subject to the discretion of the trustees. Before the trustees have vested a discretionary interest in any beneficiary, such interest will be excluded from the beneficiary's estate. The only exception is if section 3(3)(*d*) of the EDA applies. In such a case, the discretionary interest would be included in the estate of a beneficiary. Farmland property is valued at 70% of its market value for estate duty purposes and at the full market value for CGT purposes. One participant mentioned that property is also defined in the Transfer Duty Act, which includes immovable property and interests in companies or trusts owning residential property. The findings of the interviews for part A are summarised next.

6.5.1.6 Summary of the discretionary trust's findings for Part A

The following is a summary of the findings related to section A of the interview guide:

- A capital gain or a loss will only result if a capital asset is disposed, and the measurable proceeds and the base cost of the asset differ.

- A beneficiary's right is only a *spes* or hope and could also be included in the definition of a capital asset for the Eighth Schedule.
- A beneficiary only has a personal right regarding the assets in the discretionary trust.
- The revenue and capital nature of an asset held in a discretionary trust can be ascertained by case law. Besides case law, legislation also defines the differences between revenue and capital assets.
- A capital asset is different from a revenue asset, and the tax treatment of the disposal of the two types of assets is also different.
- An asset for CGT purposes could be akin to property for donations tax purposes.
- An asset for CGT purposes could be akin to property for estate duty purposes.
- A discretionary interest in a trust is a *spes* or a contingent right, which is excluded from the estate of a natural person, unless section 3(3)(*d*) of the Estate Duty Act applies.

6.5.2 Part B: Income tax (excluding capital gains) implications

Do any of the selected trustees' actions result in any income tax (excluding capital gains) implications (Research question 2)? The interviewees were asked to address any potential income tax implications excluding any disposal or deemed disposal as defined by the Eighth Schedule to the Act that may arise from each of the seven specified actions undertaken by trustees for the provided discretionary trust structure.

6.5.2.1 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 1, Part B: 2.1). All the participants disagreed that an income tax (excluding capital gains) implication will arise when 80 shares of a discretionary trust are vested in beneficiary A, and a capital gain could result which will be taxed in terms of the Eighth Schedule to and under section 26A of the Act. Both the disposal of a revenue and a capital asset is subject to income tax, with the exception that capital gains are

subject to a CGT inclusion rate, allowing the capital gain to be taxed at a lower effective tax rate than items included in gross income. CGT is not a separate tax from income tax and is included in taxable income within the parameters of the Eighth Schedule. The calculation of taxable income and the tax treatment of the disposal of a revenue asset do not fall within the Eighth Schedule. These matters are instead governed by the charging provisions and operative rules in the main body of the Act, together with any applicable sections in other Schedules, but not by the remaining Schedules as a whole. The proceeds of a disposal of a revenue asset (non-capital asset) are included in gross income and result in an income tax (excluding gains) implication. The proceeds of a capital asset are included in the calculation of a capital gain or a loss calculation in terms of the Eighth Schedule.

6.5.2.2 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 1, Part B: 2.2). All the participants disagreed that an income tax (excluding capital gains) implication will arise when 80 shares of a discretionary trust, which is a capital asset, are distributed to beneficiary A. The distribution of a capital asset will be taxed in terms of the Eighth Schedule and section 26A of the Act. In the discretionary trust structure provided the shares are defined as a capital asset which can only be subjected to CGT consequences in terms of the Eighth Schedule.

If a capital asset is distributed from a discretionary trust to a beneficiary before vesting, the vesting and distribution of the asset take place simultaneously, and a disposal in terms of paragraph 11(1)(*d*) occurs as a transfer of an asset, resulting in a change of ownership occurring. The distribution of the trust assets could also be seen as a donation to the beneficiary. The most explicit option or disposal should be selected under the *unius est exclusio alterius* legal principle. The capital gain of R800 000 will be attributed to beneficiary A in terms of paragraph 80(1) of the Eighth Schedule.

6.5.2.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 1, Part B: 2.3). All the participants disagreed that an income tax (excluding capital gains) implication will arise when 80 shares (capital asset) of the discretionary trust are sold, and the capital gain is subsequently vested in or distributed to beneficiary A. A taxable capital gain could result which will be taxed in terms of the Eighth Schedule to and under section 26A of the Act. In the discretionary trust structure provided, the shares are defined as a capital asset, which can only be subject to CGT consequences in terms of the Eighth Schedule. The subsequent distribution or vesting of the capital gain of R800 000 will result in the attribution of the capital gain to beneficiary A. In terms of paragraph 80(2) of the Eighth Schedule to the Act, the capital gain of R800 000 made by the trust on disposal of the shares is attributed to beneficiary A, who is taxed on the capital gain, which is included in the taxable income at the inclusion rate of 40%.

6.5.2.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 1, Part B: 2.4). All the participants disagreed that an income tax (excluding capital gains) implication will arise when a new beneficiary is added to the discretionary trust. It may be legally difficult for the trustees to add a new discretionary beneficiary to a trust. The underlying assets of the trust are of a capital nature, so any income tax (excluding capital gains) implications are excluded. Also, no CGT consequences will arise, as the beneficiary's interest in the trust is a mere *spes,* and the *spes* has no value. The addition of the new discretionary beneficiary will not result in any value changes amongst the beneficiaries. There is one exception, namely if the adding of a new beneficiary is not in line with "the objective or purpose of the trust," which may result in the objective and purpose of a trust coming to an end, and there may in fact be a "disposal'" by the "old trust" to the "new trust" for CGT purposes. If that is the case, one would have to consider whether the deemed disposal at market value rules, contained in paragraph 38 of the Eighth Schedule to the Act, applies. An example provided was if non-family members are added to a family trust; and the objective

and the purpose of the trust is to cater for the original family of beneficiaries; would the original objective and purpose of the trust then change. No income tax (excluding capital gains) implication will arise, and a CGT consequence will arise if the trust objective or purpose ends.

6.5.2.5 Removing a beneficiary

Removing beneficiary A from the trust (Section 1, Part B: 2.5). All the participants disagreed that an income tax (excluding capital gains) implication will arise when a beneficiary is removed from the discretionary trust. The removal of a beneficiary is subject to the conditions contained in the trust deed. The removal of beneficiaries from a trust, if not consistent with the objective of the trust, may have CGT consequences. In the discretionary trust structure provided, the shares are defined as a capital asset, which can only be subject to CGT consequences in terms of the Eighth Schedule. The removed beneficiary, beneficiary A, would forfeit a *spes*, and technically dispose of an asset (technically resulting in a capital loss in his hands), but it has no value and therefore there would be no consideration, and no actual income tax implication should arise.

6.5.2.6 Appointing a trustee

Appointing a new trustee to the trust (Section 1, Part B: 2.6). All the participants disagreed that an income tax (excluding capital gains) implication will arise when a new trustee is appointed to the discretionary trust. The assets in the trust structure are of a capital nature, which normally excludes any possibility of a gross income consequence in terms of section 1(1) of the Act. The trustees are not beneficiaries and have no rights whatsoever to any of the trust's assets. A trustee may at the same time also be a beneficiary of the trust. If a trustee is appointed in his or her capacity as a trustee, no gross income and CGT consequences take place.

6.5.2.7 Removing a trustee

Removing a trustee from the trust (Section 1, Part B: 2.7). All the participants disagreed that an income tax (excluding capital gains) implication will arise when a trustee is removed from the discretionary trust. The assets in the trust structure are of a capital nature, which reduces the possibility of any income tax (excluding capital gains) implication. The trustees are not beneficiaries and have no rights whatsoever to any of the trust's assets. A trustee may be removed from a trust and remain a beneficiary of the trust without any income tax (excluding capital gains) implication. If the trustee is removed from a trust, and receives consideration for such a removal, the trustee will have income tax consequences. The findings of the interviews for part B are summarised next.

6.5.2.8 Summary of the discretionary trust's results for Part B

The following is a summary of the findings related to part B of the interview guide:

- The vesting or distribution of a capital asset or capital gain does not fall within the definition of "gross income" and accordingly gives rise to no income-tax consequences under the ordinary revenue-tax provisions of the Act. Its consequences arise solely under the Eighth Schedule.
- When an asset is of a capital nature, any disposal of such an asset will be excluded from the definition of gross income and taxed on terms of the Eighth Schedule to the Act.
- The appointment or removal of trustees will not have income tax (excluding capital gains) implications for the trustees per se, as the trustees do not have any rights to the trust's assets.

6.5.3 Part C: Donations tax implications

Do any of the selected trustees' actions or consent of the beneficiaries result in any donations tax implications (Research question 3). Interviewees were requested to add any commentary explaining whether they agree with the statement after each

statement below regarding a discretionary interest in a trust. The first four statements are general statements (6.5.3.1 to 6.5.3.4), and the last seven statements (6.5.3.5 to 6.5.3.11) relate to the seven trustees' actions (with the written consent of the beneficiaries) evaluated in the discretionary trust structure provided.

6.5.3.1 Donating a discretionary interest with consent

A donation of a discretionary interest from one beneficiary to another beneficiary for no or an inadequate consideration will have donations tax implications (Section 1, Part C: 3.1.1). All the participants disagreed that donations tax implications would arise if the trustees were able to donate discretionary interests from one beneficiary to another beneficiary. The beneficiaries' interests in a discretionary trust are a *spes* or hope which cannot be donated. A discretionary beneficiary does not have any value in the trust's assets, and it is not possible to donate something of no value, as it will not result in any impoverishment of the donor and enrichment of the donee. A donation of a discretionary interest in a trust, which has "no value" cannot result in any gratuitous disposal of property, nor gratuitous waiver or renunciation of a right as required in the definition of a donation to in terms of section 55(1) of the Act. If a person receives money for a discretionary interest in a trust, the difference between the amount received and a base cost of nil will be the capital gain. The Eighth Schedule paragraph 81 sets the base cost at a nil value.

6.5.3.2 Donating a discretionary interest without consent

If the trustees donate a discretionary interest from one beneficiary to another beneficiary, without the consent of the other beneficiaries, a possible donations tax implication could still occur (Section 1, Part C: 3.1.2). All the participants disagreed that donations tax implications will arise if the trustees donate discretionary interests from one beneficiary to another beneficiary without the consent of the other beneficiaries. The donor should consent to make a donation, and there should be an impoverishment of the donor and an enrichment of the donee for a donation to take place (Estate Welch's v. CSARS 66 SATC 303). Also, the donation from the beneficiary is a *spes,* having no value and no donation can take place. Without any value there can be no donation in terms of section 55(1) of the Act. Before a

beneficiary has a vested interest in a trust, the beneficiary interest has no value and therefore such a beneficiary will not be able to donate his or her discretionary interest in a trust to any other person.

Any trustees who attempt to donate any trust asset outside the parameters of the trust deed could be challenged in court. Once the beneficiaries have accepted any trust benefits from a discretionary trust, their consent would be required if the trustees change the beneficiaries' rights to the trust's assets. The trustees have a fiduciary duty towards beneficiaries, and it would be almost illegal for them to donate a discretionary interest from one beneficiary to another beneficiary. Instead, the trustees would be expected to exercise their discretionary powers and be able to vest or distribute the trust's assets to the discretionary beneficiaries of the trust, which would be permitted in terms of the trust deed.

The trustees of a discretionary trust would be able to distribute a trust's assets (or donate any trust assets) to a beneficiary. This is different from donating a discretionary interest from one beneficiary to another beneficiary. Any vesting or distribution (donation) of a trust asset to a beneficiary would normally be exempt from donations tax in terms of section 56(1)(*l*) of the Act, provided that a donation made in pursuance of trust. A donation of any trust assets to non-beneficiaries is also not in pursuance of the trust (outside of the scope and purpose of the trust deed) and would therefore not be exempt from donations tax (ITC 1840 72 SATC 79).

6.5.3.3 Donating a discretionary interest paragraph 11(1)(*a*) disposal

A donation of a discretionary interest from one beneficiary to another beneficiary at market value would result in a disposal in terms paragraph 11(1)(*a*) of the Eighth Schedule to the Act (Section 1, Part C: 3.1.3). All the participants disagreed that a paragraph 11(1)(*a*) disposal would result if the trustees donated discretionary interests from one beneficiary to another beneficiary at market value. A discretionary interest in a trust is a *spes* and has no value, which cannot be donated. The donation may be deemed to be at market value as the parties involved (the donor and donee) are connected parties. The reason for the parenthesised

paragraph 38 exclusion (deemed market value transactions between connected parties), could be because of the following: timing of a tax amendment; the method of calculating the proceeds of a VSA; or to exclude all donations at a deemed market value from being a paragraph 11(1)(*g*) disposal. A *spes* has no market value, meaning that a paragraph 11(1)(*a*) disposal is not possible. The participants provided an interpretation to the wording of the definition of a VSA contained in the Eighth Schedule that excludes donations at market value from a VSA *(other than because of a disposal at market value as determined before the application of paragraph 38)* as follows:

- One should determine when paragraph 38 became effective. If for example paragraph 38 came into effect when the Eighth Schedule was promulgated, it excludes transactions before 1 October 2001.
- The logic for excluding paragraph 38 donations at market value is because in a VSA the “proceeds” of a capital gain calculation is not measured at the market value of the asset as it would be in the normal case for connected parties. Instead, the “proceeds” for a VSA is measured by deducting the market value of the transferor’s interest in the trust before the VSA from the transferor’s market value after the VSA. The “proceeds” in a VSA is the value shift and cannot be based on the full market value of an asset. The third argument is that disposals at market value are automatically excluded from the VSA definition.

6.5.3.4 Donating a discretionary interest as paragraph 11(1)(*g*) disposal

A donation of a discretionary interest from one beneficiary to another beneficiary at an inadequate value would result in a disposal in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act (Section 1, Part C: 3.1.4). All the participants disagreed that a paragraph 11(1)(*g*) disposal will result if the trustees donate discretionary interests from one beneficiary to another beneficiary. All participants disagreed that a paragraph 11(1)(*g*) disposable is possible, as it is a *spes* and has no value. A donation cannot take place, as a discretionary interest in a trust is a *spes* or a contingent hope. A disposal cannot take place; thus, a paragraph 11(1)(*g*) disposal

does not occur, and there is no value shift taking place. If an asset is transferred at an inadequate value a VSA is possible; however, before a vested interest exists no VSA is possible. The Eighth Schedule states that a discretionary interest has a zero value. If the discretionary beneficiary receives any consideration for the discretionary interest, such consideration will be the proceeds, and a capital gain would arise. In such a case a paragraph 11(1)(*a*) disposal arises.

6.5.3.5 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 1, Part C: 3.2.1). All the participants disagreed that any donations tax implications will arise when the 80 shares of the discretionary trust are vested in beneficiary A. Donations made by the trust to the beneficiaries in terms of the trust deed are exempt from donations tax, as the section 56(1)(l) exemption applies. A "donation" is defined in section 55(1) of the Act as a gratuitous "disposal" of "property" which could include the vesting of the 80 shares in beneficiary A. Property is any right "in or to" property, movable or immovable, corporeal, or incorporeal. Accordingly, a donation arises when an asset or property is vested in a beneficiary. Shares have been described as a complex of personal rights and are defined as movable property in section 35(1) of Companies Act No. 71 of 2008 (Company's Act). However, the donation is exempt from donations tax in terms of section 56(1)(l), which exempts property disposed of under, or in pursuance of, a trust.

6.5.3.6 Distributing an asset of the trust

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 1, Part C: 3.2.2). All the participants disagreed that any donations tax implications will result when the 80 shares of the discretionary trust are distributed to beneficiary A. Donations made by the trust to the beneficiaries in terms of the trust deed are not subject to donations tax, as the section 56(1)(l) exemption applies. A "donation" is defined in section 55(1) of the Act as a gratuitous "disposal" of "property," which could include the distribution or vesting of the 80 shares in beneficiary A. If the distribution occurs before vesting, then the vesting takes place simultaneously together with the distribution.

6.5.3.7 Sale of an asset and vesting or distributing the capital gain

The trustees sell trust capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 1, Part C: 3.2.3). All the participants disagreed that donations tax implications will result in the discretionary trust structure when 80 shares are sold and the resultant capital gain of R800 000 is either vested in or distributed to beneficiary A, as the section 56(1)(l) exemption applies. A donation is defined in section 55(1) of the Act as a gratuitous “disposal” of “property” which could include the distribution or vesting of the capital profit to, or in beneficiary A.

6.5.3.8 Adding a beneficiary

Adding a new beneficiary to the discretionary trust (Section 1, Part C: 3.2.4). All the participants disagreed that donations tax implications will result in the discretionary trust structure when an additional beneficiary is added to the trust, as the beneficiaries only have a *spes,* and no value is gained or lost by any of the beneficiaries, in the process. If the new beneficiary only acquires a discretionary right to the trust assets, no donations tax implications will occur. The trustees would not be able to add an additional beneficiary without the consent of the existing beneficiaries It is not possible to add an additional beneficiary other than by way of an agreement between the founder, the trustees and all the beneficiaries who have accepted the benefits stipulated for them in the relevant trust deed (see Hofer and others v. Kevitt N.O. and others 1998(1) (SA) (382) (SCA)) (even then it would not be a donation, as a new beneficiary would only have a *spes*). The existing beneficiaries would have to agree to the adding of an additional discretionary beneficiary to the trust.

6.5.3.9 Removing a beneficiary

Removing beneficiary A from the discretionary trust (Section 1, Part C: 3.2.5). All the participants disagreed that donations tax implications will result in the discretionary trust structure when a beneficiary is removed from the trust, as the beneficiaries only have a *spes,* and no value is gained or lost by any of the

beneficiaries in the process. The legal implications of removing a discretionary trust beneficiary should also be considered before removing a discretionary trust beneficiary. The removal of a trust beneficiary from a discretionary trust without any consideration will not result in a CGT event. A discretionary beneficiary normally cannot resign from a trust. The beneficiary can for example accept payment not to be involved in the trust, in which case the difference between the amount received and the base cost of zero will be the capital gain in the hands of the beneficiary. If the beneficiary consents to the removal, there would be a donation of the interest in favour of the trust, as it would be a waiver of a right, but as it is a *spes*, no value would be placed on it. The removal of a beneficiary needs to be checked against the conditions contained in the trust deed. The trust deed may contain a clause which allows the trustees to make a distribution to a beneficiary and then determine that the beneficiary is no longer a beneficiary. The distribution will be exempt from donations tax, but there will be CGT consequences. If the beneficiary is removed without the beneficiary's consent (assuming it is legal), there would be no gratuitous disposal by the beneficiary concerned, as it would be an expropriation and accordingly not a donation. According to participant 6, trust deeds normally contain a variation clause which allows for the amendment of the trust deed.

6.5.3.10 Appointing a trustee

Appointing a new trustee to a discretionary trust (Section 1, Part C:3.2.6). All the participants disagreed that donations tax implications will result in the discretionary trust structure when a trustee is appointed to the trust. All the participants disagreed that the appointment of an additional trustee to a discretionary trust will result in any donations tax implications. This is a normal administrative procedure in which the necessary documents must be submitted to the Master of the High Court's office. The trust deed should be consulted regarding the specific requirements of appointing additional trustees.

6.5.3.11 Removing a trustee

Removing a trustee from a discretionary trust (Section 1, Part C: 3.2.7) All the participants disagreed that donations tax implications will result in the discretionary

trust structure when a trustee is removed from the trust. This is a normal administrative procedure in which the necessary documents must be submitted to the Master of the High Court's office. The trustees can also resign, and no donations tax implications will occur. The results of the interviews for part C are summarised next.

6.5.3.12 Summary of the discretionary trust's results for Part C

The following is a summary of the results related to Part C of the interview guide:

- Beneficiaries cannot donate a discretionary interest from one beneficiary to another beneficiary, because a discretionary interest is a hope or *spes*, which has no value in the hands of a discretionary beneficiary.
- A donation without the consent of the donor would not be legally possible, so if the trustees donate a discretionary interest without the consent of the beneficiaries it would be an illegal act.
- A donation of a discretionary interest from one beneficiary to another beneficiary would not result in a paragraph 11(1)(*a*) nor a paragraph 11(1)(*g*) disposal under the Eighth Schedule, as it is not possible to donate a *spes* which has no value to both the donor and the donee. Donations between connected parties are deemed to be at market value; however, due to the nature of a discretionary interest, no donation is possible.
- The parenthetical exclusion in the paragraph 1 of the Eighth Schedule definition of a VSA excluding changes "arising from a disposal at market value as determined before the application of paragraph 38" serves to ensure that the proceeds of a VSA are measured under paragraph 35(2) rather than being deemed to occur at market value under paragraph 38.
- The vesting or distributing of capital assets or capital gains from a discretionary trust in or to a beneficiary will not have any donations tax implications, as donations made in pursuance of a trust is exempt from donations tax in terms of section 56(1)(l) of the Act.
- The adding or removing of beneficiaries to a discretionary trust would not result in donations tax, as the beneficiaries' rights to the trust's assets have no value

and are a hope which cannot be enforced by the beneficiaries. The trustees' ability to remove discretionary beneficiaries from a trust, has been assessed in the courts.

- The appointment or removal of trustees will have no donations tax implications, as the trustees do not have any rights in the trust's assets.

6.5.4 Part D: Ordinary disposal implications

Do any of the selected trustees' actions fall under paragraph 11(1)(*a*) to (*f*) of the Eighth Schedule (Research question 4)? Interviewees were requested to discuss any possible disposal in terms of paragraphs 11(1)(*a*) to (*f*) that may result from the trustees' actions when each of the seven following trustees' actions occur in isolation (with the written consent of the beneficiaries), for the discretionary trust structure that was provided.

6.5.4.1 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 1, Part D: 4.1). All the participants agreed that a paragraph 11(1)(*a*) to (*f*) disposal will occur if 80 of the discretionary trust's shares are vested in beneficiary A. The trustees' act of vesting 80 of the discretionary trust's capital assets (shares) in a beneficiary will result in a capital disposal in terms of paragraph 11(1)(*d*) of the Eighth Schedule. In terms of paragraph 80(1) of the Eighth Schedule to the Act, the gain of R800 000 made by the trust on the disposal of the shares is attributed to beneficiary A, who is taxed on the capital gain. A capital gain is included in the taxable income of Beneficiary A at the inclusion rate of 40% in terms of section 26A of the Act, after applying the annual exclusion in paragraph 5(1) of the Eighth Schedule (or the R300 000 exclusion in paragraph 5(2) in the year of death) and is therefore subject to income tax.

The vesting of the assets in a discretionary beneficiary could be subject to a paragraph 11(1)(*d*) disposal. It may be arguable that the provisions of paragraph 11(1)(*a*) also apply in that the trustees have made a donation. When two possibilities exist simultaneously in law for one event, the legal principle *unius est exclusio*

alterius should apply, which means that the most explicit option takes precedence over the second option which is ignored.

6.5.4.2 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 1, Part D: 4.2). All the participants agreed that a paragraph 11(1)(*a*) to (*f*) disposal will occur when the trustees distribute 80 shares from the discretionary trust to beneficiary A, prior to vesting taking place. The vesting for the purposes of paragraph 11(1)(*d*) would require that the shares be delivered, or that the shares be transferred to beneficiary A, or that the shares be registered in the name of beneficiary A. The participants agreed that the distribution of 80 of the discretionary trust's shares will result in a capital gain disposal in terms of paragraph 11(1)(*d*). The distribution of a trust asset also results in a change of ownership of the asset, which is a paragraph 11(1)(*a*) disposal. If an asset has been previously vested in a beneficiary, resulting in a disposal for CGT purposes, the subsequent distribution of the vested asset to the beneficiary will not result in a paragraph 11(1)(*a*) to (*f*) disposal.

6.5.4.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000) and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 1, Part D: 4.3). All the participants agreed that in terms of paragraph 11(1)(*a*) to (*f*) a disposal would occur if 80 of the discretionary trust's shares are sold and the capital gain from the sale of the shares are either vested in or distributed to beneficiary A. The capital gain of R800 000 from the sale of shares is attributed to beneficiary A, in terms of paragraph 80(2) of the Eighth Schedule. The sale will immediately result in a capital gain in terms of paragraph 11(1)(*a*). If the trustees immediately vest or distribute the profit or cash proceeds to a beneficiary, this will result in the attribution of capital gains tax for the beneficiary. Even if the capital profit is vested in beneficiary A, a paragraph 11(1)(*d*) disposal would not occur, as the actual sale of the trust's assets would be considered the disposal.

6.5.4.4 Adding a beneficiary

Adding a new beneficiary to the discretionary trust (Section 1, Part D: 4.4). All the participants disagreed that a capital gains disposal in terms of paragraph 11(1)(*a*) to (*f*) would occur if a discretionary beneficiary is added to a discretionary trust. The rights, i.e., the *spes*, attributed to the new beneficiary on his/her addition, would be a disposal from the trust to the new beneficiary, but it would have no value constituting proceeds. Also, the remaining beneficiaries have not forfeited any value by the addition of the new discretionary beneficiary. The trustees may not be able to unilaterally add any additional discretionary beneficiaries to the trust. It is not possible to appoint an additional beneficiary other than by way of an agreement between the founder, the trustees and all the beneficiaries who have accepted the benefits stipulated for them in the relevant trust deed (See Hofer and others v. Kevitt N.O. and others 1998(1) (SA) (382) (SCA)).

6.5.4.5 Removing a beneficiary

Removing beneficiary, A from the discretionary trust (Section 1, Part D: 4.5). Five of the experts disagreed and one participant agreed that a paragraph 11(1)(*a*) to (*f*) disposal would occur if beneficiary A were removed from a discretionary trust, provided that the beneficiary does not receive any compensation for his/her removal from the trust. If the beneficiary consents to his/her removal, this would be a forfeiture of his/her rights and would constitute a disposal, which may result in a capital loss if any value is attributable thereto. However, as there would be no value on a *spes*, no tax consequences would arise. Where the adding of new contingent beneficiaries results in the objective and purpose of a trust ending, however, there may in fact be a 'disposal' by the 'old trust' to the 'new trust' for CGT purposes. If that is the case, one would have to consider whether the deemed disposal at market value rules contained in paragraph 38 of the Eighth Schedule to the Act, applies. The removal of a discretionary beneficiary would have no capital gains consequences unless the trust's objective or purpose ends. For example, when non-family members replace the existing beneficiaries of the trust.

6.5.4.6 Appointing a trustee

Appointing a new trustee to a discretionary trust (Section 1, Part D: 4.6). All the participants disagreed that a paragraph 11(1)(*a*) to (*f*) disposal would occur if a new trustee were appointed to a discretionary trust. The appointment of a trustee is a mere administrative procedure since the trustees have no right to the assets held in the trust.

6.5.4.7 Removing a trustee

Removing a trustee from a discretionary trust (Section 1, Part D: 4.7). All the participants disagreed that a paragraph 11(1)(*a*) to (*f*) disposal would occur if a trustee were removed from a discretionary trust. The removal of a trustee is a mere administrative procedure since the trustees have no right to the assets held in the trust. The results of the interviews for part D of the interview guide are summarised next.

6.5.4.8 Summary of the discretionary trust's results for Part D

The following is a summary of the results related to part D of the interview guide:

- Both the vesting or distribution of a capital asset from a discretionary trust in or to a beneficiary, will result in a paragraph 11(1)(*d*) disposal.
- Vesting for the purposes of a paragraph 11(1)(*d*) disposal would require some form of delivery or change of ownership to the beneficiary.
- The sale of the shares from the discretionary trust will result in a CGT disposal in terms of paragraph 11(1)(*a*), and the subsequent vesting or distribution of the capital gain in or to beneficiary A will be taxable in the hands of beneficiary A because of the attribution rules of paragraph 80(2).
- The adding or removal of a beneficiary to, or from a discretionary trust will not result in a paragraph 11(1)(*a*) to (*f*) disposal.
- As mentioned in section 6.5.4.5 above, an exception occurs when the removal of a beneficiary could result in a change in the objective of a trust, and a

disposal could result from the old trust (old objective) to the new trust (new objective).

- The appointment or removal of trustees to or from a discretionary trust will not result in a paragraph 11(1)(*a*) to (*f*) disposal.

6.5.5 Part E: Beneficiaries' interest in a trust

Are the beneficiaries' interests in a trust, as defined in the definition of a VSA, considered to be a capital asset of the beneficiary for capital gains tax purposes, in each of the two types of trusts examined in this study, namely a discretionary or a vested trust (Research question 5)?

6.5.5.1 Discretionary interest in a trust

A capital gain or a loss can only occur after a disposal of a capital asset. Participants were requested to add any commentary explaining whether they agree with the statement that any discretionary interest in a trust's capital assets is considered a capital asset of a beneficiary (Section 1, Part E: 5.1). Four of the participants agreed, and two disagreed, that the Eighth Schedule's definition of an asset could include a discretionary interest in a trust, as a possible capital asset of the beneficiary. A discretionary beneficiary only has a *spes* which is a hope, and it is possible to receive consideration for such a *spes*. A discretionary interest in a trust could be considered an asset of the beneficiary for CGT purposes, as the definition of an asset includes *any right to or in property* as an asset. A discretionary interest is a contingent right that depends on the trustees' decision to vest or distribute the trust assets to the beneficiary. A discretionary interest in a trust is not a real right. If CGT disposals were only subject to changes in full ownership of a trust's assets, a discretionary interest would not be considered an asset of the beneficiary for CGT purposes. In analysing the definition of an asset for CGT purposes, the definition includes a "right to or in property" which may include a discretionary interest in a trust. The Eighth Schedule paragraph 81 deems the base cost of a beneficiary's interest in an asset of a discretionary trust to have a nil value. A discretionary interest in a trust is a *spes* or contingent right for a beneficiary; and as a result, most trustees' actions will probably not have CGT consequences; however, for CGT

purposes it is still an asset that can have CGT consequences for the beneficiary when, for example, the beneficiary receives consideration for such an interest.

Another argument for a discretionary interest in a trust to be a capital asset of the beneficiary for CGT purposes is that case law indicates that a discretionary interest can be ceded. A discretionary beneficiary normally cannot resign from a trust. The beneficiary can, for example, accept payment not to be involved in the trust, in which case the difference between the amount received and the base cost of nil will be the capital gain in the hands of the beneficiary. The appointment and removal of beneficiaries from a trust should be within the parameters of the trust deed and should be done in accordance with case law dealing with the appointment of beneficiaries to a trust. The participant who disagreed that a discretionary interest in a trust could be considered as an asset of the beneficiary relies on accountants and tax participants to deal with the tax aspects of trusts. The results of the interviews for part E of the interview guide are summarised next.

6.5.5.2 Summary of the discretionary trust results for Part E

The following is a summary of the results related to part E of the interview guide:

- A discretionary interest in a trust could be considered a capital asset of a beneficiary for CGT purposes.
- The Eighth Schedule states that a discretionary interest in a trust has a zero value.

6.5.6 Part F: Measuring a VSA

What is meant by “value shifting;” how is it measured in the context of trusts; and how are the proceeds and base cost determined in a VSA (Research question 6)? A capital gain or a loss is determined by deducting the base cost from the proceeds of an asset (paragraph 3 of the Eighth Schedule to the Act). The proceeds of a VSA are measured by the reduction in the market value of the beneficiary’s interest in a

discretionary trust before and after a trustees' action (paragraph 35(2) of the Eighth Schedule to the Act).

In terms of paragraph 23 of the Eighth Schedule to the Act, the base cost of a person's interest which is subjected to a paragraph 11(1)(*g*) value shifting disposal, is determined with the following formula:

Y = [(A – C) /A] x B Where — (i) "Y" represents the amount to be determined; (ii) "A" is the market value of that person's interests immediately prior to the disposal; (ii) "B" is the person's base cost of the interests calculated immediately prior to the disposal; (iv) "C" is the market value of that person's interests immediately after the disposal.

Participants were asked to add any commentary explaining whether they agree with the statements regarding "the discretionary trust structure provided," which statements follow below.

6.5.6.1 Measuring the market value of a VSA

The market value of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured (Section 1, Part F: 6.1). All the participants disagreed that the market value of a discretionary interest in a trust can be measured from a beneficiary's perspective, even though the capital asset in the discretionary trust, when examined in isolation, may have a market value. It would be difficult to measure the market value of a beneficiary's discretionary interest in a trust, as the beneficiary only has a *spes* or conditional right to the trust's assets.

6.5.6.2 Measuring the value shift of a VSA

A possible reduction in the market value of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured (Section 1, Part F: 6.2). All the participants disagreed that it is possible to measure a reduction in a

discretionary beneficiary interest's market value after the trustees' actions. Also, if a discretionary interest does not have any measurable value, no reduction in the market value can be measured after any of the trustees' actions.

6.5.6.3 Measuring the base cost of a VSA

The base cost of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust's assets before any of the seven trustees' actions mentioned previously can be measured (Section 1, Part F: 6.3). All the participants disagreed that it is possible to measure the discretionary interest's base cost in a trust, as a discretionary interest in a trust is a *spes* or a hope before any of the trustees' actions take place. The Eighth Schedule does provide a zero value for a discretionary interest in a trust, and the discretionary beneficiary interest has a base cost in terms of the Act. The results of the interviews for part F of the interview guide are summarised next.

6.5.6.4 Summary of the discretionary trust results for Part F

The following is a summary of the results related to part F of the interview guide:

- The market value of a discretionary interest cannot be measured at any point in time, which in turn means a reduction in the market value cannot be measured after any of the trustees' actions had taken place.
- The base cost of a discretionary interest cannot be measured at any point in time. The Eighth Schedule determines that the base cost of a discretionary interest has a nil value.

6.5.7 Part G: Value shifting disposal implications

Do any of the selected trustees' actions meet the definition of a VSA, and does it fall under paragraph 11(1)(*g*) of the Eighth Schedule (Research question 7)? The participants were requested to discuss any possible disposal in terms of paragraph 11(1)(*g*) that may result from the trustees' actions when each of the seven following

trustees' actions occur in isolation (with the written consent of the beneficiaries) for the discretionary trust structure that was provided.

6.5.7.1 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 1, Part G: 7.1). All the participants disagreed that a paragraph 11(1)(*g*) disposal will occur if 80 of the discretionary trust's shares are vested in beneficiary A. The vesting of the discretionary trust's capital assets in a beneficiary will result in a paragraph 11(1)(*d*) disposal. If any trustees' action results in a normal disposal in terms of paragraphs 11(1)(*a*) to 11(1)(*f*), a disposal in terms of paragraph 11(1)(*g*) cannot happen at the same time.

6.5.7.2 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 1, Part G:7.2). All the participants disagreed that a paragraph 11(1)(*g*) disposal will occur if 80 of the discretionary trust's shares are distributed to beneficiary A. A capital disposal will occur in terms of paragraph 11(1)(*d*) as soon as the asset is vested in the beneficiary. If an asset is distributed to a beneficiary of a discretionary trust before it has been vested in the beneficiary, the vesting takes place simultaneously with the distribution. If the assets have previously been vested in a beneficiary and are distributed at a later stage from previously vested assets (i.e., the benefit is enjoyed later), no further tax event takes place.

6.5.7.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 1, Part G:7.3). All the participants disagreed that a paragraph 11(1)(*g*) disposal will occur when the 80 shares are sold from a discretionary trust to a third party, and the capital gain of R800 000 is either vested in beneficiary A, or the cash equivalent of the capital gain is distributed to beneficiary A. Instead, paragraph 11(1)(*a*) provides that the trust has disposed of the asset by virtue of the sale. An attribution

rule applies which attributes the capital gain to beneficiary A (paragraph 80(2)). A trust is a connected person in relation to its beneficiaries but does not hold an interest in relation to itself; therefore, the provisions of paragraph 11(1)(*g*) do not apply.

6.5.7.4 Adding a beneficiary

Adding a new beneficiary to the discretionary trust (Section 1, Part G:7.4). All the participants disagreed that a paragraph 11(1)(*g*) disposal will result if beneficiary a is a new beneficiary is added to the discretionary trust. The adding of a beneficiary by a trust involves the distribution of a *spes* to the beneficiary by the trust; the trust is a connected person in relation to its beneficiary; but does not hold an interest in relation to itself, and therefore the provisions of paragraph 11(1)(*g*) do not apply to the trust. However, if the new beneficiary is a connected person in relation to the existing beneficiaries, paragraph 11(1)(*g*) could potentially apply if value is shifted to the new beneficiary. In the case of a *spes,* however, this would not be the case, as no value can be shifted to the new beneficiary who only acquires a hope or a contingent right.

6.5.7.5 Removing a beneficiary

Removing beneficiary A from the discretionary trust (Section 1, Part G:7.5). All the participants disagreed that a paragraph 11(1)(*g*) disposal will result if beneficiary A is removed from the discretionary trust. Beneficiary A would forfeit a *spes* and technically dispose of an asset (technically resulting in a capital loss in his hands), but would not retain an interest in the trust, and therefore paragraph 11(1)(*g*) would not apply. A discretionary interest has no value, so it would not be possible to measure any value shift in this scenario.

6.5.7.6 Appointing a trustee

Appointing a new trustee to the discretionary trust (Section 1, Part G:7.6). All the participants disagreed that a paragraph 11(1)(*g*) disposal will result if an additional trustee is appointed to the discretionary trust. The appointment of a new trustee to

the trust is a mere administrative exercise and will have no impact on the value of the assets held in the trust.

6.5.7.7 Removing a trustee

Removing a trustee from the discretionary trust (Section 1, Part G:7.7). All the participants disagreed that a paragraph 11(1)(*g*) disposal will result when a trustee is removed from the discretionary trust. The removal of a trustee from the trust is a mere administrative exercise and will have no impact on the value of the assets held in the trust. The results of the interviews for part G are summarised next.

6.5.7.8 Summary of the discretionary trust results for Part G

The following is a summary of the results related to part G of the interview guide:

- None of the above trustees' actions which involve the beneficiaries would result in a paragraph 11(1)(*g*) disposal.
- The removal or appointment of trustees will not result in a paragraph 11(1)(*g*) disposal.

6.5.8 Part H: Other trustees' actions

Do any other possible trustees' actions, not mentioned in the main research objective or secondary research objectives (1) to (4), constitute a VSA (Research question 8)? Participants were requested to discuss and provide detailed examples of any other trustees' actions (excluding the seven trustees' actions examined in the previous sections and donations of discretionary interests between beneficiaries) for a discretionary trust that may result in a VSA in terms of paragraph 11(1)(*g*) of the Eighth Schedule to the Act (Section 1, Part G:8.1). The results of the interviews for part H are summarised next.

6.5.8.1 Summary of the results for Part H

The following is a summary of the results related to part H of the interview guide:

- Due to the very nature of a discretionary interest in a trust, which is a *spes*, or hope, or a contingent right of the beneficiary which is subject to the trustees' discretion; the possibility of a VSA is reduced.
- The beneficiaries only have a personal right, and no real right regarding a discretionary trust's assets. The beneficiary cannot enforce any rights to such assets; the value of a discretionary interest is not measurable; and no value shift can occur. VSAs resulting from the trustees' actions are not possible, as no value shift can be measured.
- The possible applications of GAAR cannot be ruled out for some of the trustees' actions.

6.5.9 Part I: The DTC's recommendations implications

What are the implications of the DTC's recommendations in relation to VSAs (Research question 9)? Participants were requested to add any commentary explaining whether they agree with each statement below regarding a discretionary interest in a trust. The first statement relates to an understanding of the DTC's recommendations (6.5.9.1), and the last seven statements (6.5.9.2 to 6.5.9.8) relate to the trustees' actions (with the written consent of the beneficiaries) resulting in a VSA, if the DTC's recommendations were adopted for the discretionary trust structure provided.

6.5.9.1 Understanding of the DTC's recommendations

The DTC's recommendations on trusts include that a discretionary trust's income or capital income should be taxed in the trust, effectively negating the attribution rules of taxing any taxable income or capital income in the hands of the beneficiaries of a discretionary trust before any trust asset or income is vested or distributed to the beneficiary. The participants were requested to add any commentary explaining

whether they agree with the above statement (Section 1, Part I: 9.1). Five of the e participants agreed that income and capital gains are ring-fenced, and taxed in the trust, before any vesting of the trust's assets takes place if the DTC's recommendations on trusts were implemented. Before vesting of a discretionary asset from a trust, the capital gain will be taxed in the hands of the trust and not in the hands of the beneficiary at the maximum income tax rate (currently 45%). This would be a change in policy as the Act is designed to tax the beneficiaries as and when they derive the benefits from a tax benefit, except for the application of specific tax avoidance rules. Participants who indicated that they were not fully conversant with the DTC's recommendations did not answer the questions within the time constraints of the interview. If the participants, who did not respond, did not indicate that the question was ambiguous or has more than one answer, their responses were ignored.

6.5.9.2 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 1, Part G:9.2.1). Four participants disagreed that a paragraph 11(1)(*g*) disposal could occur if the DTC's recommendations on trusts were implemented for a discretionary trust, when the 80 shares are distributed to beneficiary A. The participants disagreed that any VSA is possible, because up and until the time an asset is vested in a beneficiary, any profit or disposal would be automatically taxed in the trust. Two et participants indicated that they were not fully conversant with the DTC's recommendations and did not answer the questions within the time constraints of the interview.

6.5.9.3 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 1, Part I:9.2.2). Four participants disagreed that a paragraph 11(1)(*g*) disposal could occur if the DTC's recommendations on trusts were implemented for a discretionary trust, and when the 80 shares are distributed to beneficiary A. If the distribution of the asset takes place before any vesting has occurred, the vesting occurs simultaneously together with the distribution of the trust's assets. The participants

disagreed that any VSA is possible, because until such time an asset is vested in a beneficiary, any profit or disposal would be automatically taxed in the trust. The vesting of the 80 shares will result in a capital gain for the trust and have no impact on the discretionary beneficiaries. Two participants indicated that they were not fully conversant with the DTC's recommendations and did not answer the questions within the time constraints of the interview.

6.5.9.4 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 1, Part I: 9.2.3). Four participants disagreed that a paragraph 11(1)(*g*) disposal could occur if the DTC's recommendations on trusts were implemented for a discretionary trust, when the 80 shares are sold and the capital gain from the sale is either vested in, or distributed to, beneficiary A. The participants disagreed that any VSA is possible, because until such time an asset is vested in a beneficiary, any profit or disposal would be automatically taxed in the trust. This would mean that the trust would be taxed on the capital gain at the time when the asset is sold to the third party, and the actual distribution of the capital gain would have no CGT consequences. Two participants indicated that they were not fully conversant with the DTC's recommendations and did not answer the questions within the time constraints of the interview.

6.5.9.5 Adding a beneficiary

Adding a new beneficiary to the discretionary trust (Section 1, Part I: 9.2.4). Four participants disagreed that a paragraph 11(1)(*g*) disposal could occur if the DTC's recommendations on trusts were implemented for a discretionary trust, when a new beneficiary is added to the trust. No VSA will occur when a new beneficiary is added to a discretionary trust, even if the DTC's recommendations on trusts are implemented. This is because if the DTC's recommendations would be implemented for discretionary trusts, it will result in any capital gain first being taxed in the trust. No attribution of the capital gain can be made to the beneficiaries before vesting takes place, which prevents a value shifting possibility before vesting or

distribution of trust assets to the beneficiary. The potential impact of GAAR should also be considered when a beneficiary is added to a trust. None of the participants indicated that they were uncertain regarding this question. Two participants indicated that they were not fully conversant with the DTC's recommendations and did not answer the questions within the time constraints of the interview.

6.5.9.6 Removing a beneficiary

Removing beneficiary, A from the discretionary trust (Section 1, Part I: 9.2.5). Four participants disagreed that a paragraph 11(1)(*g*) disposal could occur if the DTC's recommendations on trusts were implemented for a discretionary trust, when a beneficiary is removed from the trust. No VSA will occur, because if the DTC's recommendations would be implemented, that will result in any gain first being taxed in the trust. The potential impact of GAAR should also be considered when a beneficiary is removed from a trust. None of the participants indicated that they were uncertain regarding this question. Two participants indicated that they were not fully conversant with the DTC's recommendations and did not answer the questions within the time constraints of the interview.

6.5.9.7 Appointing a trustee

Appointing a new trustee to the discretionary trust (Section 1, Part I:9.2.6). Four participants disagreed that a paragraph 11(1)(*g*) disposal could occur if the DTC's recommendations on trusts were implemented for a discretionary trust when a trustee is appointed to the trust. The trustee has no rights to trust income or capital of the trust and is not exposed to any tax implications in his or her personal capacity as trustee of the trust. Two participants indicated that they were not fully conversant with the DTC's recommendations and did not answer the questions within the time constraints of the interview.

6.5.9.8 Removing a trustee

Removing a trustee from the discretionary trust (Section 1, Part I: 9.2.7). Four participants disagreed that a paragraph 11(1)(*g*) disposal could occur if the DTC's

recommendations on trusts were implemented for a discretionary trust, when a trustee is appointed to the trust. The trustee has no rights to trust income or capital of the trust and is not exposed to any tax implications in his or her personal capacity as trustee of the trust. Two participants indicated that they were not fully conversant with the DTC's recommendations and did not answer the questions within the time constraints of the interview. The results of the interviews for part I are summarised next.

6.5.9.9 Summary of the discretionary trust results for Part I

The following is a summary of the results related to part I of the interview guide:

- The DTC's recommendations for discretionary trusts calls for income (both non-capital and capital income) to be taxed in the trust before any of such income is vested in a beneficiary.
- If the DTC's recommendations on discretionary trusts were implemented, no VSA would occur involving the beneficiaries, as any capital gains from their actions will be ring-fenced in the trust.
- If the DTC's recommendations on discretionary trusts were implemented, the appointment and removal of the trustees would not result in a VSA.

6.5.10 Part J: Additional comments

Participants were requested to provide any additional comments regarding this study on Value Shifting Arrangements in relation to discretionary trusts (Section 1, Part J:10.1). Additional comments and discussions are provided under the various headings below.

6.5.10.1 The DTC's recommendations regarding discretionary trusts

The participants did not agree with the implementation of the DTC's recommendations for the following reasons:

- The DTC's policy on discretionary trusts, if implemented, will result in a policy change of taxing the trust, rather than the beneficiary when a beneficiary derives a benefit from the trust.
- Many tax practitioners have objected to the implementation of the DTC's recommendations.
- It would create practical difficulties for persons who have structured their estate plans over many years.
- Increasing the tax collection without controlling irregular spending by the state would not solve the country's financial affairs.
- Already the distributions or vesting of both income and capital gains are taxed in the beneficiary's hands.
- Also, once a capital gain has been attributed to a beneficiary it will form part of the beneficiary's estate.
- Improved tax compliance will improve revenue compliance measures and will increase revenue collection from trusts without the need of structural changes to the way trusts are taxed.

6.5.10.2 Discretionary trusts' resolutions

Participants were also asked if a trustees' resolution to vest a trust's assets in a beneficiary could be changed in a discretionary trust. The participants' responses were as follows:

- The actions of trustees should be recorded by means of trustees' resolutions, which are required to show all the management decisions and administration of trusts.
- If a resolution was passed to vest an asset to a beneficiary before the actual delivery or transfer of ownership of an asset to the beneficiary, it may be possible to reverse the resolution.
- If the resolution is not an irrevocable resolution, it may be possible to reverse the resolution.

- If the vesting includes the delivery or transfer of ownership of an asset, such as registering the shares in the name of the beneficiary, it would be too late to cancel or reverse the resolution taken by the trustees.
- For a paragraph 11(1)(*d*) disposal to take place, a resolution to vest a capital asset would still require a delivery or transfer of ownership to take place.

6.5.10.3 Trusts compliance

The following compliance matters were raised by the participants during the discussions:

- Proper record keeping would be required for the administration of trusts.
- The administration of trusts requires specialised knowledge relating to both trust law and tax laws.
- Non-compliance of trusts could be attributed to a knowledge gap when it comes to the use of trusts.
- Trusts should be used as a vehicle for estate planning, such the preservation of wealth and looking after future family generations.
- Discretionary trusts are the most popular type of trust used in South Africa due to their flexibility and the fact that they allow for the protection of assets from creditors.

6.6 VESTED TRUSTS RESULTS

The results for the discretionary trust (Section 2 of Appendix B) are presented next.

6.6.1 Part A: Nature of a trust's assets

How is the nature of trusts' assets determined, and is there any similarity in the definition of assets or property for income tax, donations tax, CGT, and estate duty purposes (Research question 1)?

6.6.1.1 Disposal of an asset

The disposal of a capital asset of a vested trust could result in either a capital gain or loss (Section 2, Part A:1.1). All the participants agreed that a capital gain or a loss will result from the disposal of a capital asset from a vested trust if the "proceeds" are not equal to the base cost of the asset. In a vested trust, the trustees have ownership of the trust's assets, which vest in the beneficiaries. The trustees have control over the trust's assets. A vested right gives a beneficiary a personal right against the trustees in relation to the trust's assets. The beneficiaries do not have a real right over the trust's assets. A disposal of a capital asset from a vested trust at a capital profit will be taxed in terms of section 26A of the Act. Legislation describes the definition of an asset in paragraph 1 of the Eighth Schedule of the Act, to also include any right in or to an asset. From a vested trust perspective, the participants agreed that a disposal of a capital asset from a vested trust could result in either a capital gain or a loss; the four elements for a capital gain or a loss should be present; which are a capital asset, a disposal of a capital asset, a measurable base cost, and proceeds of the asset.

Different forms of vesting are possible depending upon the wording of the trust deed. The assets could, for example, be vested in a class of beneficiaries, allowing the trustees to distribute the trust's assets to any one of the beneficiaries in the specific class. This type of trust could be viewed as a discretionary trust, as the beneficiaries in a specific vested class would only have a hope or contingent right to the trust's assets.

The vested right could be specific, linking a specific asset to a beneficiary, or the trust capital in terms of a prescribed formula. In the vested trust structure, the shares were vested equally in all three beneficiaries of the trust. The vesting of the trust's assets could either be in terms of the trust instrument, or in terms of a previous resolution passed by the trustees of a discretionary trust. A vested interest in a trust is a "right," within the definition of an asset for CGT purposes.

6.6.1.2 Capital nature of an asset

The revenue or capital nature of a vested trust's assets or proceeds of such trust's assets can be ascertained by the tests developed in case law (Section 2, Part A:1.2). All the participants agreed that the revenue and capital nature of an asset held in a vested trust can be ascertained by case law. The same case law tests are applied to the trust's assets, irrespective of whether the trust is a discretionary or a vested trust. Besides case law, legislation also defines the differences between revenue and capital assets. During the interviews reference was made to some court cases which dealt with the capital and revenue nature of an asset (Natal Estates Ltd v. CIR (1975 A) (37 SATC 193)), which found that the company had changed a revenue asset into a capital asset by the taxpayer's actions. Also, the example of the tree and the fruit, as alluded to in the case of CIR v. Visser (1937 TPD), where a tree is seen as the capital asset and the fruit as the revenue asset. None of the participants had any contrary views to the results in these cases, and acknowledged the tests laid down by the courts are sufficient to establish the capital nature of an asset.

6.6.1.3 Capital asset compared to a revenue asset

The definition of a capital asset of a vested trust for capital gains tax purposes would be the same as an asset for income tax purposes (before any disposal or deemed disposal in terms of the Eighth Schedule to the Act) (Section 2, Part A:1.3). Five of the participants disagreed that a vested trust's capital assets are the same as revenue assets. Assets are defined in the Eighth Schedule, which apply to all assets; the court cases assist in determining which of those assets are capital in nature. The sale of an asset cannot be both revenue and capital in nature at the same time. Revenue assets are included in gross income, and capital assets are included in income in terms section 26A of the Act. One participant was uncertain if a revenue asset was the same as a capital asset and choose to be neutral on this question.

6.6.1.4 Capital gains asset compared to a donations tax property

Capital assets of a vested trust for capital gains tax purposes would also be considered similar to property for donations tax purposes (Section 2, Part A:1.4). All the participants agreed that a vested trust's assets for capital gains tax purposes could be the similar to property for donations tax purposes. The definition of an "asset" for both capital gains tax and donations tax purposes are similar, as both include a right in or to property as an asset. When examining the assets held in the trust in isolation, the same asset could potentially be an asset for both CGT and donations tax purposes. A vested interest in a trust could potentially be an asset for both CGT and donations tax purposes. In all discussions the example of a farmland property as the possible capital asset of the farmer and his harvested crop of maize as a revenue asset, was discussed. For farmland property only 70% of the market value of farmland property is used for donations tax purposes, and 100% of the value is used to determine the proceeds in a capital gain calculation.

6.6.1.5 Capital gains asset compared to an estate duty property

Capital assets of a vested trust for capital gains tax purposes would also be considered similar to property for estate duty purposes (Section 2, Part A:1.5). All the participants agreed that an asset for capital gains tax could be the similar to property for estate duty purposes, if one would compare the same capital asset held by a vested trust and a natural person. A vested interest in a trust would also be included in a beneficiary's estate in the case of a natural person. Unlike a discretionary interest in a trust which has no value and is therefore normally excluded from estate duty, a vested interest in a trust has a value for the beneficiary and will be included in the beneficiary's estate. Section 3(3)(*d*) of the Estate Duty Act would not apply as in the case of a discretionary trust, as the founder of the trust no longer has control of such an asset. The results of the interview for part A are summarised next.

6.6.1.6 Summary of the vested trust results for Part A

The following is a summary of the results for vested trusts related to part A of the interview guide:

- The disposal of a capital asset from a vested trust could result in a capital gain or a loss if the proceeds of the asset are different from the base cost.
- A beneficiary's vested right could be linked to a specific asset or to the trust capital according to a specific formula, therefore, a vested right could be included in the definition of a capital asset for the Eighth Schedule to the Act.
- The capital nature of a vested trust's asset can be determined by case law.
- Legislation can assist in the understanding of a capital asset.
- A revenue asset does not have the same qualities as a capital asset.
- A capital asset could have the similar qualities as property for donations tax and estate duty purposes.
- A vested right in a trust's asset is an asset of the beneficiary for estate duty purposes.

6.6.2 Part B: Income tax (excluding capital gains) implications

Do any of the selected trustees' actions result in any income tax (excluding capital gains) implications (Research question 2)? Participants were requested to discuss any possible income tax (excluding capital gains) implications when each of the seven following trustees' actions occur in isolation for the vested trust structure that was provided.

6.6.2.1 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 2, Part B:2.1). All the participants disagreed that an income tax (excluding capital gains) implication will arise when 80 shares of a vested trust are vested in beneficiary A. The vested assets or shares are of a capital nature, and any disposal of such shares or assets should result in a capital receipt. An additional 40 vested

shares should be allocated to beneficiary A, who already has 40 vested shares, to make up the 80 shares vested in beneficiary A. The additional 40 shares would have to be ceded to beneficiary A, from beneficiaries B and C; or alternatively beneficiaries B and C would have to relinquish an equivalent of 40 shares to beneficiary A. A change in the vested interests of the beneficiaries would arise from the trustees' actions. The vesting of the 40 shares which is a capital asset could result in a capital gain and will be taxed in terms of the Eighth Schedule and section 26A of the Act.

6.6.2.2 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 2, Part B:2.2). All the participants disagreed that an income tax (excluding capital gains) implication will arise when 80 shares of a vested trust, which is a capital asset, are distributed to beneficiary A. Forty of the 80 shares are already vested in beneficiary A, and the distribution of these shares to beneficiary A will have no CGT consequences. The additional 40 shares distributed to beneficiary A, and previously vested in beneficiaries B and C, will have to be transferred to beneficiary A. One method of transferring these shares would be by means of cession; beneficiaries B and C could each cede 20 of their vested shares to beneficiary A. Before these shares can be distributed, beneficiaries B and C should consent thereto, and a disposal in terms of paragraph 11(1)(*a*) or 11(1)(*b*) could arise. The most explicit option or disposal should be selected under the *unius est exclusio alterius* legal principle. A resulting capital gain will be taxed in terms of the Eighth Schedule and section 26A of the Act.

6.6.2.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell trust capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 2, Part B:2.3). All the participants disagreed that an income tax (excluding capital gains) implication will arise when 80 shares (capital asset) of the vested trust are sold, and the capital gain is subsequently vested in or distributed to beneficiary A. In the vested trust structure provided, the shares are defined as a capital asset, which can

only be subject to CGT consequences in terms of the Eighth Schedule. A capital gain of R400 000 from the original 40 shares could be taxed in the hands of beneficiary A and will be taxed in terms of the Eighth Schedule and section 26A of the Act. The distribution of the cash profit will not in itself result in a capital gain, as currency is not an asset as defined for the purposes of the Eighth Schedule of the Act. The distribution of currency or money to a beneficiary by a trust will not attract capital gains tax. The waiver or relinquishment of the capital profit by beneficiaries B and C could result in a disposal for CGT purposes.

6.6.2.4 Adding a beneficiary

Adding a new beneficiary to the vested trust (Section 2, Part B: 2.4). All the participants disagreed that an income tax (excluding capital gains) implication will arise when a new beneficiary is added to the vested trust. The underlying assets of the trust are capital in nature and a change in the vested rights could result in CGT consequences. Legally, it may not be possible to add a new vested beneficiary to a trust. The consent of the existing beneficiaries would have to be obtained. One would have to consider whether the deemed disposal at market value rules, as contained in paragraph 38 of the Eighth Schedule to the Act, may apply.

6.6.2.5 Removing a beneficiary

Removing beneficiary, A from the vested trust (Section 2, Part B:2.5). All the participants disagreed that an income tax (excluding capital gains) implication will arise when a beneficiary is removed from the vested trust. In the vested trust structure provided, the shares are defined as a capital asset, which can only be subject to CGT consequences in terms of the Eighth Schedule to the Act. The removed beneficiary A would forfeit a vested right at market value and technically dispose of an asset resulting in a capital loss in his/her hands. The removal of vested beneficiaries from a trust should be within the parameters of the trust deed.

However, where the removal of vested beneficiaries results in the objective and purpose of a trust ending, there may in fact be a 'disposal' by the “old trust” to the ”new trust' for CGT purposes. If that is the case, one would have to consider whether

the deemed disposal at market value rules, as contained in paragraph 38 of the Eighth Schedule to the Act, may apply.

6.6.2.6 Appointing a trustee

Appointing a new trustee to the vested trust (Section 2, Part B:2.6). All the participants disagreed that an income tax (excluding capital gains) implication will arise when a new trustee is appointed to the vested trust. The assets in the trust structure are of a capital nature, which normally excludes any possibility of a gross income implication in terms of section 1 of the Act. The trustees are not beneficiaries and have no rights to the trust's assets. No CGT and no income tax implications will occur when a new beneficiary is added to the trust.

6.6.2.7 Removing a trustee

Removing a trustee from the vested trust (Section 2, Part B:2.7). All the participants disagreed that an income tax (excluding capital gains) implication will arise when a trustee is removed from the vested trust. The assets in the trust structure are of a capital nature, which reduces the possibility of any income tax (excluding capital gains) implication. The trustees are not beneficiaries and have no rights whatsoever to any of the trust's assets. If a trustee is removed from a vested trust and receives consideration for such removal, it will have tax consequences for the trustee. The results of the interviews for part B of the interview guide are summarised next.

6.6.2.8 Summary of the vested trust results for Part B

The following is a summary of the results for vested trusts for part B of the interview guide:

- The vesting or distribution of capital assets from a vested trust will not have income tax (excluding capital gains) implications.
- The sale of a capital asset from a vested trust, and the subsequent vesting or distribution of the resulting capital gain to a beneficiary, will be excluded from

gross income and taxed in terms of the Eighth Schedule to the Act. The adding or removal of beneficiaries to or from a vested trust will not have income tax (excluding capital gains) implication.

- The appointment or removal of trustees to or from a vested trust will not have income tax (excluding capital gains) implication.

6.6.3 Part C: Donations tax implications

Do any of the selected trustees' actions or consent of the beneficiaries result in any donations tax consequences (Research question 3)? Participants were requested to add any commentary explaining whether they agree with the statement after each statement below regarding a vested interest in trust. The first four statements are general statements (6.6.3.1 to 6.6.3.4), and the last seven statements (6.6.3.5 to 6.6.3.11) relate to the seven trustees' actions (with the written consent of the beneficiaries) evaluated in the vested trust structure provided.

6.6.3.1 Donating a vested interest with consent

A donation of a vested interest from one beneficiary to another beneficiary for no or an inadequate consideration, will have donations tax consequences (Section 2, Part C:3.1.1). All the participants agreed that donations tax implications would arise if the trustees donated vested interests from one beneficiary to another beneficiary with the consent of the beneficiaries. The beneficiary who donated his or her vested interest will lose value, and the beneficiary receiving a vested interest will receive an increase in value. As this entails the donation of the vested interest, which will result in the future delivery of the trust asset, such a donation needs to be in writing. Donations, based on future promises, must be in writing to be a valid donation and cannot be done verbally. One participant remarked that he has not seen such a donation of a vested interest made in practice. The donation of a vested interest would have CGT consequences.

6.6.3.2 Donating a vested interest without consent

If the trustees donate a vested interest from one beneficiary to another beneficiary, without the consent of the beneficiaries, a possible donations tax consequence could still occur (Section 2, Part C:3.1.2). All the participants disagreed that vested interests could be donated from one beneficiary to another beneficiary without the consent of the beneficiaries, which reduces the possibility of donations tax implications. It would not be possible to donate a vested interest from one beneficiary to another beneficiary without the consent of the donor (beneficiary). The trustees could possibly donate a vested interest from one beneficiary to another beneficiary, provided they obtain the consent of the existing vested beneficiaries, who could object to the donation. The trustees have an imputed computed consent from the beneficiaries, in which case they may be able to donate the vested interests in a trust from one beneficiary to another beneficiary. The trust deed would have to be consulted to establish the nature of their powers to make donations of trust assets. In a discretionary trust, the trustees would for example be able to vest or distribute any trust's asset to any of the discretionary beneficiaries without any consent required, before the assets are vested in any of the beneficiaries.

6.6.3.3 Donating a vesting interest paragraph 11(1)(*a*) disposal

A donation of a vested interest from one beneficiary to another beneficiary at market value would result in a disposal in terms of paragraph 11(1)(*a*) of the Eighth Schedule of the Act (Section 2, Part C:3.1.3). All the participants agreed that a paragraph 11(1)(*a*) disposal would result if the trustees donated vested interests from one beneficiary to another beneficiary at market value. If the vested beneficiary consents to a donation of a vested interest to another beneficiary, the donation would be deemed to be at market value. The donation of the vested interest would be subject to CGT, and a paragraph 11(1)(*a*) disposal would occur. If the donor receives the full market value for the asset, then no donation takes place. The relevance of excluding a donation at market value from the definition of a VSA has three possible explanations: (1) it could be a result of changes to the definition of a VSA in the Eighth Schedule, which excludes donations at market value, maybe before the promulgation of the Eighth Schedule or any subsequent amendments;

(2) VSAs are not measured at the full market value as is the case of all other disposals, and the proceeds for a VSA is the difference between the market value before and immediately after value shifting takes place; (3) if a donation is made at market value then it is excluded from a VSA.

6.6.3.4 Donating a vested interest paragraph 11(1)(*g*) disposal

A donation of a vested interest from one beneficiary to another beneficiary at an inadequate value would result in a disposal in terms paragraph 11(1)(*g*) of the Eighth Schedule to the Act (Section 2, Part C:3.1.4). Four of the participants agreed and one disagreed that a paragraph 11(1)(*g*) disposal would result if the trustees donated vested interests at an inadequate value from one beneficiary to another beneficiary. The participants agreed that a donation of a vested interest at an inadequate value would result in a disposal in terms of paragraph 11(1)(*a*) to (*g*) of the Eighth Schedule to the Act. The paragraphs 11(1)(*a*) to (*g*) describe possible capital gains disposals, and only one of them needs to apply. Paragraphs 11(1)(*a*) to 11(1)(*g*) are not mutually exclusive; all disposals have an element of value shifting. In a sale of a farm, for instance, the value of the farm is transferred to the purchaser. All disposals have an element of value shifting, and paragraph 11(1)(*g*) of the Eighth Schedule is an extremely specific anti-tax avoidance measure, which targets specific VSAs. A VSA contains certain elements which are not considered in the case of a normal disposal; there is a decrease and corresponding increase in value between connected parties. If more than one outcome is possible in terms of the law, the most explicit option or disposal should be selected under the *unius est exclusio alterius* legal principle. A donation to a third party who is not a connected person and party to the donor would result in a relinquishment of a right which is described in both paragraphs 11(1)(*a*) and 11(1)(*b*). One would have to examine the trustees' actions in relation to the beneficiaries to establish which sub-paragraph of paragraphs 11(1)(*a*) to 11(1)(*g*) best describe the trustees' actions in conjunction with the beneficiaries' actions.

One participant explained that the reference to the parenthesised paragraph 38 exclusion in the definition of a VSA was to allow the measurement of the proceeds of a VSA in terms of paragraph 35(2) of the Eighth Schedule. Both paragraphs 38

and 35 should be compared, as they deal with the proceeds of disposals at an inadequate value. The logical link between these two paragraphs should be examined. Paragraph 35(2) specifically looks at the comparison of the market value before and after the VSA. Paragraph 38 also deals with establishing the proceeds of the disposal between connected persons at an inadequate value, and the time of measurement is when the disposal takes place. One participant stated that if the donation were at market value it would be excluded from the definition of a VSA.

6.6.3.5 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 2, Part C:3.2.1). All the participants agreed that donations tax implications will arise when the 80 shares of the vested trust are vested in beneficiary A. The donations tax will relate to the additional 40 shares vested in beneficiary A from beneficiaries B and C. Beneficiary A already has 40 vested shares. To have 80 vested shares in total, an additional 40 shares from beneficiaries B and C must be vested in beneficiary A. It would be exceedingly difficult from a legal standpoint for the trustees to change the vesting rights of the trust's assets without the consent of all the beneficiaries. For a donation to take place, these shares must be registered in the name of the beneficiary for a delivery to take place in terms of a valid donation. Any donation of a future promise must be in writing, which may be required for a vested asset, which may only be delivered at a future date. If the trustees donate the additional 40 shares to beneficiary A, it would not be in the pursuance of the trust, and the donations tax exemption would not apply as in the case of a discretionary trust. Beneficiaries B and C would have to cede or donate their vested shares to beneficiary A.

6.6.3.6 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 2, Part C:3.2.2). All the participants agreed that any donations tax implications will result when the 80 shares of a vested trust are distributed to beneficiary A; the donations tax will relate to the additional 40 shares distributed to beneficiary A from beneficiaries B and C. Beneficiary A already has 40 vested shares. The distribution

of these shares to beneficiary A would be in pursuance of the trust and be exempt from donations tax. The distribution of the additional 40 vested shares to beneficiary A could have donations tax implications. It would be exceedingly difficult from a legal standpoint for the trustees to change the vesting rights of the trust's assets to allow the distribution of the additional 40 shares to beneficiary A. The distribution of the additional shares is not within the normal parameters of the conduct of the trust's activities and is therefore not exempt from donations tax implications. The beneficiaries' consent would be needed for the change of vesting to occur. Beneficiaries B and C could cede their vested rights in the 40 additional shares to allow for the eventual distribution of these shares to beneficiary A.

6.6.3.7 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 2, Part C:3.2.3). All the participants agreed that donations tax implications will result in a vested trust structure when 80 shares are sold, and the resultant capital gain of R800 000 is either vested or distributed to beneficiary A. The R400 000 capital gain from the shares previously vested in beneficiaries B and C would be subject to donations tax. The sale of the shares at market value will not result in a donation. The vesting conditions in the trust deed or the prior trustees' resolution should permit the trustees to sell the trust's assets, with the proviso that the trustees are allowed to distribute the resultant capital gain to the beneficiaries.

A total of R800 000 of the capital gain would be distributed or vested in beneficiary A, of which R400 000 of the total capital gain was previously vested in beneficiary A. The capital profit from the sale of these shares of the original 40 vested shares, and any subsequent distribution of such profit to the beneficiary, would be exempt from donations tax. The distribution or vesting of the additional R200 000 each from beneficiaries B and C may require a cession agreement, or a donation, or at the very least the consent of beneficiaries B and C.

6.6.3.8 Adding a beneficiary

Adding a new beneficiary to the vested trust (Section 2, Part C:3.2.4). Five participants agreed, and one disagreed that donations tax implications will result in a vested trust structure when an additional beneficiary is added to the trust. It is not possible to add an additional beneficiary other than by way of an agreement between the founder, the trustees and all the beneficiaries who have accepted the benefits stipulated for them in the relevant trust deed (see Hofer and others v. Kevitt N.O. and others 1998(1) (SA) (382) (SCA)). The consent of all the existing beneficiaries would have to be obtained for the change in vesting to take place. The adding of a new vested beneficiary to a trust would have donations tax implications. The newly added beneficiary acquires a vested interest in the shares, and the existing beneficiary's consent to the relinquishment of their vested shares to the new beneficiary.

6.6.3.9 Removing a beneficiary

Removing beneficiary, A from the vested trust (Section 2, Part C:3.2.5). All the participants agreed that donations tax implications will result in the vested trust structure when a beneficiary is removed from the trust, as the beneficiary's value decreases in the process. The removal of a vested beneficiary from a trust with an inadequate value or no consideration will have donations tax consequences. Beneficiary A would have consented thereto, and as the donation or cession is not within the normal parameters of the running of the trust, the section 56(1)(l) exemption will not be applicable.

6.6.3.10 Appointing a trustee

Appointing a new trustee to the vested trust (Section 2, Part C:3.2.6). All the participants disagreed that donations tax implications will result in the vested trust structure when a trustee is appointed to the trust. The appointment of a trustee to a vested trust will not result in any donations tax implications. This is a normal administrative procedure in which the necessary documents must be submitted to

the relevant Master of the High Court's office. The trust deed should be consulted regarding the specific requirements of appointing additional trustees.

6.6.3.11 Removing a trustee

Removing a trustee from the vested trust (Section 2, Part C:3.2.7). All the participants disagreed that donations tax implications will result in the vested trust structure when a trustee is removed from the trust. The removal of a trustee from a vested trust will not result in any donations tax implications. This is a normal administrative procedure in which the necessary documents must be submitted to the relevant Master of the High Court's office. The trustees can also resign, and donations tax implications may not occur. The results of the interviews for part C of the interview guide are summarised next.

6.6.3.12 Summary of the vested trust results for Part C

The following is a summary of the results for vested trusts for part C of the interview guide:

- A donation of a vested interest from one beneficiary to another beneficiary would require all the beneficiaries' consent, and if the beneficiaries consent thereto, donations tax implications will result.
- The vesting or distribution of shares which were previously vested in beneficiaries B and C to beneficiary A, could have donations tax implications.
- A paragraph 11(1)(*a*) disposal could occur if a vested interest is donated between beneficiaries at a deemed market value; the parenthesised paragraph 38 exclusion in the definition of a VSA may be to allow the paragraph 35(2) measurement of the "proceeds" of a disposal or changes promulgated in the Eighth Schedule of the Act.
- A paragraph 11(1)(*g*) disposal could occur if a vested interest is donated between beneficiaries at an inadequate value.
- The vesting or distribution of the shares which were previously vested in beneficiaries B and C to beneficiary A, could have donations tax implications.

- The vesting or distribution of the capital gain from the shares which were previously vested in beneficiaries B and C to beneficiary A, could have donations tax implications.
- The trustees' adding of beneficiaries to a trust has been assessed in the courts.
- The adding (vested rights) or removal of a beneficiary to or from a vested trust could result in donations tax implications.
- The appointment or removal of a trustee to or from a vested trust would have no donations tax implications.

6.6.4 Part D: Ordinary disposal implications

Do any of the selected trustees' actions fall under paragraph 11(1)(*a*) to (*f*) of the Eighth Schedule (Research question 4)? Participants were requested to discuss any possible disposal in terms of paragraphs 11(1)(*a*) to (*f*) that may result from the trustees' actions when each of the seven following trustees' actions occur in isolation (with the written consent of the beneficiaries), for the vested trust structure that was provided.

6.6.4.1 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 2, Part D: 4.1). Five of the participants stated that a potential paragraph 11(1)(*a*) to (*f*) disposal would most likely occur when the 40 additional shares are vested in beneficiary A; one of the participants stated that a possible paragraph 11(1)(*g*) disposal could also most likely occur. One participant was uncertain, stating that if the shares were specifically vested in the beneficiaries, a paragraph 11(1)(*a*) to (*f*) disposal would occur if the trustees were able to sell the shares and reinvest the capital, in which case the trust would be like a discretionary trust.

The participants mentioned that beneficiaries B and C could donate, cede, abandon, or relinquish their vested rights to beneficiary A. When more than one possibility exists, one should select the one which best fits the circumstances and ignore the other, which is amplified in the legal principle *unius est exclusio alterius*. Also, there

is a tax principle that the same income should not be taxed twice, so only one disposal can be included once in the CGT net.

If a beneficiary repudiates any trust benefit and has not previously accepted any benefits from a trust, the beneficiary will not be subject to capital gains tax. Trusts are contracts between the founder and the trustees whereby assets are donated for the benefit of clearly identified beneficiaries. Refer to Durandt NO v. Pienaar NO and others [2000] 4 All SA 77 (C); Klerck and Schärges NNO v. Lee and others [1995] 2 All SA 225 (SE); Kellerman NO v. Van Vuren and others 1994 (4) SA 336 (T).

Also, in family trusts there are normally classes of beneficiaries beyond the three beneficiaries in the trust structures provided in this study. If the assets are vested in a specific class of beneficiaries, and the trustees have power and authority in terms of the trust deed, the trust would be more aligned with a discretionary trust.

The trust structures provided in the interview guides stated that the shares were vested equally in the beneficiaries (33.33% per vested beneficiary). None of the participants questioned the precise type of vesting of the beneficiaries. One participant provided an analogy of a change in partnership rights resulting in either a paragraph 11(1)(*b*) disposal, or a paragraph 11(1)(*g*) disposal if the change was brought about in a verbal agreement. In the example of a change in a partnership profit sharing ratio, this could be seen as the partner who has reduced his or her share to have relinquished some rights, which entails a paragraph 11(1)(*b*) disposal. The change in partnership profit sharing ratio without any payment could also be a VSA.

6.6.4.2 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 2, Part D:4.2). Five of the participants stated that a potential paragraph 11(1)(*a*) to (*f*) disposal would occur when the 40 additional shares are distributed to beneficiary A. One of the participants stated that a paragraph 11(1)(*g*) disposal could also most likely occur. One participant was uncertain, stating that if the shares were

specifically vested in the beneficiaries, a paragraph 11(1)(*a*) to (*f*) disposal would occur if the trustees were able to sell the shares and reinvest the capital. Such a trust would be like a discretionary trust. The trust structures provided in the interview guides stated that the shares were vested equally in the beneficiaries (33.33% per vested beneficiary). None of the other participants questioned the precise type of vesting of the beneficiaries.

6.6.4.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 2, Part D:4.3). Five of the participants stated that a potential paragraph 11(1)(*a*) to (*f*) disposal would most likely occur when the R400 000 capital gain is vested or distributed to beneficiary A, from the shares previously vested in beneficiaries B and C. One of the participants stated that a possible paragraph 11(1)(*g*) disposal could also most likely occur. The vesting or distribution of the capital gain in a different ratio to that of the vesting ratio could result in either a paragraph 11(1)(*a*) to (*f*) disposal or a paragraph 11(1)(*g*) disposal (of a VSA), depending on which of the disposal rules would best describe the trustees' and the beneficiaries' actions. If the beneficiaries (B and C) do a formal cession of their vested rights or a capital gain to beneficiary A, a paragraph 11(1)(*a*) disposal could occur. If no formal cession is conducted, a compelling argument for a paragraph 11(1)(*g*) disposal may be evident.

The sale of the shares would be a paragraph 11(1)(*a*) disposal, resulting in a capital gain of R800 000 (R10 000 x 80 shares), of which R400 000 (R10 000 x 40 shares) is already vested in beneficiary A. Beneficiary A will be taxed on the capital gain arising from the shares previously vested in him or her.

One participant was uncertain, stating that if the shares were specifically vested in the beneficiaries, a paragraph 11(1)(*a*) to (*f*) disposal would occur. If the trustees were able to sell the shares and reinvest the capital, that trust would be like a discretionary trust.

6.6.4.4 Adding a beneficiary

Adding a new beneficiary to the vested trust (Section 2, Part D:4.4). Four of the participants stated that a potential paragraph 11(1)(*a*) to (*f*) disposal would occur when a new vested beneficiary is added to the trust with the consent of all the beneficiaries. One participant stated that a paragraph 11(1)(*g*) disposal could also occur. One participant was of the view that the trustees would not be able to add a new beneficiary to the trust without the consent of the existing beneficiaries. It is not possible to add a beneficiary other than by way of an agreement between the founder, the trustees and all the beneficiaries who have accepted the benefits stipulated for them in the relevant trust deed (see Hofer and others v. Kevitt N.O. and others 1998(1) (SA) (382) (SCA)).

6.6.4.5 Removing a beneficiary

Removing beneficiary, A from the vested trust (Section 2, Part D:4.5). All the participants agreed that if beneficiary A is removed from a vested trust without any compensation, a disposal in terms of paragraphs 11(1)(*a*) to (*f*) could occur. When more than one option exists, the option which best describes the transaction should be selected and the others ignored. Beneficiary A would be relinquishing, ceding, donating, or abandoning 40 shares to the remaining beneficiaries B and C of the trust. This may require a cession of vested shares, which would be a disposal. No paragraph 11(1)(*g*) disposal will occur when a vested beneficiary is removed from the trust.

6.6.4.6 Appointing a trustee

Appointing a new trustee to the vested trust (Section 2, Part D:4.6). All the participants disagreed that the appointment of a new trustee to a vested trust will result in a paragraph 11(1)(*a*) to (*f*) disposal. The appointment of a new trustee to the trust is a mere administrative exercise and will have no impact on the value of the assets held in the trust.

6.6.4.7 Removing a trustee

Removing a trustee from the vested trust (Section 2, Part D:4.7). All the expert participants disagreed that the removal of a trustee from a trust will result in a paragraph 11(1)(*a*) to (*f*) disposal. The removal of a trustee from the trust is a mere administrative exercise and will have no impact on the value of the assets held in the trust. The results of the interviews for part D of the interview guide are summarised next.

6.6.4.8 Summary of the vested trust results for part D

The following is a summary of the results for vested trusts for part D of the interview guide:

- The vesting or distribution of the shares which were previously vested in beneficiaries B and C to beneficiary A, could result in a paragraph 11(1)(*a*) to (*f*) disposal.
- The vesting or distribution of the capital profit from the shares which were previously vested in beneficiaries B and C to beneficiary A, could result in a paragraph 11(1)(*a*) to (*f*) disposal.
- The sale of the shares would be a paragraph 11(1)(*a*) disposal, resulting in a capital gain of R800 000 (R10 000 x 80 shares), of which R400 000 (R10 000 x 40 shares) is already vested in beneficiary A, and taxed in the hands of beneficiary A.
- The adding or removal of a beneficiary, to or from a vested trust, could result in a paragraph 11(1)(a) to (*f*) disposal.
- One participant had a contrary view, namely that the trustees' actions described in sections 6.3.4.1 to 6.3.4.4 were best described as a paragraph 11(1)(*g*) disposal; stating the legal principle that when legal alternatives exist, the best fit option should be accepted.
- One participant also had a contrary view, stating that a vested trust which allowed beneficiaries to sell and reinvest trust assets was like a discretionary trust.

- The appointment or removal of trustees, to or from a vested trust, would not result in a paragraph 11(1)(*a*) to (*f*) disposal.

6.6.5 Part E: Beneficiaries' interest in a trust

Are the beneficiaries' interests in a trust, as defined in the definition of a VSA, considered to be a capital asset of the beneficiary for capital gains tax purposes, in each of the two types of trusts examined in this study, namely a discretionary and a vested trust (Research question 5)?

6.6.5.1 Vested interest in a trust

A capital gain or a loss can only occur after a disposal of a capital asset. The participants were requested to add any commentary explaining whether they agree with this statement below. Any vested interest in a trust's capital assets is considered a capital asset of a beneficiary (Section 2, Part E:5.1). Five of the participants agreed that a vested interest in a trust could be considered a capital asset of a beneficiary for CGT purposes, and one participant disagreed. A vested interest in a trust gives a beneficiary a personal right against the trustees, which may be enforceable depending on the wording of the trust deed. The trust deed may for example stipulate that the trust's assets can be distributed to the beneficiaries at a certain future date, in which case the beneficiaries can enforce such a right when the date of the distribution arrives. The beneficiaries do not have a real right over the vested assets and are not able to have full control over any vested assets before the distribution of such assets to them. A vested right to a trust's assets would be included in the definition of an asset in terms of the Eighth Schedule to the Act, which deals with any rights to, or in property. The participant who disagreed, stated that the trustees are the owners of the trust's assets in a vested trust. The results of the interviews for part E of the interview guide are summarised next.

6.6.5.2 Summary of the vested trust results for Part E

The following is a summary of the results for vested trusts for part E of the interview guide:

- A vested interest in a trust would be considered as an asset of the beneficiary for the purposes of CGT.
- One participant held a contrary view, stating that the trustees are the owners of the trust's assets.

6.6.6 Part F: Measuring a VSA

What is meant by "value shifting;" how is it measured in the context of trusts; and how are the proceeds and base cost determined in a VSA (Research question 6)? A capital gain or a loss is determined by deducting the base cost from the proceeds of an asset (paragraph 3 of the Eighth Schedule of the Act). The proceeds of a VSA are measured by taking the reduction in the market value of the beneficiaries' interest in a vested trust before and after a trustees' action (paragraph 35(2) of the Eighth Schedule of the Act). In terms of paragraph 23 of the Eighth Schedule of the Act, the base cost of a person's interest which is subjected to a paragraph 11(1)(*g*) value shifting disposal, is determined using the following formula:

Y = [(A – C) /A] × B where— (i) "Y" represents the amount to be determined; (ii) "A" is the market value of that person's interests immediately prior to the disposal; (iii) "B" is the person's base cost of the interests calculated immediately prior to the disposal; (iv) "C" is the market value of that person's interests immediately after the disposal.

Participants were requested to add any commentary explaining whether they agree with the statements regarding the vested trust structure that was provided. Their feedback is presented next.

6.6.6.1 Measuring the market value of a VSA

The market value of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust's assets before and after any of the seven trustees' actions mentioned previously can be measured (Section 2, Part F:6.1). All the participants

agreed that it would be possible to measure the market value of a vested interest before any of the trustees' actions are conducted. Also, the vested beneficiaries' rights do have a value; as for estate duty purposes a vested interest is included in the estate duty calculation, and a discretionary interest that has no value is normally excluded from the estate duty calculation of a deceased beneficiary.

6.6.6.2 Measuring the value shift of a VSA

A possible reduction in the market value of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust's assets before and after any of the seven trustees' action mentioned previously can be measured (Section 2, Part F:6.2). All the participants agreed that a possible reduction in the market value of a vested interest could be measured. It would be possible to measure the market value of a vested beneficiary's interest in a trust either before or after any trustees' action occurs. Accordingly, a reduction in the market value of a vested interest is measurable for those beneficiaries who are forfeiting their vested rights in a trust. The market value could be attributed to a specific trust asset or a pool of trust assets or capital if a beneficiary has a proportion of the capital vested in that beneficiary.

6.6.6.3 Measuring the base costs of a VSA

The base cost of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust's assets before any of the seven trustees' actions mentioned previously can be measured (Section 2, Part F:6.3). All the participants agreed that the base cost of a vested beneficiary's interest in a trust can be measured. The base cost of a vested interest in the underlying assets of a trust can be determined whether vesting is in a specific asset or a proportion of the vested trust's assets or capital. One participant also mentioned that in the case of a unit trust fund, the base cost is ascertainable. A holder of a unit trust has ownership of a fraction of the shares held in a unit trust portfolio. The results from the interviews for part F of the interview guide are summarised next.

6.6.6.4 Summary of the vested trust results for Part F

The following is a summary of the results for vested trusts for part F of the interview guide:

- The market value of a vested interest can be measured before and after a VSA, which may indicate a reduction in the market value after the trustees' actions.
- The base cost of a vested interest can be measured before a VSA occurring.

6.6.7 Part G: Value shifting disposal implications

Do any of the selected trustees' actions meet the definition of a VSA, and does it fall under paragraph 11(1)(*g*) of the Eighth Schedule (Research question 7)? The participants were requested to discuss any possible disposal in terms of paragraph 11(1)(*g*) that may result from the trustees' actions when each of the seven following trustees' actions occur in isolation (with the written consent of the beneficiaries) for the vested trust structure that was provided.

6.6.7.1 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 2, Part G:7.1). Five of the participants agreed that the vesting of the additional 40 shares in beneficiary A, of which 20 shares each were previously vested in beneficiaries B and C, would result in a paragraph 11(1)(*g*) disposal. One participant also mentioned that a disposal in terms of paragraph 11(1)(*g*) or paragraph 11(1)(*a*) could also occur if beneficiaries B and C had to cede their rights, to vest the full 80 shares to beneficiary A. This would require a series of transactions which is more likely to be an arrangement. All the beneficiaries are connected persons, by virtue of being beneficiaries of the same trust and blood relatives. One should also consider the GAAR rules in such instances. One participant also had a contrary view that a vested trust which allowed beneficiaries to sell and reinvest trust assets is like a discretionary trust.

6.6.7.2 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 2, Part G:7.2). Five of the participants agreed that the distribution of the additional 40 shares to beneficiary A, of which 20 shares each were previously vested in beneficiaries B and C, would result in a paragraph 11(1)(*g*) disposal. participant also mentioned that a disposal in terms of paragraph 11(1)(*g*) or paragraph 11(1)(*a*) could also occur if beneficiaries B and C have donated or ceded their rights to vest the full 80 shares in beneficiary A. This would require a series of transactions which is more likely to be an arrangement. All the beneficiaries are connected persons, by virtue of being beneficiaries of the same trust and blood relatives. One should also consider the GAAR rules in such instances. One participant had a contrary view that a vested trust which allowed beneficiaries to sell and reinvest trust assets is like a discretionary trust.

6.6.7.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 2, Part G:7.3). Three participants agreed, and two disagreed that a possible paragraph 11(1)(*g*) disposal would occur when the trustees sell 80 of the shares held in the trust and vest or distribute the capital gain from the shares previously vested in beneficiaries B and C, in or to beneficiary A. One participant also mentioned that a paragraph 11(1)(*g*) or paragraph 11(1)(*a*) disposal could occur, depending on whether beneficiaries B and C had to cede or donate their rights to beneficiary A. One participant did not comment, as he was of the view that the trustees could not conduct the changes without the consent of the founder, the trustees, and the beneficiaries.

The sale of the shares would be a paragraph 11(1)(*a*) disposal, resulting in a capital gain of R800 000 (R10 000 x 80 shares), of which R400 000 (R10 000 x 40 shares) is already vested in beneficiary A. Beneficiary A will be taxed on the capital gain arising from the shares previously vested in him or her.

6.6.7.4 Adding a beneficiary

Adding a new beneficiary to the vested trust (Section 2, Part G:7.4). Four participants agreed and one disagreed that a possible paragraph 11(1)(*g*) disposal would occur when an additional vested beneficiary is added to a trust, with the same vesting rights as the existing beneficiaries to the trust's assets. One participant stated that either a paragraph 11(1)(*g*) or (*a*) disposal would occur, depending on when the beneficiaries are ceding or donating their rights to the new beneficiary. One participant believed it is not normally possible to add an additional beneficiary other than by way of an agreement between the founder, the trustees and all existing beneficiaries who have accepted the benefits stipulated for them in the relevant trust deed.

6.6.7.5 Removing a beneficiary

Removing beneficiary, A from the vested trust (Section 2, Part G:7.5). Four of the participants agreed, and one disagreed that a possible paragraph 11(1)(*g*) disposal might occur when beneficiary A is removed from the vested trust, without any compensation. One stated that either a paragraph 11(1)(*a*) or 11(1)(*g*) disposal would be possible if a vested beneficiary is removed. One participant did not comment, as he was of the view that if the beneficiaries did not consent, the removal of beneficiary A was not possible. This participant also disagreed that the removal of a vested beneficiary will result in a VSA, because of the wording of the definition of a VSA. Beneficiary A would no longer have a vested interest in the trust, once removed. The definition of a VSA in the Eighth Schedule for the purposes of a paragraph 11(1)(*g*) disposal requires that the beneficiaries retain an interest in a trust after the value shifting occurs, which is not the case when the beneficiary is completely removed as a beneficiary from the trust. The consent of the beneficiaries would be required for the removal of the beneficiary.

6.6.7.6 Appointing a trustee

Appointing a new trustee to the vested trust (Section 2, Part G:7.6). All the participants disagreed that appointing a trustee to the trust will result in a paragraph

11(1)(*g*) disposal. The appointment of a new trustee is merely an administrative procedure.

6.6.7.7 Removing a trustee

Removing a trustee from the vested trust (Section 2, Part G:7.7). All the participants disagreed that removing a trustee from the trust will result in a paragraph 11(1)(*g*) disposal. The removal of a trustees is merely an administrative procedure. The results of the interviews for part G are summarised next.

6.6.7.8 Summary of vested trust results for Part G

The following is a summary of the results for vested trusts for part G of the interview guide:

- The vesting or distribution of the shares which were previously vested in beneficiaries B and C to beneficiary A, could result in a paragraph 11(1)(*g*) disposal.
- The vesting or distribution of the capital gain from the shares which were previously vested in beneficiaries B and C to beneficiary A, could result in a paragraph 11(1)(*g*) disposal.
- The adding or removal of a beneficiary, to or from a vested trust, could result in a paragraph 11(1)(*g*) disposal. One participant had the contrary view that a removal of a vested beneficiary would not result in a paragraph 11(1)(*g*) disposal.
- One participant also had a contrary view, namely that a paragraph 11(1)(*a*) disposal may occur if the beneficiaries ceded their rights to achieve the trustees' actions described in sections 6.6.7.1 to 6.6.7.5.
- When there is more than one legal outcome for a transaction, the legal principle of the option which best describes the transaction should be accepted.
- The appointment or removal of a trustee, to or from a vested trust, would not result in a paragraph 11(1)(*g*) disposal.

6.6.8 Part H: Other trustees' actions

Do any other possible trustees' actions not mentioned in the main research objective or secondary research objectives (1) to (4) constitute a VSA (Research question 8)? Participants were requested to discuss and provide detailed examples of any other trustees' actions (excluding the seven trustees' actions examined in the previous sections and donations of discretionary interests between beneficiaries) for a vested trust that may result in a VSA in terms of paragraph 11(1)(*g*) of the Eighth Schedule to the Act (Section 2, Part H:8.1).

Other examples of a VSA regarding vested trusts, as identified by the participants, are the following:

- If the beneficiary sells a portion of his/her interest to another beneficiary below market value, this will be a VSA.
- If the trust deed is amended with the changes of vesting interests amongst children who are beneficiaries, then a value shifting will occur.
- The trustees amend the rights of the preference or ordinary shares held in a company by the trust, thereby changing the vested value of the specific shares held by the different beneficiaries.
- Any suspension of rights attached to the trust's capital assets. The vesting of property, the sale of property or the sale of property with suspensive conditions could result in a VSA.
- The creating of a usufruct over trust assets, depending on the ages of the usufructuary and bare dominion holder, could result in a VSA.
- A possible VSA could occur if the trustees give a beneficiary life use or exclusive usage of a vested asset over a lengthy period.
- If the trustees are able, from a legal standpoint, to possibly change any vested rights in a trust, without any intervention from the beneficiaries, a possible VSA will occur.
- A change in the vesting rights without any payment for the value shifted, could result in a VSA. One participant provided an analogy of a change in partnership rights resulting in either a paragraph 11(1)(*a*) or (*b*) disposal, or a paragraph

11(1)(*g*) disposal if the change was brought about in a verbal agreement. In the example of a change in a partnership profit sharing ratio, this could be seen as the partner who has reduced his or her share in the partnership and relinquish some rights which is a paragraph 11(1)(*b*) disposal. The change in a partnership profit sharing ratio without any payment could also be a VSA. Another consideration would be if the partners verbally agree or agree in writing to a change in the partnership without compensation, in which case this could be a possible donation. Donations are normally completed when delivery takes place. If a donation is for a future delivery, the donation must be in writing.

- A counter argument to the possibility to a VSA of vested trusts is provided as follows: if the trust's capital or assets already vest in the beneficiaries, the trustees do not have the power, without the consent of the relevant beneficiaries, to change the vested interests or rights in the trust's assets. The consent provided by the vested beneficiaries for any change in the rights could be viewed as a relinquishment of their vested rights.
- An expropriation, donation or cession of vested rights would not be a VSA.
- A VSA is most likely to occur if the beneficiaries' rights were changed without the consent of the beneficiaries. Beneficiaries may also tacitly agree to a change in their vested rights. When asked how the beneficiaries were able to change the trust deed, one participant referred to his articles published online which indicate that for all trusts, once the beneficiaries have accepted benefits from the trust, the beneficiaries' consent would be required to change the trust deed.

6.6.9 Part I: The DTC's recommendations implications

What are the implications of the DTC's recommendations on VSAs (Research question 9)? Participants were requested to add any commentary explaining whether they agree with each statement below regarding a vested interest in a trust. The first statement relates to an understanding of the DTC's recommendations (6.6.9.1), and the last seven statements (6.6.9.2 to 6.6.9.8) relate to the trustees' actions (with the written consent of the beneficiaries) resulting in a VSA, if the DTC's recommendations were adopted for the vested trust structure provided.

6.6.9.1 Understanding the DTC's recommendations

If the DTC's recommendations were to be implemented, beneficiaries of vested trusts (with the indisputable and irrevocable vested right to a trust's taxable income or capital income) would be taxed on taxable income and capital income from such trusts, as was the case prior to the implementation of DTC's recommendations. Participants were requested to add any commentary explaining whether they agree with the above statement (Section 2, Part I:9.1). Five of the participants agreed that if the DTC's recommendations were to be implemented, beneficiaries of vested trusts (with the indisputable and irrevocable vested right to a trust's taxable income or capital income) would be taxed on taxable income and capital income from such trusts, as was the case prior to the implementation of the DTC's recommendations. One participant did not answer the question, as he had not yet examined the recommendations of the DTC.

6.6.9.2 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 2, Part I:9.2.1). Three participants agreed that a paragraph 11(1)(*g*) disposal could occur when the additional 40 shares from beneficiaries B and C are vested in beneficiary A if the DTC's recommendations on trusts were implemented for a vested trust. One participant stated that a paragraph 11(1)(a) or (*g*) disposal could occur. The remaining experts did not comment, as they had not yet studied the DTC's recommendations on trusts in detail.

6.6.9.3 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 2, Part I:9.2.2). Three participants agreed that a paragraph 11(1)(*g*) disposal could occur when the additional 40 shares from beneficiaries B and C are distributed to beneficiary A if the DTC's recommendations on trusts were implemented for a vested trust. One participant stated that a paragraph 11(1)(*a*) or (*g*) disposal could occur. The remaining participants did not comment, as they had not yet studied the DTC's recommendations on trusts in detail.

6.6.9.4 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 2, Part I:9.2.3). Two of the participants agreed and one disagreed that the distribution of 80 additional shares to beneficiary A, which were previously vested in beneficiaries B and C (40 each), could result in a paragraph 11(1)(*g*) disposal. One participant also mentioned the possibility of a paragraph 11(1)(*a*), (*b*) or (*g*) disposal, depending on the beneficiaries' actions. The remaining participants did not answer the question, as they had not yet examined the recommendations of the DTC in sufficient detail.

6.6.9.5 Adding a beneficiary

Adding a new beneficiary to the vested trust (Section 2, Part I:9.2.4). Two of the participants agreed and one disagreed that the adding of a new beneficiary D to a vested trust, with equal vested shares as the remaining beneficiaries, could result in a paragraph 11(1)(*g*) disposal. One participant mentioned that a paragraph 11(1)(*a*) or (*g*) disposal would occur. Another participant disagreed that a paragraph 11(1)(*g*) disposal would occur. The remaining participants did not answer the question, as they had not yet examined the recommendations of the DTC in sufficient detail.

6.6.9.6 Removing a beneficiary

Removing beneficiary, A from the vested trust (Section 2, Part I:9.2.5). Two of the participants agreed and one disagreed that the removal of beneficiary A from a vested trust, leaving beneficiaries B and C with equal rights in the trust assets, could result in a paragraph 11(1)(*g*) disposal. One participant mentioned that a paragraph 11(1)(*a*) or (*b*) disposal would occur. The remaining participants did not answer the question, as they had not yet examined the recommendations of the DTC in sufficient detail.

6.6.9.7 Appointing a trustee

Appointing a trustee to the vested trust (Section 2, Part I:9.2.6). Four of the participants disagreed that the implementation of the DTC's recommendations, and the appointment of a trustee to the vested trust, will result in a paragraph 11(1)(*g*) disposal. The appointment of a new trustee to the trust is a mere administrative exercise and will have no impact on the value of the assets held in the trust.

6.6.9.8 Removing a trustee

Removing a trustee from the vested trust (Section 2, Part I:9.2.7). Four of the participants disagreed that the implementation of the DTC's recommendations, and the removal of a trustee from the vested trust, will result in a paragraph 11(1)(*g*) disposal. The removal of a trustee from the trust is a mere administrative exercise and will have no impact on the value of the assets held in the trust**.**

6.6.9.9 Summary of the vested trust results for Part I

The following is a summary of the results for vested trusts for part I of the interview guide:

- The vesting or distribution of the shares which were previously vested in beneficiaries B and C to beneficiary A, could result in a paragraph 11(1)(*g*) disposal if the DTC's recommendations for vested trusts were implemented.
- The vesting or distribution of the capital gain from the shares which were previously vested in beneficiaries B and C to beneficiary A, could result in a paragraph 11(1)(*g*) disposal if the DTC's recommendations for vested trusts were implemented.
- The addition or removal of a beneficiary to or from a vested trust, could result in a paragraph 11(1)(*g*) or (*a*) disposal if the DTC's recommendations for vested trusts were implemented.

- The appointment or removal of a trustee, to or from a vested trust, would not result in a paragraph 11(1)(*g*) disposal if the DTC's recommendations for vested trusts were implemented.

6.6.10 Part J: Additional comments on a vested trust

Participants were requested to provide any additional comments regarding VSA's pertaining to vested trusts (Research question 10). The participants' additional comments and discussions are provided under the various headings below (Section 2, Part J:10.1).

6.6.10.1 Classes of beneficiaries

- The wording of the trust deeds can be drafted in such a manner to accommodate a variety of changing family circumstances.
- In a testamentary trust, the trust benefits of a predeceased beneficiary may devolve upon the remaining beneficiaries.
- Also, in family trusts there are normally classes of beneficiaries, beyond the three beneficiaries in the trust structures provided in this study.

6.6.10.2 The Transfer Duty Act

- The Transfer Duty Act normally applies to property such as land and buildings.
- The Transfer Duty Act was amended as follows to include discretionary trusts with residential properties in paragraph (*f*) under the definition of "property" in section 1(1) of the Transfer Duty Act: a contingent right to any residential property held by a discretionary trust (other than a special trust as defined in section 1 of the Act.

6.6.10.3 Repudiation of trust benefits

- In a case which dealt with an insolvent estate of a beneficiary and the beneficiary was able to repudiate the vested interest, the liquidators were unable to attach the trust's assets.
- So, if a beneficiary repudiates any trust benefit and has not previously accepted any benefits from a trust, the beneficiary will not be subject to capital gains tax. Trusts are contracts between the founder and the trustees whereby assets are donated for the benefit of clearly identified beneficiaries. Refer to Durandt NO and others v. Pienaar NO and others [2000] 4 All SA 77 (C); Klerck and Schärges NNO v. Lee and others [1995] 2 All SA 225 (SE); Kellerman NO v. Van Vuren and others 1994 (4) SA 336 (T).

6.6.10.4 Types of vested trusts

- A further distinction can be made between vested trusts in which specific assets are vested in a beneficiary, with provisions prohibiting the trustees from selling the asset; and trusts which permit the trustees to sell the trusts' assets, if the proceeds of such assets remain vested in the beneficiary.
- If the trustees have a discretion to sell assets and acquire new ones, the result is that the beneficiary has a right, when the trust deed authorises him/her to do so, to enforce distribution of the relevant fraction of the trust fund to him. The beneficiary cannot enforce a transfer of a specific asset to him/her. Participants were satisfied that the definition of an asset for CGT purposes is wide enough to include a vested interest in a trust as an asset of the beneficiary, provided the underlying trust asset meets the requirement of tests developed by the courts for defining a capital asset.

6.7 FOREIGN TRUST PARTICIPANTS' DEMOGRAPHICS

The same demographics were used for the foreign trust participants interviewed as for the SA participant s in section 5.2 of Chapter 5. The Australian expert is referred to as participant seven (P7) and the UK participant as expert eight participant (P8)

to meet the confidentiality requirements of the UNISA Code of Ethics (2016:12). The demographics of the foreign experts interviewed are presented in Table 6.2 below.

Table 6.2: Foreign trust participants' demographics

Category	Sub-categories	P7	P8
1.Gender	Male	YES	YES
2.Current position	Partner/Director in private practice		YES
	Specialist/ Consultant	YES	YES
3.Work environment	International firm	YES	YES
	National firm		YES
4.Tust years' experience	More than 10 years	YES	YES
5.Professional Affiliations	Queensland Law Society	YES	
	Chartered Tax Advisor		YES
7.Trusteeship	Currently acting as a trustee	YES	YES

Both participants seven and eight work with taxes in more than one tax jurisdiction and understand the trust law applicable in the foreign jurisdictions. Each of the foreign trust participants used in the foreign trust interviews have a minimum of 30 years' experience in the field of taxation in their respective countries. All of them are currently trustees of trusts, which provides them with the practical knowledge of trust administration in their respective jurisdictions.

6.8 PRESENTATION OF THE FOREIGN TRUSTS RESEARCH RESULTS

The foreign interview guide for Australia (Appendix C) and the UK (Appendix D) addresses the following research question:

Part K: Foreign value shifting alternatives: Are there examples of VSAs in the foreign revenue guides for trusts in Australia and the UK that can apply to South African trusts (Research question 11)?

The Australian interview guide included four sections as follows: general questions (1); discretionary trusts (2); fixed trusts (3) and fixed units trusts (4). The UK interview guide included three sections as follows: general questions (1); discretionary trusts (2); and fixed trusts (3). Each section of the interview guide

sections 2 to 4 contains nine parts, each addressing the same research questions (parts A, B, D, E, F, G, H and J) as described in section 6.3 above. Part I which deals with the DTC's recommendations which is specific SA trusts was omitted from the foreign interview guides.

6.9 FOREIGN TRUSTS RESEARCH RESULTS

6.9.1 General questions

Both Participant 7 and 8 confirmed both discretionary and non-discretionary or fixed trusts were used for estate planning purposes in both Australia and the UK. Participant 7 confirmed both Gift Tax (Donations Tax) and Inheritance Tax (Estate Duty) were not applicable in Australia. According to Participant 8 the UK in the UK both Gift Tax (Donations Tax) and Inheritance Tax (Estate Duty) is only applicable after death.

6.9.2 Findings for sections 2 to 4 of the interview guides

The results for discretionary trusts and non-discretionary trusts, as detailed in Parts A to G, are shown in Tables 6.3 to 6.8 below. The findings for Part H are provided in a summary narrative.

Table 6.3: Findings: Nature of Trust's Assets (Part A)

STATEMENT	DISCRETIONARY TRUSTS		NON -DISCRETIONARY TRUSTS		
	Australian Discretionary Trust	UK Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust
1.1 The disposal of a capital asset of a discretionary trust could result in either a capital gain or a capital loss.	YES	YES	YES	YES	YES
1.2 The revenue or capital nature of a discretionary trust's assets or proceeds of such trust's assets can be ascertained by the tests developed in case law.	YES	YES	YES	YES	YES
1.3 A capital asset of a discretionary trust for capital gains tax purposes, would be the same as an revenue asset for income tax purposes.	NO	NO	NO	NO	NO

Table 6.4: Findings: income tax (excluding capital gains) implications (Part B)

STATEMENT	DISCRETIONARY TRUSTS		NON -DISCRETIONARY TRUSTS		
	Australian Discretionary Trust	UK Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust
2.1 The trustees vest the trust's capital assets (80 shares) in beneficiary A.	NO	NO	NO	NO	NO
2.2 The trustees distribute the trust's capital assets (80 shares) to beneficiary A.	NO	NO	NO	NO	NO
2.3 The trustees sell trust capital assets (80 shares) at market value ($/£1 200 000), and either vest or distribute the capital gain ($/£800 000) to beneficiary A.	NO	NO	NO	NO	NO
2.4 Adding a new beneficiary to the trust.	NO	NO	NO	NO	NO
2.5 Removing beneficiary A from the trust.	NO	NO	NO	NO	NO
2.6 Appointing a new trustee to the trust	NO	NO	NO	NO	NO
2.7 Removing a trustee from the trust.	NO	NO	NO	NO	NO

The results for appointing or removing an appointor or trustee were identical across all Australian trusts.

Table 6.5: Findings: Donations Tax Implication (Part C)

STATEMENT	DISCRETIONARY TRUSTS		NON -DISCRETIONARY TRUSTS		
	Australian Discretionary Trust	UK Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust
3.1 If beneficiaries donate a discretionary interest or non-discretionary interest, from one beneficiary to another beneficiary, donations tax could be applicable.	N/A	N/A	N/A	N/A	N/A
3.2 If a donation of a discretionary interest or non-discretionary interest from one beneficiaries to another at full market value, an ordinary dispsal captal gains disposal would occur.	NO	NO	UNC	YES	YES
3.3 if a donation of a discretionary interest or non-discretionary interest from one beneficiaries to another at an inadequate value, will result in a value shifting.	NO	NO	UNC	YES	YES

Table 6.6: Findings: Ordinary disposals implications (Part D)

STATEMENT	DISCRETIONARY TRUSTS		NON -DISCRETIONARY TRUSTS		
	Australian Discretionary Trust	UK Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust
4.1 The trustees vest capital assets (80 shares) in beneficiary A.	YES	YES	YES	YES	YES
4.2 The trustees distribute capital assets (80 shares) to beneficiary A.	YES	YES	YES	YES	YES
4.3 The trustees sell trust capital assets (80 shares) at market value ($/£1 200 000), and either vest or distribute the capital gain ($/£800 000) to beneficiary A.	YES	YES	YES	YES	YES
4.4 Adding a new beneficiary to the trust.	NO	NO	NO	NO	YES
4.5 Removing beneficiary A from the trust.	NO	NO	NO	NO	YES
4.6 Appointing a new trustee to the trust.	NO	NO	NO	NO	NO
4.7 Removing a trustee from the trust.	NO	NO	NO	NO	NO

The results for appointing or removing an appointor or trustee were identical across all Australian trusts.

Table 6.7: Findings: Beneficiary Interest in a Trust (Part E)

STATEMENT	DISCRETIONARY TRUSTS		NON -DISCRETIONARY TRUSTS		
	Australian Discretionary Trust	UK Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust
5.1 A disposal of a discretionary interest or non-discretionary in a trust's capital asset by a beneficiary, could result in a capital gain or a loss for the beneficiary.	NO	NO	YES	YES	YES

Table 6.8: Findings: Measurement of a VSA (Part F)

STATEMENT	DISCRETIONARY TRUSTS		NON -DISCRETIONARY TRUSTS		
	Australian Discretionary Trust	UK Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust
6.1 The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	NO	NO	YES	YES	YES
6.2 A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	NO	NO	YES	YES	YES
6.3 The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets before any of the seven trustees' actions mentioned previously can be measured.	NO	NO	YES	YES	YES

Table 6.9: Findings: Value Shifting (Part G)

STATEMENT	DISCRETIONARY TRUSTS		NON -DISCRETIONARY TRUSTS		
	Australian Discretionary Trust	UK Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust
7.1 The trustees vest capital assets (80 shares) in beneficiary A.	NO	NO	NO	NO	NO
7.2 The trustees distribute capital assets (80 shares) to beneficiary A.	NO	NO	NO	NO	NO
7.3 The trustees sell trust capital assets (80 shares) at market value ($/£1 200 000), and either vest or distribute the capital gain ($/£800 000) to beneficiary A.	NO	NO	NO	NO	NO
7.4 Adding a new beneficiary to the trust.	NO	NO	YES	YES	YES
7.5 Removing beneficiary A from the trust.	NO	NO	YES	NO	NO
7.6 Appoint a new trustee to the trust.	NO	NO	NO	NO	NO
7.7 Removing a trustee from the trust.	NO	NO	NO	NO	NO

The results for appointing or removing an appointor or trustee were identical across all Australian trusts.

6.9.3 Part H: Other trustees' actions

Participant 7 mentioned that value shifting is complex, and one would have to look at ITAA for specific value shifting events related to trusts. Participant 8 did not provide any other trustees actions that may result in value shifting tax avoidance in the UK.

6.10 SUMMARY

This chapter comprehensively addressed all the research questions relating to RSA and foreign trusts. The demographics of both the RSA, Australian and UK participants were provided, followed by the findings of the interviews. The interviews highlighted that it is challenging to determine the base cost and market value of an

interest in a discretionary trust. However, in the South African context, the base cost and market value of an interest in a vested trust can be reliably measured. The potential for a VSA was found to be unlikely in both South African and foreign discretionary trusts, whereas a VSA is possible in both South African and foreign vested trusts. In the next chapter, the analysis of both the online questionnaires and the participant interviews for discretionary trusts will be presented.

CHAPTER 7

ANALYSIS OF THE RESEARCH RESULTS FOR DISCRETIONARY TRUSTS

7.1 INTRODUCTION

This chapter employs methodological triangulation to integrate the doctrinal and empirical findings relating to contingent rights in discretionary trusts, thereby strengthening the validity of the conclusions drawn in relation to the research objectives. It presents an integrated analysis of the doctrinal findings from Chapter 3 together with the findings of the SA online questionnaire (Chapter 5) and the findings from the interview guides (Chapter 6). Using a convergent mixed-methods approach, data from questionnaire respondents and interview participants are compared against the same research questions (see section 4.1.2.5 in Chapter 4). Where questionnaire and interview findings diverge, and for key issues, supplementary doctrinal analysis together with the analysis in Chapter 3 is used to ensure triangulation. Cross-tabulated findings are consolidated with the finding from Chapters 5 and 6, with key findings highlighted throughout. The chapter proceeds with an analysis of South African discretionary trusts (section 7.2), a comparative analysis of South African and foreign discretionary trusts (section 7.3), and a discussion and summary of the combined findings (section 7.4).

7.2 ANALYSIS OF DISCRETIONARY TRUSTS

The analysis is divided into Parts A, B, C, D, E, F, G, H, I and J each aligned with the research questions (see section 1.5.2, Chapter 1) and the ten categories for discretionary trusts in section 1 of both the SA Online Questionnaire (Appendix A) and the SA Interview Guide (Appendix B).

7.2.1 Part A: Nature of a trust's assets

Are the beneficiaries' rights or interest to or in a trust asset regarded as an asset in terms of the underlying definitions of an "asset" or "property" in section 1(1) of the Act (Gross Income), section 55(1) of the Act (Donations Tax), section 3(2) of the

Estate Duty Act (Estate Duty) or Paragraph 1 of the Eighth Schedule (CGT) (Research question 1)? The respondents and the participants had to agree or disagree to each separate statement below, which examined the nature of an asset. The cross tabulation of all the sub-questions for part A is summarised in Table 7.1 below.

Table 7.1: Summary of the cross-tabulation results for Part A

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
1.1 The disposal of a capital asset of a discretionary trust could result in either a capital gain or a capital loss.	100%	0%	32	100%	0%	6	N/A
1.2 The revenue or capital nature of a discretionary trust's assets or proceeds of such trust's assets can be ascertained by the tests developed in case law.	100%	0%	32	100%	0%	6	N/A
1.3 A capital asset of a discretionary trust for capital gains purposes, would be the same as an revenue asset for income tax purposes.	6,7%	93,3%	30	0%	100%	5	1
1.4 Capital assets of a discretionary trust for capital gains purposes, would also be the same as property for donations tax purposes.	96,7%	3,3%	30	100%	0%	6	1
1.5 Capital assets of a discretionary trust for capital gains purposes, would the same property for estate duty purposes.	96,7%	6,7%	30	100%	0%	6	1

7.2.1.1 Disposal of an asset

The disposal of a capital asset of a discretionary trust could result in either a capital gain or a loss (Section 1, Part A:1.1). All the respondents (a mean score of 1.00 in section 5.5.1.6 in Chapter 5) and all six of the participants (see section 6.5.1.1 in Chapter 6) agreed that a disposal of a capital asset could result in either a capital gain or a loss. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) agreed with the statement that a disposal of a discretionary trust's capital assets could result in a capital gain or a loss. The Fisher's exact score could not be calculated, as there are no variances for this sub-question. Both the respondents and the participants' answers were the same.

The participants mentioned that a discretionary interest in a trust is a mere hope or a contingent right or expectation from the beneficiary's perspective, and has no value in the beneficiary's hands, which may make it difficult to measure the base cost of a discretionary interest. According to participant five, "*If a person receives money for a discretionary interest, then the difference between the amount received and a base cost of zero will be the capital gain. The Eighth Schedule sets the base cost of a discretionary interest in a trust at a zero value,"* which indicates that even

though a discretionary interest may not have a measurable base cost, it could still have CGT consequences for the beneficiary. The analysis confirmed that the disposal of a capital asset of the trust could result in either a capital gain or a loss.

7.2.1.2 Capital nature of an asset

The revenue or capital nature of a discretionary trust's assets or the proceeds of such trust's assets can be ascertained by the tests developed in case law (Section 1, Part A:1.2). All the respondents (a mean score of 1.00 in section 5.5.1.6 in Chapter 5) and all six of the participants (see section 6.5.1.2 in Chapter 6) agreed that the capital nature of an asset can be ascertained by the tests developed by case law. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) agreed with the statement. The Fisher's exact test P-value could not be calculated as there are no variances for this sub-question. The respondents and participants' answers were the same.

When analysing the respondents and the participants' results, there are two components to the capital asset; firstly, there should be an asset and secondly, the asset in question could be either of a capital or a revenue nature. French and Stretch (2023:5.1) confirmed the participants' responses that the revenue and capital nature of an asset can be ascertained by case law. The authors mentioned that the test for the capital nature should be based on the relevant facts of each case. It is evident that the tests developed in case law can be used to establish the capital or revenue nature of an asset. Participant five emphasised that when examining a capital asset: "*besides case law, also legislation defines a capital asset."* The definition of an asset for CGT purposes should be examined in the Eighth Schedule. The terms "property" and "asset" are synonymous (Olivier, 2007:37) in the definition of an asset if the term "property" is used. In terms of paragraph 1 of the Eighth Schedule an asset is defined as follows:

> *(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."

In paragraphs (*a*) and (*b*) of paragraph 1 of the Eighth Schedule, an "asset" is defined as "property". Accordingly, for the purposes of the analysis in this Chapter, the terms "asset" and "property" are used interchangeably. The definition of an asset in the Eighth Schedule describes all assets and does not describe the "capital nature" of the asset, as confirmed by Stein (2023:1.1). De Koker and Williams (2024:3.1) and Stiglingh *et al*. (2026:49) also disagreed that the capital nature of an asset is defined in the Act, which does not fully support the argument that legislation would assist with defining the "capital nature" of an asset. Instead, the Eighth Schedule defines all assets, which could either be revenue or capital in nature.

When considering if a discretionary interest is a capital asset of the beneficiary, the participants described such an interest as a *spes* which is not a real right, so one would have to analyse the possibility of a "discretionary interest" being an asset of the beneficiary. Participant two stated that, "*in terms of case law, a discretionary interest has been described as a contingent right or a personal right,"* which is confirmed by Olivier *et al.* (2023:4.3.2.2). This makes it impossible for one of the discretionary beneficiaries to sell a "discretionary interest" in a trust to a third party, as the discretionary beneficiary will not be able to deliver any enforceable rights or property to the purchaser. The possibility exists that when a discretionary beneficiary gives up or surrenders such discretionary interest for payment, a capital disposal would take place. When one looks at the legislation, as recommended by participant five, a capital asset, as defined in the Eighth Schedule in part (b) as "*a right or interest of whatever nature to or in such property",* which is confirmed by Davis *et al.* (2024:2A:4A), it indicates that a discretionary interest may be included in the definition of a capital asset. Also, as indicated by the participants, the Eighth Schedule places a zero value on a discretionary interest in a trust, which supports the participants' view that a discretionary interest is an asset for CGT purposes. An understanding of the beneficiary's rights is required for this study, which excludes a detailed doctrinal analysis of rights which is outside the scope of this study. The analysis confirmed that the capital nature of a trust asset could be determined by using case law.

7.2.1.3 Capital asset compared to a revenue asset

The definition of a capital asset of a discretionary trust for capital gains tax purposes would be the same as an asset for income tax purposes (before any disposal or deemed disposal in terms of the Eighth Schedule of the Act) (Section 1, Part A:1.3). Most of the respondents (a mean score of 4.66 in section 5.5.1.6 in Chapter 5) and five of the six participants (see section 6.5.1.3 in Chapter 6) disagreed that a capital asset is the same as a revenue asset. The cross-tabulation results show a high percentage of the respondents (93.3%), and all the participants (100%) disagreed with this statement. The Fisher's test P-value is 1 for this sub-question, which is greater than 0.05 and demonstrates that the comparison between the respondents' questionnaire responses and the participants' interviews responses is statistically insignificant.

The respondents and the participants confirmed that a disposal of a revenue asset is included in income in terms of the definition of gross income (section 1 of the Act); and a disposal of a capital asset is included in the calculation of a capital gain or a loss in terms of the Eighth Schedule. Section 26A of the Act includes a portion of the capital gain (the taxable capital gain) in the calculation of taxable income.

Respondents who do not work with the tax aspects of trusts may not be aware of the terminology used in tax and did not answer this question. Five of the participants disagreed that a capital asset is the same as a revenue asset, and one participant elected not to answer this question. Explanations for the participant not answering this question are as follows:

- The statement mentioned that the definition of a capital asset should be compared to that of a revenue asset. Whilst a capital asset is defined in the Eighth Schedule, a revenue asset is not defined in the Act.
- When a capital asset, which was subject to a wear-and-tear allowance, is disposed of, the portion of the proceeds which is recouped under section 8(4) of the Act is included in gross income and is excluded as part of the capital gain calculation.

- When an asset is purchased with mixed intentions that is both for speculative and investment purposes, then the dominant intention should be applied. Insufficient information is provided in the question regarding the nature of the asset, even in cases where mixed intentions are present; thus, the dominant intention should still apply.
- Also, the participant's uncertainty could be because of how he interpreted and understood the question.

The overall analysis confirmed that the definition of a capital asset is different from a revenue asset.

7.2.1.4 Capital gains asset compared to a donations tax property

Capital assets of a discretionary trust for capital gains tax purposes would be similar to property for donations tax purposes (Section 1, Part A:1.4). Most of the respondents (a mean score of 1.34 in section 5.5.1.6 in Chapter 5) and all six of the participants (see section 6.5.1.4 in Chapter 6) agreed that a capital asset for CGT purposes could also be considered an asset for donations tax purposes. The cross-tabulation results show a high percentage of the respondents (96.7%), and all (100%) the participants agreed with the statement. The Fisher's test P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' questionnaire responses and the participants' interviews responses is statistically insignificant.

A capital asset would be property for donations tax purposes; but all property for donations tax purposes would not be assets for CGT purposes. All the participants agreed that an asset for capital gains tax purposes could be similar to property for donations tax purposes when one compares the definitions. The definition of an asset for CGT purposes was derived from the definition of property for donations tax purposes (Olivier, 2007:37). Thus, it would also be beneficial for the definition of property from a donations tax perspective. In section 54 of the Act an asset or property is defined for donations tax purposes as: *"property" which means any right in or to property, movable or immovable, corporeal, or incorporeal, where so ever*

situated". The capital gains tax definition provided above includes the words "*movable or immovable property,"* which supports the participants' assertion that an asset for capital gains tax purposes has similarities to that of property for donations tax purposes. The participants did not mention that the converse statement is not correct, and that property for donations tax purposes is not always an asset for capital gains tax purposes, as property for donations tax purposes include both revenue assets and capital assets.

In all discussions the example of a farmland property as the possible capital asset of the farmer and his harvested crop of maize as a revenue asset, was discussed (CIR v. George Forest Timber *Co Ltd* 1 SATC 20 1924 AD 516). All the participants agreed that the farm held by a trust could have capital gains tax implications and donations tax implications, which means that the definition of an asset could be the same for CGT purposes and donations tax purposes. Participant five also pointed out that farmland property is valued at 70% of its market value for donations tax purposes and at full market value for CGT purposes, as confirmed by Stiglingh *et al*. (2026:1050).

When discussing the similarity of an asset and property in relation to CGT and donations tax, participant two replied as follows: *"Agree as to the nature of the asset but donations tax implications (for a discretionary trust), would only arise when they vest an asset in a beneficiary, and then an exemption applies in terms of section 56(1)(i) of the Act"*. The vesting of the discretionary interest will be subject to CGT, and the vesting or donation of the discretionary asset to the beneficiary will have no donations tax consequences because of the exemption. For the same trustee action of vesting a discretionary asset in a beneficiary, there will be a CGT implication and no donations tax consequence; the donations tax exemptions are different from the CGT exclusions. The donation of a discretionary interest in a trust is further addressed in part C. The analysis confirmed that a capital asset for CGT purposes could be similar to property for donations tax purposes.

7.2.1.5 Capital gains asset compared to an estate duty property

Capital assets of a discretionary trust for capital gains tax purposes would be similar to property for estate duty purposes (Section 1, Part A:1.5). Most of the respondents (a mean score of 1.47 in section 5.5.1.6 in Chapter 5) and all six of the participants (see section 6.5.1.5 in Chapter 6) agreed that a capital asset for CGT purposes could be similar to property for estate duty purposes. The cross-tabulation results show that a high percentage of the respondents (93.3%) and all (100%) the participants agreed with the statement. The Fisher's test P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' questionnaire responses and the participants' interview responses is statistically insignificant.

A capital asset would be similar to property for estate duty purposes. The converse that all property for estate duty purposes would be an asset for CGT purposes is not necessarily applicable. A discretionary interest in a trust is normally excluded from the estate of the beneficiary. A comparison of the definition of a capital asset for CGT purposes (see section 5.2.1.2 in Chapter 5) and the definition of property for estate duty purposes, supports the participants' view that an asset and property is the same in most instances. Section 3(2) of the Estate Duty Act defines an asset or property as *"Property" which means any right in or to property, movable or immovable, corporeal or incorporeal, and includes- (a) any fiduciary, usufructuary or other like interest in property (including a right to an annuity charged upon property) held by the deceased immediately prior to his death; (b) any right to an annuity (other than a right to an annuity charged upon any property) enjoyed by the deceased".* Both the CGT and donations tax definitions refer to movable and immovable assets. Also, when analysing the legislation of the estate duty definition of "property", as advised by participant five, the wording "*any right in or to property" could* be narrower than the CGT wording: "*(b) a right or interest of whatever nature to or in such property"* used in the definition of an asset for CGT purposes (paragraph 1 of the Eighth Schedule). Property for estate duty purposes include both revenue assets and capital assets. The participants did not state that the converse statement is not correct, namely that property for estate duty purposes is

not always an asset for CGT purposes. According to participant five, for farmland property only 70% of the market value is used for estate duty purposes, and 100% of the said value is used to determine the proceeds in a capital gains tax calculation, as confirmed by Botha (2023:11.6.8).

From the perspective of a beneficiary, a discretionary interest in a trust is a mere hope or *spes and* would be excluded from a beneficiary's estate for estate duty purposes. Participant two described a discretionary interest as follows: "*Case law holds that a spes (or mere expectation), is a contingent right to the assets of a trust."* Van Huyssteen (2020:312) also referred to court cases which deal with contracts for a third party, such as beneficiaries' rights in a trust asset. Participant three also provided a memorandum on discretionary trusts for the purposes of transfer duty, which referred to several cases and Honore's SA Law of Trust, which deals with the discretionary rights in a trust. Cameron *et al.* (2002:557) described a beneficiary's right in a trust's assets as a *spes* or hope in terms of Honore's SA Law of Trust and referred to several cases which dealt with discretionary rights in a trust. A discretionary beneficiary does not have a real right in a trust asset; the discretionary beneficiary has a personal right, as confirmed by Cameron *et al.* (2002:558).

According to participant two, "*an asset held in a discretionary trust from the perspective of the beneficiary, will only form part of the beneficiary's estate if the beneficiary could exercise control over the asset on or before his or her death in terms of section 3(3)(d) of the Estate Duty Act".* This was confirmed by Davis *et al.* (2024:14.5). For this reason, trust deeds are drafted in such a manner that the trustees or founder of a trust cannot exercise unilateral control over a trust's assets. When comparing the CGT and estate duty definition of an asset and property, the CGT definition does not have the section 3(3)(*d*) equivalent of the Estate Duty Act. The analysis confirmed that a capital asset for CGT purposes could be the same property for estate duty purposes.

7.2.1.6 Summary of the results for a discretionary trust (Section 1, Part A)

The following is a summary of the results for discretionary trusts for Part A:

- A disposal of a capital asset could result in a capital gain or a loss if the proceeds of a capital asset are different from the base cost (P-value not applicable).
- There are exceptions for capital assets which are subject to capital allowances, whereby a recoupment or a tax loss would be excluded from the capital gain or loss calculation.
- A beneficiary's interest in a discretionary trust asset has a base cost of zero for CGT purposes, and therefore a discretionary interest can be included in the definition of an asset in terms of the Eighth Schedule.
- The court decisions can be used to determine the capital nature of an asset in a trust, and the beneficiary's right in relation to the trust's asset (P-value not applicable).
- The definition of an "asset" and "property" for CGT, donations tax and estate duty tax is similar, in that such an asset can include an interest or rights, in or to property as an asset (P-value > 0.05).
- Property for donations tax and estate duty purposes include both revenue and capital assets; assets for CGT purposes only include assets that are of a capital nature (P-value > 0.05).
- A discretionary interest in a trust has no value and is a hope or *spes*, and as such is excluded from the estate of the beneficiary, unless the beneficiary has control over the assets and section 3(3)(*d*) of the Estate Duty Act is applicable.
- These conclusions are also supported by the doctrinal analysis in section 3.2.5 of Chapter 3.

7.2.2 Part B: Income tax (excluding capital gains) implications

Do any of the actions taken by the trustees, as mentioned in the primary and secondary research objectives 1 to 7, result in income tax (excluding capital gains) implications, and should they therefore be excluded from a VSA (Research question 2)? When each of the seven following trustees' actions occurs in isolation for the discretionary trust structure provided, discuss any income tax implications before any disposal or deemed disposal of the Eighth Schedule of the Act. The

respondents and the participants had to agree or disagree that the trustees' actions below would result in gross income and be excluded from CGT. The cross tabulation of all the sub-questions for part B is summarised in Table 7.2 below.

Table 7.2: Summary of the cross-tabulation results for Part B

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
2.1 The trustees vest capital assets (80 shares) in beneficiary A.	9,4%	90,6%	32	0%	100%	6	1
2.2 The trustees distribute capital assets (80 shares) to beneficiary A.	15,6%	84,4%	32	0%	100%	6	0,570
2.3 The trustees sell trust's capital assets (80 shares) at market value of (R 1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	15,6%	84,4%	32	0%	100%	6	0,570
2.4 Adding a new beneficiary to the trust.	6,3%	93,8%	32	0%	100%	6	1
2.5 Removing beneficiary A from the trust.	6,5%	93,5%	31	0%	100%	6	1
2.6 Appointing a new trustee to the trust.	0%	100%	32	0%	100%	6	N/A
2.7 Removing a trustee from the trust.	0%	100%	32	0%	100%	6	N/A

7.2.2.1 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 1, Part B: 2.1). Most of the respondents (a mean score of 4.59 in section 5.5.2.8 in Chapter 5) and all six of the participants (see section 6.5.2.1 in Chapter 6) disagreed that when trustees vest the trust's capital assets in beneficiary A it would have a gross income consequence. The cross-tabulation results show that a high percentage of the respondents (90.6%) and all (100%) the participants disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' questionnaire responses and the participants' interview responses is statistically insignificant.

According to participant six "*the vesting of the shares of a capital asset of a trust to a beneficiary will result in a capital gain and will not result in gross income.*" A distinction should be made between capital gains and gross income, as both are subject to income tax; the calculation of the taxable portion of a capital gain is subject to the terms of the Eighth Schedule to the Act, and receipts or accruals of a non-capital nature (revenue in nature) are fully included in gross income. The definition of gross income contained in section 1(1) of the Act excludes the receipts or accruals of a capital nature from gross income. The vesting of a discretionary

trust's capital assets in a beneficiary would be excluded from gross income and could result in a capital gain event.

7.2.2.2 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 1, Part B: 2.2). Most of the respondents (a mean score of 4.34 in section 5.5.2.8 in Chapter 5) and all six of the participants (see section 6.5.2.2 in Chapter 6) disagreed that the distribution of the trust's capital assets to beneficiary A would have a gross income consequence. The cross-tabulation results show that a high percentage of the respondents (84.4%) and all (100%) the participants disagreed with the statement. The Fisher's test P-value is 0.570 for this sub-question, which is greater than 0.05, and demonstrates that the comparison between the respondents' questionnaire responses and the participants' interview responses is statistically insignificant.

Participant two described the vesting of a capital asset as a paragraph 11(1)(*d*) disposal, which excludes the possibility of a gross income consequence. The distribution of a capital asset will be taxed in terms of the Eighth Schedule and section 26A of the Act. In the discretionary trust structure provided, the shares are defined as a capital asset, which can only be subjected to CGT consequences in terms of the Eighth Schedule. The distribution of a discretionary trust's capital assets to a beneficiary would be excluded from gross income and could result in a capital gain for the beneficiary.

7.2.2.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell a trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 1, Part B: 2.3). Most of the respondents (a mean score of 4.41 in section 5.5.2.8 in Chapter 5) and all six of the participants (see section 6.5.2.3 in Chapter 6) disagreed that the above trustees' action would have a gross income consequence. The cross-tabulation results show that a high percentage of the respondents (84.4%) and all the participants (100%) disagreed with the statement. The Fisher's test P-value is

0.570 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

According to participant one the sale of a capital asset "*will trigger capital gains tax, and not gross income."* Thus, the receipts and accruals of a capital asset are excluded from the definition of gross income, as contained in section 1 of the Act. Participant five stated that the sale of an asset results in either a capital or a revenue receipt by explaining that "*the sale or disposal of a capital asset and a revenue asset are mutually exclusive, one results in gross income, the other a section 26A inclusion*". The trust's assets were described as capital assets and are therefore excluded from gross income. Participant two mentioned three possible Eighth Schedule disposals for the above trustees' action which would be excluded from gross income: the sale of the shares (paragraph 11(1)(*a*)); the vesting of the capital gain (paragraph 11(1)(*d*)) or the donation of the cash profit to beneficiary A (paragraph 11(1)(*a*)). The analysis confirmed that the sale of a discretionary trust's capital asset, and the subsequent vesting or distribution of the resulting capital gain in or to a beneficiary would be excluded from gross income and could result in a capital gain in the hands of the discretionary beneficiary.

7.2.2.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 1, Part B: 2.4). Most of the respondents (a mean score of 4.75 in section 5.5.2.8 in Chapter 5) and all six of the participants (see section 6.5.2.4 in Chapter 6) disagreed that the above trustees' action would have a gross income consequence. The cross-tabulation results show a high percentage of the respondents (93.8%), and all the participants (100%) disagreed with the statement. The Fisher's test P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

According to participant three, "*the trustees may not be able to unilaterally, appoint any additional discretionary beneficiaries to trust. It is not possible to appoint an*

additional beneficiary other than by way of an agreement between the founder, the trustees and all beneficiaries who have accepted the benefits stipulated for them in the relevant trust deed (See Hofer and others v. Kevitt N.O. and others 1998(1) (SA) (382) (SCA))". For the purposes of this study, it was assumed for all the trustees' actions examined, when necessary, the beneficiaries' consent was obtained unless the contrary was stated. Participant two also mentioned that the trustees' actions would have to be executed within the parameters of the trust deed (see section 7.2.10.2).

According to participant six, "*where the interest is a spes, no value would be attributed to it constituting consideration. Therefore, no income tax implications arise."* The newly added discretionary beneficiary would be acquiring a *spes* or a hope which has no value. The existing beneficiaries also have a *spes* and have not sold or disposed of any value to the new beneficiary, therefore no gross income or CGT consequences can occur. The underlying assets of the trust are of a capital nature, so any gross income consequence is excluded. The adding of a new discretionary beneficiary to a trust would be excluded from gross income and could result in a capital gain.

7.2.2.5 Removing a beneficiary

Removing beneficiary, A from the trust (Section 1, Part B: 2.5). Most of the respondents (a mean score of 4.72 in section 5.5.2.8 in Chapter 5) and all six of the participants (see section 6.5.2.5 in Chapter 6) disagreed that the above trustees' action would have a gross income consequence. The cross-tabulation results show that a high percentage of the respondents (93.5%) and all the participants (100%) disagreed with the statement. The Fisher's test P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' questionnaire responses and the participants' interview responses is statistically insignificant.

According to participant 5, *"a discretionary beneficiary normally cannot resign from a trust, the beneficiary can for example accept payment not to be involved in the trust, in which case the difference between the amount received and the base cost*

of zero will be the capital gain in the hands of the beneficiary". Capital gains are excluded from gross income. The adding and removal of beneficiaries to or from a trust should be within the parameters of the trust deed. Case law deals with the adding of beneficiaries to a trust. According to participant two, "*the removed beneficiary, beneficiary A, would forfeit a spes, and technically dispose of an asset (technically resulting in a capital loss in his hands) but is has no value and therefore, there would be no consideration, and no actual income tax position should arise*." No gross income consequences will arise when a beneficiary resigns or is removed from a trust. The removal of a beneficiary from a trust would be excluded from gross income and could result in a capital gain.

7.2.2.6 Appointing a trustee

Appointing a new trustee to the trust (Section 1, Part B: 2.6). All the respondents (a mean score of 5.00 in section 5.5.2.8 of Chapter 5) and all six of the participants (see section 6.5.2.6 of Chapter 6) disagreed that the above trustees' action would have a gross income consequence. The cross-tabulation results show all the respondents (100%), and all the participants (100%) disagreed with this statement. The Fisher's exact P-value could not be calculated, as there are no variances for this sub-question. Both the respondents' and the participants' answers were the same.

All the respondents and the participants disagreed that an income tax (excluding capital gains) implication will arise when a new trustee is appointed to a discretionary trust, for the following four reasons:

- The assets in the trust structure are of a capital nature, which reduces the possibility of any normal income tax implication.
- The trustees are not beneficiaries and have no rights whatsoever to any of the trust's assets.
- The trustees' rights and obligations should be limited to administrating the trust assets within the dictated parameters of the trust deed.

- The removal of a trustee is an administrative procedure and has no impact on the beneficiaries' interest in a trust's assets.

The appointment of a new trustee to a discretionary trust would have no gross income consequence.

7.2.2.7 Removing a trustee

Removing a trustee from the trust (Section 1, Part B: 2.7). All the respondents (a mean score of 5.00) (see section 5.5.2.8 of Chapter 5) and all the participants (see section 6.5.2.7 of Chapter 6) disagreed that the above trustees' action would have an income tax (excluding capital gains) implication. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) disagreed with the statement. The Fisher's exact P-value could not be calculated as there are no variances for this sub-question; both the respondents' and participants' answers were the same.

Both the respondents and the participants disagreed that an income tax (excluding capital gains) implication will arise when a trustee is removed from a discretionary trust, for the following four reasons:

- The assets in the trust structure are of a capital nature, which reduces the possibility of any gross income and therefore any income tax (excluding CGT) implication.
- The trustees are not beneficiaries and have no rights whatsoever to any of the trust's assets.
- The trustees' rights and obligations should be limited to administrating the trust assets within the dedicated parameters of the trust deed.
- The removal of a trustee is an administrative procedure and has no impact on the beneficiaries' interest in a trust's assets.

The removal of a trustee from a discretionary trust would have no gross income consequence.

7.2.2.8 Summary of the results for a discretionary trust (Section 1, Part B)

The following is a summary of the research results for a discretionary trust for Part B of the research instruments:

- The vesting or distribution of a capital asset in one of the discretionary beneficiaries of a discretionary trust will not have a gross income and income tax (excluding CGT) implication (P-value > 0.05).
- The sale of a discretionary trust's capital asset and the subsequent vesting or distribution of the capital gain in or to a beneficiary, would not result in gross income and income tax (excluding CGT) implication (P-value > 0.05).
- The adding or removal of a beneficiary to or from a discretionary trust would not result in a gross income and income tax (excluding CGT) implication (P-value > 0.05).
- The appointment or removal of a trustee to or from a discretionary trust would not result in any gross income and gross income and income tax (excluding CGT) implication, as the trustees do not have rights to the trust's assets and the assets of the trust are of a capital nature (P-value not applicable).
- These conclusions are also supported by the doctrinal analysis in section 3.3.1.1 of Chapter 3, any amounts included gross income will be excluded from the Eighth Schedule and VSA.

7.2.3 Part C: Donations tax implications

Do any of the selected trustees' actions mentioned in the primary and secondary research objectives 1 to 7 result in donations tax, and should they therefore by implication be excluded from a VSA (Research question 3)? Respondents and the participants had to agree or disagree to the first four specific statements or questions related to discretionary trusts in Part C of the questionnaire, which addressed donations in general. Respondents had to agree or disagree that the last seven statements (trustees' actions) would result in donations tax implications for a discretionary trust. The cross tabulation of all the sub-questions for Part C is summarised in Table 7.3 below.

Table 7.3: Summary of the cross-tabulation results for Part C

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
3.1.1 If beneficiaries donate of a discretionary interest, from one beneficiary to an another beneficiary, donations tax could be applicable.	16,7%	83,3%	30	0%	100%	6	0,564
3.1.2 If the trustees donate of a discretionary interest from one beneficiary to another, without the consent of the beneficiaries, donations tax could be applicable.	10,3%	89,7%	29	0%	100%	6	1
3.1.3 If a donation of a discretionary interest from one beneficiary to an another beneficiary at full market value, a disposal in terms of paragraph of 11(1)(*a*) of the Eighth Schedule would occur.	27,6%	72,4%	29	0%	100%	5	0,309
3.1.4 if a donation of a discretionary interest from one beneficiary to an another beneficiary at an inadequate value, a disposal in terms of paragraph of 11(1)(*g*) of the Eighth Schedule would occur.	17,2%	82,8%	29	0%	100%	6	0,561
3.2.1 The trustees vest capital assets (80 shares) in beneficiary A.	9,7%	90,3%	31	0%	100%	6	1
3.2.2 The trustees distribute capital assets (80 shares) to beneficiary A.	16,1%	83,9%	31	0%	100%	6	0,567
3.2.3 The trustees sell trust's capital assets (80 shares) at market value (R 1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	16,1%	83,9%	31	0%	100%	6	0,567
3.2.4 Adding a new beneficiary to the trust.	6,5%	93,5%	31	0%	100%	6	1
3.2.5 Removing beneficiary A from the trust.	3,2%	96,8%	31	0%	100%	6	1
3.2.6 Appointing a new trustee to the trust.	0%	100%	31	0%	100%	6	N/A
3.2.7 Removing a trustee from the trust.	0%	100%	31	0%	100%	6	N/A

7.2.3.1 Donating a discretionary interest with consent

A donation of a discretionary interest from one beneficiary to another beneficiary for no or an inadequate consideration will have donations tax implications (Section 1, Part C:3.1.1). Most of the respondents (a mean score of 4.35 in section 5.5.3.12 in Chapter 5) and all six of the participants (see section 6.5.3.1 in Chapter 6) disagreed that the above trustees' action would have donations tax implications. The cross-tabulation results show that a high percentage of the respondents (83.3%) and all (100%) the participants disagreed with the statement. The Fisher's P-value is 0.564 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' questionnaire responses and the participants' interview responses is statistically insignificant.

A beneficiary's interest in a discretionary trust's assets is a *"spes"* or hope which cannot be donated. A discretionary beneficiary does not have any value in the trusts' assets, and it is not possible to donate something of no value, as it will not result in any impoverishment for the donor and an enrichment of the donee. A donation of a discretionary interest, which has no value, would not be considered a gratuitous donation of property in terms of section 55 of the Act, which requires that the donor's value in an asset be reduced by means of the donation. If a person receives money for a discretionary interest in a trust, then the difference between the amount

received and a base cost of zero will be the capital gain. The Eighth Schedule sets the base cost at a zero value. The analysis confirmed that a beneficiary may not be able to donate a discretionary interest in a discretionary trust, and therefore no donations tax implications would arise.

7.2.3.2 Donating a discretionary interest without consent

If the trustees donate a discretionary interest from one beneficiary to another beneficiary, without the consent of the beneficiaries, a possible donation tax implication could still occur (Section 1, Part C: 3.1.2). Most of the respondents (a mean score of 4.42 in section 5.5.3.12 in Chapter 5) and all six of the participants (see section 6.5.3.2 in Chapter 6) disagreed that the above trustees' action would have donations tax implications. The cross-tabulation results show that a high percentage of the respondents (89.7%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The donor should consent to a donation, and there should be an impoverishment for the donor and an enrichment for the donee for a donation to take place. Also, the donation from the beneficiary is a *spes,* having no value and therefore no donation can take place. No donation of a discretionary interest is possible in terms of section 55 of the Act. Before the beneficiary has a vested interest in a trust, the beneficiary will not be able to donate his or her discretionary interest in a trust's assets to any other person.

Any trustees' action to donate any trust asset outside the parameters of the trust deed could be challenged in court by the beneficiaries. The trustees have a fiduciary duty towards beneficiaries, and it would be almost illegal for them to donate a discretionary interest from one beneficiary to another beneficiary. Instead, according to participant six, the trustees would be cautious to exercise their stipulated discretionary powers and be able to vest or distribute the trust's assets to the discretionary beneficiaries of the trust, which would be permitted in terms of the

trust deed. The vesting or distribution (donation) of a trust's asset to a beneficiary would normally be exempt from donations tax in terms of section 56(1)(l) of the Act. The donation of a discretionary interest from one beneficiary to another beneficiary, without the consent of the donor beneficiary, would not have any donations tax implications.

7.2.3.3 Donating a discretionary interest paragraph 11(1)(*a*) disposal

A donation of a discretionary interest from one beneficiary to another beneficiary at market value would result in disposal in terms paragraph 11(1)(*a*) of the Eighth Schedule to the Act (Section 1, Part C: 3.1.3). Most of the respondents (a mean score of 3.9 in section 5.5.3.12 in Chapter 5) and all six of the participants (see section 6.5.3.3 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*a*) disposal. The cross-tabulation results show that most of the respondents (72.4%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 0.309 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Normally a donation of an asset which has value and is donated for less than its market value, will be deemed to be donated at market value between connected parties in terms of paragraph 38 of the Eighth Schedule, which is used to determine the proceeds of the disposal of an asset. A discretionary interest in a trust is a *spes* and has no value, and as a result has no market value. The participants disagreed with this statement on the basis that a donation was not possible. A *spes* has no market value and cannot be donated, and therefore a paragraph 11(1)(*a*) disposal is not possible.

7.2.3.4 Donating a discretionary interest paragraph 11(1)(*g*) disposal

A donation of a discretionary interest from one beneficiary to another beneficiary at an inadequate value would result in a disposal in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act (Section 1, Part C: 3.1.4). Most of the respondents (a mean score of 4.23 in section 5.5.3.12 in Chapter 5) and all six of the participants

(see section 6.5.3.4 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal. The cross-tabulation results show that most of the respondents (82.8%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 0.561 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

A donation cannot take place, as a discretionary interest in a trust is a *spes* or a contingent hope. Therefore, a disposal cannot take place, thus, a paragraph 11(1)(*g*) disposal does not occur, and there is no value shifting taking place. If an asset is transferred at an inadequate consideration a VSA is possible, however, no VSA is possible before a vested interest exists. The Eighth Schedule states that a discretionary interest has a zero value, if the discretionary beneficiary receives any consideration for the discretionary interest, such consideration will be the proceeds, and a capital gain would arise. A donation of a discretionary interest from one beneficiary to another beneficiary at an inadequate consideration, may result in a paragraph 11(1)(*a*) disposal, but would not result in a disposal in terms of paragraph 11(1)(*g*)**.**

7.2.3.5 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section1, Part C: 3.2.1). Most of the respondents' (a mean score of 4.61 in section 5.5.3.12 in Chapter 5) and all six of the participants (see section 6.5.3.5 in Chapter 6) disagreed that the above trustees' action would have donations tax implications. The cross-tabulation results show that most of the respondents (90.3%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

A "donation" is defined in section 55 of the Act as a gratuitous "disposal" of "property," which could include the vesting of the 80 shares in beneficiary A.

According to participant two, "*shares have been described as a complex of personal rights and are defined as movable property in the Companies Act*," and property is defined for donations tax purposes as any right "in or to" property, movable or immovable, corporeal, or incorporeal. Accordingly, a donation arises when an asset or property is vested in a beneficiary. Donations made by the trustees to the beneficiaries in terms of the trust deed are exempt from donations tax in terms of section 56(1)(l) of the Act. The trustees' vesting of trust assets in a beneficiary would be exempted from donations tax.

7.2.3.6 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 1, Part C: 3.2.2). Most of the respondents (a mean score of 4.35 in section 5.5.3.12 in Chapter 5) and all six of the participants (see section 6.5.3.6 in Chapter 6) disagreed that the above trustees' action would have donations tax implications. The cross-tabulation results show that most of the respondents (83.9%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 0.567 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Donations made by the trustees to the beneficiaries in terms of the trust deed are exempt from donations tax, as a section 56(1)(l) exemption applies. A "donation" is defined in section 55 of the Act as a gratuitous "disposal" of "property," which could include the distribution or vesting of the eighty shares in beneficiary A. If the distribution occurs before vesting, then the vesting takes place simultaneously with the distribution. The distribution of the 80 shares to a discretionary beneficiary A would not result in a donations tax implication.

7.2.3.7 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000) and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 1, Part: C: 3.2.3). Most of the respondents (a mean score of 4.35 in section 5.5.3.12

in Chapter 5) and all six of the participants (see section 6.5.3.7 in Chapter 6) disagreed that the above trustees' action would have donations tax implications. The cross-tabulation results show that most of the respondents (83.9%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 0.567 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The sale of 80 shares results in a capital gain of R800 000, provided the capital gain is vested or distributed to the beneficiary in the same tax year as the shares were sold; the attribution rules result in the beneficiary being taxed on the capital gain. The actual vesting or distribution to beneficiary A is a donation from the trust, which is exempt from donations tax in terms of section 56(1)(l) of the Act. The sale of the trust's capital assets (80 shares) at market value (R1 200 000), and either vesting or distributing the capital gain (R800 000) in/to beneficiary A, would not have any donations tax consequences.

7.2.3.8 Adding a beneficiary

Adding a new beneficiary to the trust (Section 1, Part C: 3.2.4). Most of the respondents (a mean score of 4.77 in section 5.5.3.12 in Chapter 5) and all six of the participants (see section 6.5.3.8 in Chapter 6) disagreed that the above trustees' action would have donations tax implications. The cross-tabulation results show that most of the respondents (93.5%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The existing beneficiaries may have to agree to the adding of a discretionary beneficiary to the trust (see section 7.2.10.4). Assuming the necessary consent was obtained from all the parties, the new beneficiary would only acquire a *spes* which has no value, and the existing discretionary beneficiaries will not have any reduced value, as they also only have a *spes* or a hope before the adding of the new

beneficiary, therefore, no donations tax is applicable. The adding of a new discretionary beneficiary to a trust would have no donations tax implications.

7.2.3.9 Removing a beneficiary

Removing beneficiary, A from the trust (Section 1, Part C: 3.2.5). Most of the respondents (a mean score of 4.84 in section 5.5.3.12 in Chapter 5) and all six of the participants (see section 6.5.3.9 in Chapter 6) disagreed that the above trustees' action would have donations tax implications. The cross-tabulation results show that most of the respondents (96.8%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The legal implications of removing a discretionary trust beneficiary should also be considered before removing a discretionary trust beneficiary. If the trust deed is silent on this matter, and if the beneficiaries have accepted any benefits, then their permission or consent should first be obtained. A court order can be obtained to remove a beneficiary from a trust if it can be proven that the terms of the trust deed are unconstitutional (according to participant six).

Prior to a discretionary beneficiary being removed from the trust, the beneficiary only had a *spes* or hope of no value. Thus, the beneficiary can experience no loss in value after being removed from the trust, and no donations tax implications will apply. Also, the remaining discretionary beneficiaries in the trust only have a spes or hope to the trust's assets, and there is no increase in value which is required for a donation to take place. The removal of a discretionary beneficiary from a trust will have no donations tax consequences.

7.2.3.10 Appointing a trustee

Appointing a new trustee to the trust (Section 1, Part C: 3.2.6). All the respondents (a mean score of 5.00 as reflected in section 5.5.3.12 in Chapter 5) and all six of

the participants (see section 6.5.3.10 in Chapter 6) disagreed that the above trustees' action would have donations tax implications. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) disagreed with the statement. The Fisher's exact P-value could not be calculated, as there are no variances for this sub-question. The responses of the respondents and the participants were the same.

A donation requires a reduction of value for the donor, and an increase in value of the donee's assets. The trustees do not have any rights to the trust assets, and their appointment to a trust does not result in any reduction of value of the trust's assets. The appointment of a trustee to a trust without any reduction in value of the trust's assets or the beneficiaries' interest in a discretionary trust has no donations tax implications.

7.2.3.11 Removing a trustee

Removing a trustee from the trust (Section 3.2.7, Part 1: section C). All the respondents (a mean score of 5.00 in section 5.5.3.12 in Chapter 5) and all six of the participants (see section 6.5.3.11 in Chapter 6) disagreed that the above trustees' action would have donations tax implications. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) disagreed with the statement. The Fisher's exact P-value was not calculated, as there are no variances for this sub-question since the answers of the respondents and the participants were the same.

The trustees do not have any rights to the trust's assets, and the removal of a trustee from a trust does not result in any reduction of the value of the trust's assets. Without a decrease and corresponding increase in values between any beneficiaries of a discretionary trust, when a trustee is removed, no donation or donations tax implication occurs. The removal of a trustee from a trust, without any reduction in value of the trust's assets or beneficiaries' interest in a discretionary trust therefore has no donations tax implications.

7.2.3.12 Summary of the results for a discretionary trust (Section 1, Part C)

The following is a summary of the research results for a discretionary trust for Part C of the research instruments:

- A discretionary interest cannot be donated from one beneficiary to another beneficiary, as a discretionary interest has no value, and therefore no donations tax implications will arise (P-value > 0.05).
- The trustees cannot donate a discretionary interest from one beneficiary to another beneficiary without the consent of all the beneficiaries. A discretionary interest has no value, and therefore no donations tax implications will arise (P-value > 0.05).
- The trustees cannot donate a discretionary interest from one beneficiary to another beneficiary, and therefore no paragraph 11(1)(*a*) disposal will arise (P-value > 0.05).
- The trustees cannot donate a discretionary interest from one beneficiary to another beneficiary, and therefore no paragraph 11(1)(*g*) disposal will arise (P-value > 0.05).
- The trustees cannot donate a discretionary interest from one beneficiary to another beneficiary without the consent of all the beneficiaries. A discretionary interest has no value, and therefore no donations tax implications will arise (P-value > 0.05).
- The trustees vesting or distributing a capital asset in or to a discretionary beneficiary will not result in donations tax due to the donations tax exemption contained in section 56(1)(l) of the Act (P-value > 0.05).
- The sale of a capital asset and the subsequent vesting or distribution of the capital gain in or to a beneficiary will not result in donations tax due to the donations tax exemption contained in section 56(1)(l) of the Act (P-value > 0.05).
- The adding or removal of a beneficiary to or from a trust does not result in any donations tax implications, as the trustees have no value or right in the trust's assets at any stage (P-value > 0.05).

- The appointment or removal of a trustee to or from a trust does not result in any donations tax implications, as the trustees have no value or right in the trust's assets at any stage (P-value not applicable).
- These conclusions are also supported by the doctrinal analysis for discretionary rights in section 3.4.2.6 of Chapter 3.
- The doctrinal analysis in section 3.5.1 of Chapter 3 also confirms that a donation in terms of paragraph 11(1)(*a*) of the Eighth Schedule would also preclude a VSA.

7.2.4 Part D: Ordinary disposal implications

Do any of the selected trustees' actions mentioned in the primary and secondary research objectives 1 to 7 result in a paragraph 11(1)(*a*) to (*d*) ordinary disposal of the Eighth Schedule of the Act, and should they therefore be excluded from a VSA (Research question 4)? The respondents and the participants had to agree or disagree that the seven trustees' actions below would result in a paragraph 11(1)(*a*), (*b*), (c) and (*d*) disposal in terms of the Eighth Schedule. The cross tabulation of all the sub-questions for part D of the questionnaire is summarised in Table 7.4 below.

Table 7.4: Summary of the cross-tabulation results for Part D

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Experts	
	Agree	Disagree		Agree	Disagree		
4.1 The trustees vest capital assets (80 shares) in beneficiary A.	96,8%	3,2%	31	100%	0%	6	1
4.2 The trustees distribute capital assets (80 shares) to beneficiary A.	100%	0%	31	100%	0%	6	N/A
4.3 The trustees sell trust's capital assets (80 shares) at market value (R 1 200 000), and immediately vest or distribute the capital profit (R800 000) to beneficiary A.	93,5%	6,5%	31	100%	0%	6	1
4.4 Adding a new beneficiary to the trust.	6,9%	93,1%	29	0%	100%	6	1
4.5 Removing beneficiary A from the trust.	6,9%	93,1%	29	16,7%	83,3%	6	0,442
4.6 Appointing a new a trustee to the trust.	3,3%	96,7%	30	0%	100%	6	1
4.7 Removing a trustee from the trust.	3,3%	96,7%	30	0%	100%	6	1

7.2.4.1 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 1, Part 1: Part D:4.1). Most of the respondents (a mean score of 1.16 in section 5.5.4.8 in Chapter 5) and all six of the participants (see section 6.5.4.1 in Chapter 6) agreed that the above trustees' action will result in an ordinary disposal. The cross-

tabulation results show that most of the respondents (96.8%) and all the participants (100%) agreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

According to participant six, "*the vesting of the 80 shares in beneficiary A will result in a capital disposal in terms of paragraph 11(1)(d). A capital gain can only arise if assets are vested in a beneficiary in terms of an irrevocable resolution."* Participant one elaborated on the meaning of vesting for the purposes of paragraph 11(1)(*d*), which indicates that more than a resolution is required. He stated the following: "*I submit that vesting as contemplated per paragraph 11(1)(d) of the Eighth Schedule of the Income Tax Act of 1962, is either an outright vesting, or an ad hoc vesting plus some further act to found/constitute an outright vesting, (such further act being for example a distribution or delivery of the asset as it is the subject matter of an ad hoc vesting)"*. The annual financial statements of the trust could reflect the capital not yet distributed to beneficiary A for the vesting, as a liability. Participant two described the taxation of the vesting of the shares as a disposal as follows:

- *The vesting of the shares is a disposal by the trust to beneficiary A in terms of paragraph 11(1)(d) of the Eighth Schedule to the Act.*
- *In terms of paragraph 80(1) of the Eighth Schedule to the Act the gain of R800 000 made by the trust on disposal of the shares is attributed to beneficiary A, who is taxed on the capital gain.*
- *A capital gain is included (at the inclusion rate of 40%) in the taxable income of beneficiary A in terms of section 26A of the Act and is therefore in fact subject to income tax.*

Participant six mentioned that when vesting or distributing the capital "*the conduit principle will be applicable, and the capital gain will be passed on to beneficiary A."* The income will retain its character and be taxed as a capital gain when taxed in the beneficiary's hands. Participant two mentioned that the trustees' vesting of the 80 shares in beneficiary A could be viewed as either a paragraph 11(1)(*a*) donation

disposal or a paragraph 11(1)(*d*) vesting disposal. When applying the legal principle "unius est exclusio alterius," the trustees' vesting is best described as an ordinary disposal in terms of paragraph 11(1)(*d*) of the Eighth Schedule.

7.2.4.2 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 1, Part 1: Part D:4.2). Most of the respondents (a mean score of 1.03 in section 5.5.4.8 in Chapter 5) and all the participants (see section 6.5.4.2 in Chapter 6) agreed that the above trustees' action would result in an ordinary disposal. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) agreed with the statement. The Fisher's exact P-value could not be calculated as there are no variances for this sub-question. Both the respondents' and the participants' answers were the same.

According to participant five, the distribution of a capital asset from a trust to a beneficiary could be viewed as a donation, being a change of ownership or vesting an asset for the purposes of a paragraph 11(1)(*d*) disposal in terms of the Eighth Schedule. If a capital asset is distributed from a discretionary trust to a beneficiary before vesting, the vesting and distribution of the asset take place simultaneously, and a disposal in terms of paragraph 11(1)(*d*) occurs, as the transfer of the asset resulted in a change of ownership (according to participant two). Participant six mentioned that when vesting or distributing a capital of a trust, "*the conduit principle will be applicable, and the capital gain will be passed on to beneficiary A"* in terms of paragraph 80(1) of the Eighth Schedule. Participant six stated the following: *"If the shares have already vested, then no further tax consequences arise."* Participant two mentioned that when a vested asset is distributed to a beneficiary, no capital gain disposal occurs. When applying the legal principle "*unius est exclusio alterius*," to the trustees' action of distributing the trust's assets to a beneficiary before vesting, is it best described as an ordinary disposal in terms of paragraph 11(1)(*d*) of the Eighth Schedule.

7.2.4.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell a trust's capital assets (80 shares) at market value (R1 200 000) and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 1, Part 1: Part D:4.3**).** Most of the respondents (a mean score of 1.26 in section 5.5.4.8 in Chapter 5) and all six of the participants (see section 6.5.4.3 in Chapter 6) agreed that the above trustees' action would result in an ordinary disposal. The cross-tabulation results show that most of the respondents (93.5%) and all the participants (100%) agreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

According to participant one, *"the sale will immediately result in capital gains. If they immediately vest and distribute the shares or cash, this will result in a capital gains tax event for the beneficiary."* Participant one identified the sale as an ordinary disposal as described in paragraph 11(1)(*a*) of the Eighth Schedule. Participant four mentioned that "*the sale and the distribution of the profit is made immediately using the conduit principle*," as developed in the Armstrong and Rosin cases, which would result in the capital gain being taxed in beneficiary A's hands. The vesting or distribution of the capital gain should occur in the same year of assessment for the application of paragraph 80(2) to attribute the capital gain of R800 000 to beneficiary A (SARS, 2020:613). According to the SARS (2020:613) the vesting an asset is also considered a paragraph 11(1)(*d*) disposal if the asset was vested in the beneficiary before the sale. In such a case, a paragraph 11(1)(*d*) disposal would occur. The trustees selling the capital assets of a discretionary trust at market value, and the subsequent vesting or distribution of the capital gain to a beneficiary, could be considered as an ordinary disposal that is best described as a paragraph 11(1)(*a*) disposal.

7.2.4.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 1, Part 1: Part D:4.4). Most of the respondents (a mean score of 4.65 in section 5.5.4.8 in Chapter 5) and all six of the

participants (see section 6.5.4.4 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*a*) to (*f*) disposal. The cross-tabulation results show that most of the respondents (93.1%) and all the experts (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Participant six described the process and consequences of adding an adoptive child as a beneficiary to a century old discretionary trust which had no variation clause in the trust deed as follows:

- The beneficiaries had previously accepted benefits from the trust, and their consent had to be obtained to appoint the adoptive child as a beneficiary to the trust.
- A court application had to be made to insert a variation clause in the trust deed.
- The courts can permit amendments to the trust deed which are fair and just.
- All modern trust deeds contain a variation clause on adoptive children who are included as beneficiaries of a family trust.

For the purposes of this study, it was assumed that the trustees were legally able to conduct the trustees' actions, and that, where necessary, the consent of the beneficiaries would be obtained (see section 7.2.10.3); and that the beneficiaries received no compensation in any of the trustees' actions evaluated in the study. According to participant two, the rights (*spes*) attributed to the new beneficiary on his adding to the trust would be a disposal from the trust to the new beneficiary, but it would have no value. The remaining beneficiaries have not forfeited any value by the addition of the new discretionary beneficiary to the trust; the adding of a discretionary beneficiary does not result in any changes in the value and therefore no proceeds can be measured for CGT purposes. The researcher submits that no paragraph 11(1)(*a*) to (*f*) disposal will occur, irrespective whether the beneficiaries' consent was obtained for the adding of a new beneficiary to the trust. The adding

of a discretionary beneficiary to the trust, without the consent of the existing beneficiaries, may result in the trustees breaching their fiduciary duties towards the existing beneficiaries of the trust (Pace & Van der Westhuizen, 2023:18.2). A full analysis of the trustees' fiduciary duties and the validity of trust deed amendments are outside the scope of this study.

Participant two mentioned the following exception: "*There is one exception if the appointment of a new beneficiary is not in line with "the objective or purpose of the trust," which may result in the objective and purpose of a trust coming to an end, there may in fact be a 'disposal' by the 'old trust' to the 'new trust' for CGT purposes. If that is the case, one would have to consider whether the deemed disposal at market value rules, contained in paragraph 38 of the Eighth Schedule to the Act, may be applicable".* An example provided was if non-family members were appointed to a family trust; and the objective and the purpose of the trust were to cater for the original family of the beneficiaries. The adding of a new beneficiary to a discretionary trust would normally not result in an ordinary disposal unless the adding of the new beneficiary results in a change in the trust's objective.

7.2.4.5 Removing a beneficiary

Removing beneficiary, A from the trust (Section 1, Part 1: Part D:4.5). Most of the respondents (a mean score of 4.65 in section 5.5.4.8 in Chapter 5) and five of the participants disagreed (see section 6.5.4.5 in Chapter 6) that the above trustees' action would result in a paragraph 11(1)(*a*) to (*f*) disposal. One participant agreed with this statement. The cross-tabulation results show that most of the respondents (93.1%) and all the participants (83.3%) disagreed with the statement. The Fisher's P-value is 0.442 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Participant three referred to the Hofer v. Kevitt and Potgieter v. Potgieter court cases which dealt with the amendment of trust deeds to change the beneficiaries' rights in a trust. In Hofer and others v. Kevitt NO and others [1997] 4 All SA 620 (A), it was held that the trustees could remove the beneficiaries of a discretionary trust before

they accepted any benefits from the trust, and after the beneficiaries have accepted benefits from the trust their consent would be required to amend the trust deed. In Potgieter & another v. Potgieter NO & others [2011] JOL 27892 (SCA), it was held that, where the beneficiaries had accepted benefits of the trust, the trust deed could not be amended without their consent, because the founder has accepted benefits on behalf of the beneficiaries in the wording to the preamble of the original trust deed. Participant five made the following statements regarding the removal of a beneficiary from a discretionary trust:

- The removal of a trust beneficiary from a discretionary trust without any consideration will not result in a CGT event.
- The trust deed may contain a clause which allows the trustees to make a distribution to a beneficiary and then determine that the beneficiary is no longer a beneficiary.
- A discretionary beneficiary normally cannot resign from a trust. The beneficiary can for example accept payment not to be involved in the trust, in which case the difference between the amount received and the base cost of zero will be the capital gain taxable in the hands of the beneficiary.
- If the beneficiary consents to the removal, there would be a donation of the interest in favour of the trust or a waiver of a right, which may indicate a disposal in terms of paragraphs 11(1)(*a*) (donation or expropriation) or (*b*) (waiver of a right) taking place.

Under the general instructions of both the online questionnaire and the interview guide, respondents and participants were informed that, when necessary, the trust deeds could be amended to facilitate the trustees' actions evaluated in this study. Immediately after the instructions and the definition of a discretionary trust for this study, participants were also informed that they could assume that beneficiaries' consent in writing was obtained, if necessary, unless the contrary was stated, to allow the trustees' actions evaluated to take place.

Participant two emphasised that a discretionary beneficiary has only a hope or *spes* in a trust as follows: "*If the beneficiary consents to his removal, this would be*

forfeiture of his rights and would constitute a disposal, which may result in a capital loss if any value is attributable thereto. However, as there would be no value on a spes, no tax consequences would arise."

Participant two also mentioned that "*where the adding of new contingent beneficiaries results in the objective and purpose of a trust ending, however, there may in fact be a 'disposal' by the 'old trust' to the 'new trust' for CGT purposes. If that is the case, one would have to consider whether the deemed disposal at market value rules, contained in paragraph 38 of the Eighth Schedule to the Act may be applicable"*. Removing a beneficiary without compensation from a trust with or without the beneficiary's consent would not result in a gratuitous or an ordinary disposal, as the beneficiary only has a hope or *spes* in the trust's assets.

7.2.4.6 Appointing a trustee

Appointing a new trustee to the trust (Section 1, Part 1: Part D:4.6). Most of the respondents (a mean score of 4.81 in section 5.5.4.8 in Chapter 5) and all the participants (see section 6.6.4.6 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*a*) to (*f*) disposal. The cross-tabulation results show that most of the respondents (96.7%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The trustees do not have any rights to or in the trust's assets. Without any rights to or in an asset, no capital gain disposal can occur. All four elements should be present for a CGT disposal: a capital asset; a disposal, an asset with both measurable base cost and proceeds. A trustee does not have any right to the trust's assets, and therefore no base cost or proceeds of a capital asset can be ascribed to the trustee. The appointment of a trustee to a trust will not result in any paragraph 11(1)(*a*) to (*f*) disposal in terms of the Eighth Schedule.

7.2.4.7 Removing a trustee

Removing a trustee from the trust (Section 1, Part 1: Part D:4.7). Most of the respondents (a mean score of 4.81 in section 5.5.4.8 in Chapter 5) and all the participants (see section 6.5.4.7 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*a*) to (*f*) disposal. The cross-tabulation results show that most of the respondents (96.7%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The trustees do not have any rights to or in the trust's assets. Without any rights to or in an asset, no capital gain disposal can occur. All four elements should be present for a CGT disposal to be triggered: a capital asset; a disposal, an asset with both base cost and proceeds. A trustee does not have any right to the trust's assets; hence, no base cost or proceeds of a capital asset can be ascribed to the trustee. The removal of a trustee from a trust will not result in any paragraph 11(1)(*a*) to (*f*) disposal in terms of the Eighth Schedule.

7.2.4.8 Summary of the results for discretionary trusts (Section 1, Part D)

The following is a summary of the research results for discretionary trusts for Part D of the research instruments:

- The vesting (P-value > 0.05) or distribution (P-value not applicable) of a capital asset in or to a discretionary beneficiary would result in a paragraph 11(1)(*d*) disposal.
- The sale of a capital asset is best described by a paragraph 11(1)(*a*) disposal, which occurs when the trustees (P-value > 0.05) sell a capital asset. The subsequent vesting or distribution of the capital gain in or to the beneficiary will result in the capital gain from the sale of the capital asset being included in the

beneficiary's income in terms of the attribution rules of paragraph 80 of the Eighth Schedule.

- The adding or removal of a discretionary beneficiary to or from a trust will not result in a paragraph 11(1)(*a*) to (*f*) disposal (P-value > 0.05). There are two exceptions that may result in a paragraph 11(1)(*a*) to (*f*) disposal, namely when the beneficiaries receive compensation or when the trust's objective is changed.
- The appointment or removal of trustees will not result in any changes in the beneficiaries' rights to the trust's assets, and consequently no paragraph 11(1)(*a*) to (*f*) disposal will occur (P-value > 0).
- These conclusions are also supported by the doctrinal analysis in section 3.5.2.4 of Chapter 3.
- The doctrinal analysis in section 3.5.1 of Chapter 3 also confirms that a donation in terms of paragraph 11(1)(*a*) of the Eighth Schedule would be excluded from a VSA.

7.2.5 Part E: Beneficiaries' interest in a trust

Are the beneficiaries' interests in a trust, as referred to in the definition of a VSA in paragraph 1 of the Eighth Schedule to the Act, considered to be a capital asset for CGT purposes pertaining to trust beneficiaries in discretionary or vested trusts (Research question 5)? The respondents and the participants had to agree or disagree that the disposal of a discretionary interest in a trust would result in a capital gain or a loss. The cross tabulation of all the sub-questions for part E is summarised in Table 7.5 below.

Table 7.5: Summary of the cross-tabulation results for Part E

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
5.1 A disposal of discretionary interest in a trust's capital asset by a beneficiary, could result in a capital gain or a capital loss for the beneficiary.	83,3%	16,7%	30	66,7%	33,3%	6	0,573

7.2.5.1 Discretionary interest in a trust

A capital gain or a loss can only occur after a disposal of a capital asset. Add any commentary explaining whether you agree with this statement (Section 1, Part E: 5.1). Most of the respondents (a mean score of 1.70 in section 5.5.5.2 in Chapter 5) and four of the participants (see section 6.5.5.1 in Chapter 6) agreed that a discretionary interest in a trust could be considered a capital asset of the beneficiary. Two of the participants disagreed with this statement. The cross-tabulation results show that most of the respondents (83.3%) and most of the participants (66.7%) agreed with the statement. The Fisher's P-value is 0.573 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

According to participant six, a discretionary beneficiary only has a *spes* which is a hope, and it is possible to receive consideration for such a *spes*. A discretionary interest is a contingent right, which depends upon the trustees' decision to vest or distribute the trust's assets to the beneficiary. Two of the participants disagreed with the statement, since a discretionary beneficiary only has a personal right against the trustees for the proper management of the trust's assets, which limits the discretionary beneficiary to dispose of such interest in a trust to any third party. The only exception would be when all the beneficiaries of the trust receive consideration to waive all their discretionary rights in a trust to a new beneficiary. These schemes were popular with residential property-owning trusts and were used to avoid transfer duty costs. Instead of selling the residential property out of the trust to the purchaser, the beneficiaries waived their rights to the buyer who then became the new beneficiary of the trust, and the new trustees replaced the old trustees (according to participant four). Participant four further explained the changes made to the Transfer Duty Act to prevent the avoidance of Transfer Duty as follows: *"In the event of the sale of an interest in a company or trust which owns a residential property, transfer duty is applicable."*

The question that arises is whether a real right would be included in the definition an asset for CGT purposes, whilst a personal right would not be included. If this was

the case, then disposals in terms of the Eighth Schedule would only apply when a change of ownership occurs. SARS (2020:44) lists some examples of assets for CGT purposes, and notably a beneficiary's interest in a trust is not amongst the listed examples. An asset for CGT purposes is defined in paragraph 1 of the Eighth Schedule as follows:

> *"(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."*

The subsection (*b*) includes a beneficiary's interest in a trust as an asset for CGT purposes. According to SARS (2020:49), both a personal right and a real right could be considered as an asset within the definition of an asset for CGT purposes. A discretionary interest in a trust therefore could also be considered as a capital asset.

A discretionary interest in a trust could be considered an asset of the beneficiary for CGT purposes, as the definition of an asset includes *any right to or in property* (definition of an asset in paragraph 1 of the Eighth Schedule). Williams (2005:79) describes a "*right to"* property as a personal right and "*right in"* property as a real right. Participant six provided two reasons that indicate that a discretionary interest in a trust could be considered as a capital asset of a beneficiary:

- If the beneficiary receives payment for the discretionary right attached to a capital asset held in a trust, CGT will be applicable.
- The base cost of a discretionary interest in a trust is zero. The Eighth Schedule specifically gives a zero value to a discretionary interest, which indicates that such interest could be considered as an asset for CGT purposes.

Another argument provided by participant two for a discretionary interest in a trust to be considered an asset of the beneficiary for CGT purposes, is that case law indicates that a discretionary interest can be ceded. According to participant two, "*the definition of an asset in paragraph 1 of the Eighth Schedule to the Act defines*

*an asset as any right in or to an asset. The expression "right" is not defined and potentially has a wide application, such as including a spes (or expectation), which is a contingent right that is realised when trustees exercise discretion in favour of the holde*r." The SARS (2020:597) confirms that a discretionary interest in a trust could be considered as an asset of the beneficiary for CGT purposes. The detailed study of beneficiaries' rights is excluded from the scope of this study. A discretionary interest in a trust therefore could also be considered as a capital asset of a beneficiary.

7.2.5.2 Summary of the results for a discretionary trust (Section 1, Part E)

The following is a summary of the research results for discretionary trusts for part E of the research instruments:

- A discretionary interest in a trust is a personal right against the trustees to manage the trust's assets in terms of the stipulations contained in the trust deed; and is included in the definition of an asset for CGT purposes (P-value > 0.05)**.**
- This conclusion is also supported by the doctrinal analysis in section 3.2.5 of Chapter 3.

7.2.6 Part F: Measuring a VSA

How are proceeds and base costs measured in a trust VSA? Are there examples of VSAs related to trusts, companies, or partnerships in the SARS guides that can help with this measurement Research question 6)? The respondents and the participants had to agree or disagree that the various components of calculating a capital gain or a loss for a VSA, as defined in paragraph 35(2) (proceeds) and 23 (base cost) of the Eighth Schedule, are present for the trustees' actions evaluated in this study. The cross tabulation of all the sub-questions for part F is summarised in Table 7.6 below.

Table 7.6: Summary of the cross-tabulation results for Part F

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
6.1 The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	86,7%	13,3%	30	0,0%	100%	6	0,000
6.2 A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	23,3%	76,7%	30	0,0%	100%	6	0,317
6.3 The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets before any of the seven trustees' actions mentioned previously can be measured.	90%	10%	30	0,0%	100%	6	0,000

7.2.6.1 Measuring the market value of a VSA

The market value of each of the beneficiaries' interests (beneficiaries A, B, and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously, can be measured (Section 1, Part F:6.1). Most of the respondents (a mean score of 1.73 in section 5.5.6.4 in Chapter 5) agreed, as opposed to all six of the participants (see section 6.5.6.1 in Chapter 6) who disagreed with the above statement. The cross-tabulation results show that the respondents and the participants did not have the same responses to this question: 86.7% of the respondents agreed, whereas 100% of the participants disagreed with this statement. The Fisher's P-value is 0 for this sub-question, which is less than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically significant.

Van Zyl (2019:726) quoted ITC 76 which states that for a right to be measured in monetary terms, the right should have a present value attached to it; the future benefit accruing to the beneficiary could be discounted at a fair market rate to arrive at the present value today. According to Stein (2023:7.12), paragraph 31 of the Eighth Schedule does provide guidance on determining the market value of assets for CGT purposes. For example, the value of listed financial instruments should be based on the ruling price on the recognised security exchange. Stiglingh *et al.* (2026:703) also mentioned some of the paragraph 31 market rules which are based "*on the willing buyer, willing seller at arm's length in an open market"* principle, which constitutes an acceptable value basis for immovable farmland property, unlisted

shares, and other assets. Explanations of the respondents' agreement that a "discretionary interest" could be measured, include the following:

- The respondents may have considered the future value of the possible benefits having a zero value; hence the present value of an asset held in a discretionary trust also having a zero value.
- The respondents may have considered that shares or assets of a discretionary trust are a *spes* or merely a hope, which therefore have no value to the beneficiary, as the trustees are not compelled to vest or distribute it in or to any beneficiary at any point in time.
- As it is possible to amend a trust deed before a discretionary beneficiary has accepted benefits from the trust, without the consent of the discretionary beneficiaries, the discretionary beneficiaries' interest has no value to protect, which indicates that the discretionary beneficiaries' interest at market value is also of zero value (Van Zyl, 2019:717).
- After some of the trustees' actions, whereby a capital asset or a capital gain is either vested in or distributed to a beneficiary, it may be possible to measure the value in the recipient beneficiary's hands.
- Alternatively, the respondents may have realised that the market value of the assets held in the trust could be measured, as opposed to the discretionary interest in a trust which may be difficult to measure.

All the participants disagreed that the market value of a discretionary interest in a trust can be measured from a beneficiary's perspective, as it would be difficult to measure the market value of a beneficiary's discretionary interest in a trust, when using the present value concept due to the following uncertainties:

- The fact that a discretionary beneficiary's future benefit is unpredictable, and dependent upon the trustees exercising their unfettered right to distribute the trust assets to any one of the beneficiaries.
- The timeline for the trustees to eventually vest or distribute the trust's assets or capital profit to a beneficiary may also be uncertain.

Participant one described the market value of a discretionary trust as follows: "*The asset in the trust has a market value, which is from the perspective of the trust. A discretionary interest has no value for the beneficiary. Thus, no market value for the beneficiary, which is from the perspective of the discretionary beneficiary."*

According to participant six, in the case of a "*discretionary trust, the beneficiary's rights are only a hope or a spes, and such interests are excluded from the estate of the beneficiary,"* which provides an estate duty perspective. The rights attached to an asset (*spes)* held in a discretionary trust have no value to the beneficiary for CGT purposes (according to participant two). Due to the uncertainty caused by the trustees' unfettered discretion to vest or distribute trust's assets *(*Pace & Van der Westhuizen, 2023:6.1.3), it may not be possible to measure the market value of a discretionary interest in a trust. Both the delivery and the date of delivery of the asset is unpredictable, and no valuation model such as the discounted cash flow method could be used to measure a discretionary interest in a trust (Aliyu, 2020:71). The examination of the valuation methods to determine the appropriate market value of a discretionary beneficiary's interest in a trust is outside the scope of this study. Due to the nature of a discretionary interest in a trust, such interest would have no value and would be difficult to measure before any of the trustees' actions take place.

7.2.6.2 Measuring the value shift of a VSA

A possible reduction in the market value of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously, can be measured (Section 1, Part F: 6.2). Most of the respondents (a mean score of 4.03 in section 5.5.6.4 in Chapter 5) and all six of the participants (see section 6.5.6.2 in Chapter 6) disagreed that a discretionary interest in a trust could be considered a capital asset of the beneficiary. The cross-tabulation results show that most of the respondents (77.63%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 0.317 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The purpose of this question was to identify if a change in the market value of the proceeds of a VSA can be measured in terms of paragraph 35(2) of the Eighth Schedule, which is defined as follows:

> *"*The amount of the proceeds from a disposal by way of a value shifting arrangement is determined as the market value of the person's interests to which subparagraph 11(1)(*g*) applies immediately prior to the disposal less the market value of the person's interests immediately after the disposal, which amount shall be treated as having been received or accrued to that person*"*.

From the paragraph 35(2) definition of the proceeds for a VSA there should be an increase in the market value of the interest of one beneficiary with a corresponding decrease in the market value of the interest for another beneficiary, before the proceeds of a VSA can be measured. According to participant four, "there is no value attached to a discretionary interest," because the beneficiary's interest in a trust is a *spes* or hope, which indicates that a discretionary interest in a trust has no market value. In Table 7.7 below, the market value of the beneficiaries' interest in the discretionary trust structure before and after the trustees vest the 80 shares in beneficiary A, is reflected.

Table 7.7: Measuring a VSA for vesting 80 shares of the discretionary trust

Beneficiary	Market value of discretionary interest before trustees' action	Market value of discretionary interest after trustees' action	Value shift
Beneficiary A	R0	R1 200 000	R1 200 000
Beneficiary B	R0	R0	R0
Beneficiary C	R0	R0	R0

The vesting or distribution of 80 shares at a market value of R15 000 per share will result in an increase in value of R1 200 000 for beneficiary A (80 shares x R15 000). Both beneficiaries B and C have a *spes,* which is a hope and has no value, both before and after the trustees' action described above. There is no corresponding decrease in the value of the interest in beneficiaries B and C, and consequently the proceeds of a VSA, as defined in paragraph 35(2) of the Eighth Schedule, cannot be measured for the above-mentioned trustees' action. A reduction in a

discretionary beneficiary's market value of his/her discretionary interest, with a corresponding increase in market value of the other beneficiaries' discretionary interests, cannot be measured before and after the trustees' actions take place. This conclusion is also supported by the doctrinal analysis in section 3.6.2.4 of Chapter 3.

7.2.6.3 Measuring the base cost of a VSA

The base cost of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust's assets before any of the seven trustees' actions mentioned previously, can be measured (Section 6.3, Part 1: section F). Most of the respondents (a mean score of 1.40 in section 5.5.6.4 in Chapter 5) agreed, as opposed to all six of the participants (see section 6.5.6.3 in Chapter 6) who disagreed with the above statement. The cross-tabulation results show that the respondents and the participants do not have the same responses for this question: 90% of the respondents agreed, whereas 100% of the participants disagreed with this statement. The Fisher's P-value is 0 for this sub-question, which is less than 0.05; and demonstrates that the comparison between the respondents' questionnaire responses and the participants' interview responses is statistically significant.

The respondents may have considered that the base cost of a discretionary interest has a nil value in terms of the Eighth Schedule, and therefore a nil value could be used as a measure of the discretionary interest in a trust, before the trustees' actions take place. According to participant six, *"the base cost of a spes cannot be measured. The Eighth Schedule does give a zero value to a discretionary interest in a trust."* All the participants disagreed that the market value of a discretionary interest in a trust can be measured from a beneficiary's perspective, as it would be difficult to measure the base cost of a beneficiary's discretionary interest in a trust, because the beneficiary only has a *spes* or hope to the trust's assets. Van Zyl (2019:726) quoted ITC 76 which states that for a right to be measured in monetary terms, the right should have a present value attached to it; a *spes* does not constitute a contingent right (Pace & Van der Westhuizen, 2023:6.1.3) and therefore cannot be measured. Van Zyl (2019:717) commented that it is possible to amend a

trust deed before a discretionary beneficiary has accepted benefits from the trust, without the consent of the discretionary beneficiaries; the discretionary beneficiary's interest has no value to protect, prior to the beneficiaries having accepted their discretionary benefits. From the above analysis the researcher submits that the value of a discretionary interest in a trust cannot be measured before any of the trustees' actions take place. However, the Eighth Schedule deems the measure of a discretionary interest in a trust to have a zero value (paragraph 81 of the Eighth Schedule).

7.2.6.4 Summary of the results for a discretionary trust (Section1, Part F)

The following is a summary of the research results for discretionary trusts for Part F of the research instruments:

- The value of a discretionary interest in a trust is a *spes* which cannot be easily measured, however, a *spes* has no value, which indicates that the market value of a discretionary interest also has a nil value or a nil-market value (P-value < 0.05).
- Further research may be necessary to determine the market value of a discretionary interest.
- A reduction in the market value of a discretionary interest in a trust cannot be measured in any of the trustees' actions examined above, as the beneficiaries only have a hope or *spes* which has no value either before or after the trustees' actions take place (P-value > 0.05).
- The value of the base cost of a discretionary interest (*spes*) in a trust cannot be measured before any of the trustees' actions take place. However, the Eighth Schedule deems the measure of the base cost of a discretionary interest in a trust to have a zero value (paragraph 81 of the Eighth Schedule) (P-value < 0.05).
- The conclusions are also supported by the doctrinal analysis in section 3.6.4 of Chapter 3.

7.2.7 Part G: Value shifting disposals

Do any of the trustees' actions mentioned in the research objectives meet the definition of a VSA, and does it fall under paragraph 11(1)(*g*) of the Eighth Schedule to the Act (Research question 7)? The respondents and the participants had to agree or disagree that the seven trustees' actions below would result in a paragraph 11(1)(*g*) disposal of the Eighth Schedule. The cross tabulation of all the sub-questions for part G is summarised in Table 7.8 below.

Table 7.8: Summary of the cross-tabulation results for Part G

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
7.1 The trustees vest capital assets (80 shares) in beneficiary A.	16,7%	83,3%	30	0%	100%	6	0,564
7.2 The trustees distribute capital assets (80 shares) to beneficiary A.	20%	80%	30	0%	100%	6	0,561
7.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	13,3%	86,7%	30	0%	100%	6	1
7.4 Adding a new beneficiary to the trust.	3,4%	96,6%	29	0%	100%	6	1
7.5 Removing beneficiary A from the trust.	0%	100%	29	0%	100%	6	N/A
7.6 Appointing a new trustee to the trust.	0%	100%	29	0%	100%	6	N/A
7.7 Removing a trustee from the trust.	0%	100%	29	0%	100%	6	N/A

When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing) for "the discretionary trust structure provided," the respondents and the participants were requested to discuss any possible disposal in terms of paragraph 11(1)(*g*) that may result from the trustees' actions.

7.2.7.1 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 1, Part G: 7.1). Most of the respondents (a mean score of 4.30 in section 5.5.7.8 in Chapter 5) and all six of the participants (see section 6.5.7.1 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal. The cross-tabulation results show that most of the respondents (83.3%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 0.564 for this sub-question, which is greater than 0.05; and demonstrates that the comparison

between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Participant two described the definition of a VSA as follows: "*Paragraph 11(1)(g) provides for a deemed disposal in terms of a value shifting arrangement where the transferor's interest in a trust, which he retains, decreases and a connected party's interest in the trust in relation to the transferor's interest, increases. A trust is a connected person in relation to its beneficiaries but does not hold an interest in relation to itself. Therefore, the provisions of paragraph 11(1)(g) do not apply, but paragraph 11(1)(d) applies instead. As the trust is a discretionary trust, the market value of beneficiary A's interest in the trust may have increased, but the market value of the other beneficiaries' interests in the trust would have remained the same and, accordingly, no value shifting arrangement would have taken place."* From participant two's description of a VSA, the following elements should be present for a value shifting arrangement to take place:

- The beneficiaries should be connected parties in terms of the Act.
- The transferor beneficiary should have a decrease in the market value in the trust.
- The transferee beneficiary should have an increase in the market value in the trust.
- The transferor beneficiary should retain an interest in the trust after the VSA has occurred.

In the definition of a "connected person" contained in section 1(1) of the Act, the beneficiaries of the trust and relatives of the beneficiaries are connected persons. All the beneficiaries retain an interest in the trust after the shares are vested in beneficiary A. The reduction and increase in the market value of the beneficiaries' market value in the trust cannot be measured, as the beneficiaries have a *spes* with no market value in a trust (see section 7.2.6). The proceeds of a VSA, in terms of paragraph 35(2) of the Eighth Schedule, cannot be measured without a decrease and corresponding change in the market value in the trust's assets occurring. If a VSA took place when the trustees vest a capital asset in a beneficiary, the base

cost would be measured in terms of paragraph 23(*g*) of the Eighth Schedule as follows: the base cost of a VSA is calculated as Y = [(A - C) / A] × B, where A represents the market value before the VSA (which is zero for beneficiaries B and C), B is the base cost of the asset before the VSA (also zero (paragraph 81 of the Eighth Schedule)), and C is the market value for beneficiaries B and C after the VSA (again, zero). Substituting these values into the formula: Y = [(0 - 0) / 0] × 0, results in a base cost of zero. Both the proceeds and the base cost are required to measure a VSA, but with no measurable proceeds no VSA can occur. The vesting of a capital asset in a beneficiary of a discretionary trust will not result in a paragraph 11(1)(*g*) disposal.

7.2.7.2 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 1, Part G: 7.2). Most of the respondents (a mean score of 4.17 in section 5.5.7.8 in Chapter 5) and all the participants (see section 6.5.7.2 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal. The cross-tabulation results show that most of the respondents (80%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 0.561 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

According to participant two, *"It may be arguable that the provisions of paragraph 11(1)(a) also apply in that the trustees have made a donation*". Alternatively, one could argue that a paragraph 11(1)(*d*) vesting disposal has occurred. Participant two stated that when more than one possibility exists in law, the possibility which best describes the transaction should be selected: "*In such a case the legal principle unius est exclusio alterius should find application, which states that if one of the two possibilities of an event is talked about expressly, then the second possibility is kicked out by default since the simultaneous occurrence of both possibilities of a single event is undesirable and not valid under the law"*. Participant five stated that a paragraph 11(1)(*d*) disposal best describes the trustees' action above.

Both beneficiaries B and C have a *spes,* which is a hope and has no value, before and after the trustees' action described above. No decrease in the market value of the interest of beneficiaries B and C in the trust can be measured, and consequently the proceeds of a VSA, as defined in paragraph 35(2) of the Eighth Schedule, cannot be measured for the above-mentioned trustees' action (see section 7.2.6.2). The possible VSA's base cost of the discretionary beneficiary's interest in the trust, for the above trustees' action, as calculated in terms of paragraph 23(*g*) the Eighth Schedule, will be zero. Without any measurable proceeds, no VSA is possible. The distribution of a capital asset to a beneficiary of a discretionary trust would not result in a paragraph 11(1)(*g*) disposal.

7.2.7.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell a trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 1, Part G: 7.3). Most of the respondents (a mean score of 4.47 in section 5.5.7.8 in Chapter 5) and all six of the participants (see section 6.5.7.3 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal. The cross-tabulation results show that most of the respondents (86.7%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1. for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

In this scenario at least three different disposals may occur: a donation and a sale in terms of paragraph 11(1)(*a*), and a vesting in terms of a paragraph 11(1)(*d*) disposal of the Eighth Schedule. By applying the legal principle *unius est exclusio alterius,* participant two concluded that a "*paragraph 11(1)(a) disposal that provides that the trust has disposed of the asset by virtue of the sale"* has taken place*.* According to participant two, an attribution rule applies which attributes the capital gain to beneficiary A (paragraph 80(2)).

Both beneficiaries B and C have a *spes,* which is a hope and has no value, before and after the trustees' action described above. There is no corresponding decrease

in the value of the discretionary interests of beneficiaries B and C, and consequently the proceeds of a VSA, as defined in paragraph 35(2) of the Eighth Schedule, cannot be measured for the above-mentioned trustees' action (see section 7.2.6.2). The possible VSA's base cost of the discretionary beneficiary's interest in the trust for the above trustees' action, as calculated in terms of paragraph 23(*g*) the Eighth Schedule, will be zero (see section 7.2.7.1).

In Table 7.9 below the market value of the discretionary beneficiary's interest in a trust is reflected before and after the trustees' vest or distribute a capital gain from the sale of the 80 shares in or to beneficiary A.

Table 7.9: Trustees sell 80 shares and either vest or distribute the resulting capital gain in or to beneficiary A

Beneficiary	Market value of discretionary interest before trustees' action	Market value of discretionary interest after trustees' action	Value shift
Beneficiary A	R0	R800 000	R800 000
Beneficiary B	R0	R0	R0
Beneficiary C	R0	R0	R0

The sale of 80 shares at a capital gain of R10 000 per share results in a capital gain of R800 000 (80 shares x R10 000 capital gain per share). The vesting or distribution of the R800 000 capital gain in or to beneficiary A results in an increased value of R800 000 for beneficiary A. Both beneficiaries B and C have a *spes,* which is a hope and has no value, both before and after the trustees' action described above. There is no corresponding decrease in the value of the discretionary interest for beneficiaries B and C, and consequently the proceeds of a VSA, as defined in paragraph 35(2) of the Eighth Schedule, cannot be measured for the above-mentioned trustees' action. The trustees' sale of a trust's capital asset (80 shares) at market value (R1 200 000), and either vesting or distributing the capital gain (R800 000) to beneficiary A, would not result in a paragraph 11(1)(*g*) disposal.

7.2.7.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 1, Part G: 7.4). Most of the respondents (a mean score of 4.80 in section 5.5.7.8 in Chapter 5) and all the

participants (see section 6.5.7.4 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal. The cross-tabulation results show that most of the respondents (96.6%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 10 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The beneficiaries who have accepted benefits would have to consent to the adding of a new beneficiary to the discretionary trust. According to participant one, a "*discretionary interest has no value for the beneficiary. Thus, no market value for the beneficiary. You cannot measure a reduction in the market value of the beneficiary."* The new beneficiary only acquires a hope or a contingent right. The existing beneficiaries will also be forfeiting a hope or *spes* with no value. Whether the beneficiaries agree or not to the adding of a new beneficiary to the trust, no value shifting and no change in the market value will occur. The proceeds of a VSA, as defined in paragraph 35(2) of the Eighth Schedule, cannot be measured for the adding of a new discretionary beneficiary to a discretionary trust. The adding of a new beneficiary to a discretionary trust would not result in a paragraph 11(1)(*g*) disposal.

7.2.7.5 Removing a beneficiary

Removing beneficiary, A from the trust (Section 1, Part G: 7.5). Most of the respondents (a mean score of 4.90 in section 5.5.7.8 in Chapter 5) and all six participants (see section 6.5.7.5 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) disagreed with the statement. The Fisher's exact P-value could not be calculated as there are no variances for this sub-question; both the respondents' and participants' answers were the same.

Participant six described the absence in the reduction of the market value and a value when a beneficiary is removed from a discretionary trust as follows: *"Because,*

before and after the beneficiary only has a spes. The possible change in the market value of the beneficiary's interest in the trust cannot be measured." Irrespective if the beneficiaries' consent to the removal of the beneficiary was obtained, no value shifting in terms of paragraph 35(2) will be measurable, as the beneficiaries' interest remain a *spes*. The proceeds of a VSA, as defined in paragraph 35(2) of the Eighth Schedule, cannot be measured when a discretionary beneficiary is removed from a discretionary trust. The removal of a discretionary beneficiary from a discretionary trust would not result in a paragraph 11(1)(*g*) disposal.

7.2.7.6 Appointing a trustee

Appointing a new trustee to the trust (Section 1, Part G: 7.6). Most of the respondents (a mean score of 4.90 in section 5.5.7.8 in Chapter 5) and all six of the participants (see section 6.5.7.6 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) disagreed with the statement. The Fisher's exact P-value could not be calculated as there are no variances for this sub-question. The respondents' and experts' answers were the same.

According to participant six, "*the trustees do not have any rights to the trust's assets in a discretionary trust,"* thus, no income tax or CGT consequences will arise with the appointment of a new trustee to a trust. Without any interest in the trust, as required in the definition of a VSA, in terms of paragraph 1 of the Eighth Schedule, no possible VSA can take place when a new trustee is appointed to a trust. The appointment of a new trustee to a discretionary trust would not result in a paragraph 11(1)(*g*) disposal.

7.2.7.7 Removing a trustee

Removing a trustee from the trust (Section 1, Part G: 7.7). Most of the respondents (a mean score of 4.90 in section 5.5.7.8 in Chapter 5) and all six participants (see section 6.5.7.7 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal. The cross-tabulation results show that all the

respondents (100%) and all the participants (100%) disagreed with the statement. The Fisher's exact P-value could not be calculated as there are no variances for this sub-question.

According to participant six. "*The trustees do not have any rights to the trust's assets in a discretionary trust;"* thus, no income tax or CGT consequences will arise with the removal of trustees from a trust. Without any interest in the trust assets, as required in the definition of a VSA, in terms of paragraph 1 of the Eighth Schedule, no possible VSA can take place when a trustee is removed from a trust. The removal of a trustee from a discretionary trust would not result in a paragraph 11(1)(*g*) disposal.

7.2.7.8 Summary of the results for a discretionary trust (Section 1, Part G)

The following is a summary of the results for discretionary trusts for Part G of the research instruments:

- The vesting or distribution of 80 of the 120 shares would not result in a VSA (P-value > 0.05).
- The sale of 80 of the 120 shares and the subsequent vesting or distributing of the resulting capital gain in or to beneficiary A, would not result in a VSA (P-value > 0.05).
- The adding (P-value > 0.05) or removal (P-value not applicable) of a beneficiary to or from a discretionary trust would not result in a VSA.
- The appointment or removal of a trustee to or from the discretionary trust would not result in a VSA (P-value not applicable).
- The conclusions are also supported by the doctrinal analysis in section 3.6.4 of Chapter 3.

7.2.8 Part H: Other trustees' actions

Do any of the trustees' actions not mentioned in the primary and secondary research objectives 1 to 6 constitute a VSA (Research question 8)? Respondents and the

participants were requested to discuss and provide examples of any other trustees' actions in detail (excluding the seven trustees' actions examined in the previous sections and donations of vested interests between beneficiaries) for a discretionary trust that may result in a VSA, in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act (Section 1, Part H: 8.1).

7.2.8.1 Other examples

According to participant two, *"where a discretionary trust is concerned, I see only the application of GAAR having any significance as explained above by virtue of the fact, that a spes has no value."* Due to the very nature of a discretionary interest in a trust; which is a *spes*, or hope, or a contingent right of the beneficiary subject to the trustees' discretion; the possibility of a VSA is reduced (see section 6.5.8.1 in Chapter 6 and 5.8.8 in Chapter 5).

7.2.8.2 Summary of the results for a discretionary trust (Section 1, Part H)

The following is a summary of the results for discretionary trusts for Part H of the online questionnaire and the interview guide:

- Both the respondents and the participants provided no examples of a VSA for discretionary trusts.

7.2.9 Part I: The DTC's recommendations implications

What are the implications for trustees' actions if the recommendations of the Davis Tax Committee's Report on the Feasibility of Wealth Tax in South Africa (DTC, 2018:81) in relation to VSAs are implemented in South Africa on VSAs (Research question 9)? The respondents and participants had to agree or disagree to a specific question relating to their understanding of the DTC's recommendations; followed by seven questions on whether the trustees' actions below would result in a paragraph 11(1)(*g*) disposal in terms of the Eighth Schedule if the DTC's recommendations on trusts would be implemented. The cross tabulation of all the sub-questions for part I are summarised in Table 7.10 below.

Table 7.10 Summary of the cross-tabulation results for Part I

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
9.1 The DTC Recommendations on trusts recommends that a discretionary trust's income or capital income, should be taxed in the trust, effectively negating the attribution rules of taxing any taxable income or capital income in the hands of the beneficiary.	100%	0%	31	100%	0%	6	N/A
9.2.1 The trustees vest trust's capital assets (80 shares) in beneficiary A.	13,8%	86,2%	29	0%	100%	4	1
9.2.2. The trustees distribute trust's capital assets (80 shares) to beneficiary A.	14,3%	85,7%	28	0%	100%	4	1
9.2.3 The trustees sell trust assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	10,3%	89,7%	29	0%	100%	4	1
9.2.4 Adding a new beneficiary to the trust.	0%	100%	28	0%	100%	4	N/A
9.2.5 Removing beneficiary A from the trust.	0%	100%	28	0%	100%	4	N/A
9.2.6 Appointing a new trustee to the trust.	0%	100%	28	0%	100%	4	N/A
9.2.7 Removing a trustee from the trust.	0%	100%	28	0%	100%	4	N/A

7.2.9.1 Understanding of the DTC's recommendations

The DTC's recommendations on trusts stipulate that a discretionary trust's income or capital income should be taxed in the trust, effectively negating the attribution rules of taxing any taxable income or capital income in the hands of the beneficiaries of a discretionary trust before any trust asset or income is vested or distributed to the beneficiary.

The respondents and the participants were requested to add any commentary explaining whether they agreed with the above statement (Section 1, Part I: 9.1). Most of the respondents (a mean score of 1.55 in section 5.5.9.9 in Chapter 5) and all six of the participants (see section 6.5.9.1 in Chapter 6) agreed that, if the DTC's recommendations for discretionary trusts were to be implemented, the attribution rules of taxable income and capital gains in the hands of beneficiaries will be circumvented, resulting in all capital gains to be taxed in the trust before the assets are vested in the beneficiaries. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) who answered this question disagreed with the statement. The Fisher's exact P-value could not be calculated as there are no variances for this sub-question since both the respondents' and participants' answers were the same.

According to participant six, the implementation of the DTC's recommendations for discretionary trusts would not only negate the attribution rules, but *"this would result in the removal of the conduit principle. It would not be fair to do fundamental*

changes to the taxation of trusts." The DTC's recommendations for discretionary trusts are aimed at preventing the splitting of income and capital gains in a discretionary trust, as the income and capital gains will be taxed in the trust at the highest maximum marginal income tax rate (currently 45%), and no longer in the hands of the beneficiaries who might be at a lower marginal income tax rate. Participant six also emphasised that, according to the DTC's recommendations, the vesting must be irrevocable before any income or capital gain from a discretionary trust would be taxable in the hands of the beneficiary. The DTC's recommendations for discretionary trusts will effectively ring fence the taxable income and capital gains in the trust before the taxable income and capital gain is vested in the beneficiary.

In the followings sections (7.2.9.2 to 7.2.9.8), participants and respondents were requested to indicate whether, if the DTC's recommendations for the discretionary trust structure provided, would be implemented, any of the seven following trustees' actions (with the consent of the beneficiaries in writing) would result in a VSA.

7.2.9.2 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 1, Part I:9.2.1). Most of the respondents (a mean score of 4.37 in section 5.5.9.9 in Chapter 5) and four of the participants who answered this question (see section 6.5.9.2 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal should the DTC's recommendations be implemented. The cross-tabulation results show that most of the respondents (86.2%) and all four of the participants (100%) who answered this question, disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The respondents and the participants who have not examined the DTC's recommendations in detail, did not answer this question. The wording of the recommendations of the DTC indicates that the capital gains are taxed in the discretionary trust up to the time vesting occurs, and the wording is as follows:

"Capital income, generated while assets are held in trust on anything other than a vested basis, must be taxed within the trust up to the time of vesting or disposal as defined in paragraph 11 of the Eighth Schedule to the ITA". The disposal rules contained in paragraph 1 would still apply, so the vesting will trigger a CGT event. The resulting capital gain is taxed in the trust at the time of vesting, limiting the application of a VSA disposal. Beneficiaries B and C also have not had any reduction in the market value of their discretionary interest, thus, no VSA takes place. The vesting of a capital asset in a discretionary beneficiary will not result in a VSA if the DTC's recommendations are implemented.

7.2.9.3 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 1, Part I: 9.2.2). Most of the respondents (a mean score of 4.38 in section 5.5.9.9 of Chapter 5) and four of the participants who answered this question (see section 6.5.9.3 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal if the DTC's recommendations were to be implemented. Two of the participants did not answer this question, as they have not examined the DTC's recommendations fully. The cross-tabulation results show that most of the respondents (85.7%) and all four of the participants (100%) who answered this question disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Respondents and participants who have not examined the DTC's recommendations in detail did not answer this question. If implemented, the DTC's recommendations will ring-fence the capital gain in the trust until the discretionary trust's assets are irrevocably vested in the beneficiary, with the resulting capital gain taxed in the trust at the time of distribution or vesting. Vesting and distribution occur simultaneously, and distributing a capital asset to a discretionary beneficiary will not result in a VSA if the DTC's recommendations are implemented.

7.2.9.4 Sale of an asset and vesting or distributing the capital gain

The trustees sell a trust's capital assets (80 shares) at market value (R1 200 000) and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 1, Part I: 9.2.3). Most of the respondents (a mean score of 4.47 in section 5.5.5.9 in Chapter 5) and four of the participants who answered this question (see section 6.5.9.4 in Chapter 6) disagreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal if the DTC's recommendations were to be implemented. The cross-tabulation results show that most of the respondents (89.7%) and all four of the participants (100%), who answered this question, disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Respondents and the participants who have not examined the DTC's recommendations in detail, did not answer this question. From the wording of the DTC's recommendations for discretionary trusts, the sale of the trust's assets will automatically trigger a capital gain in terms of a paragraph 11(1)(*a*) disposal, which will the taxable in the trust. The taxable capital gain will have a higher inclusion rate for trusts (80%) than for a beneficiary (40%) who is a natural person (participant two). The sale of the capital asset will result in a capital gain and in cash or currency held by the trust. The subsequent vesting or distribution of the capital gain would also be a disposal in terms of paragraph 11(1)(*d*) of the Eighth Schedule. Currency, however, is excluded from the definition of an asset as confirmed by participant two: "*Currency is not an asset as defined for the purposes of the Eighth Schedule to the Act. The vesting or distribution of currency or money to a beneficiary by a trust will not attract capital gains tax."* The sale of a capital asset and the subsequent vesting or distribution of the capital gain in or to a discretionary beneficiary will not result in a VSA if the DTC's recommendations are implemented.

7.2.9.5 Adding a beneficiary

Adding a new beneficiary to the trust (Section 1, Part I: 9.2.4). Most of the respondents (a mean score of 4.86 in section 5.5.9.9 in Chapter 5) and four of the participants who answered this question (see section 6.7.9.5 in Chapter 6) disagreed that if the DTC's recommendations were to be implemented, the above trustees' action would result in a paragraph 11(1)(*g*) disposal. The cross-tabulation results show that most of the respondents (100%) and all participants (100%) who answered this question, disagreed with the statement. The Fisher's exact P-value could not be calculated as there are no variances for this sub-question since the respondents' and participants' answers were the same.

Respondents and the participants who have not examined the DTC's recommendations in detail, did not answer this question. The DTC's recommendations for discretionary trusts require that any capital gain would first be taxed in the trust. The capital assets remain in the trust, and no real or vested rights are changed when a discretionary beneficiary is appointed to a trust. The adding of a new discretionary beneficiary who only acquires a *spes* which has no value or market value does not result in any changes in the market value for any of the beneficiaries; thus, no VSA, in terms of paragraph 1 of the Eighth Schedule, takes place. The adding of a new discretionary beneficiary to a trust will not result in a VSA if the DTC's recommendations are implemented.

7.2.9.6 Removing a beneficiary

Removing beneficiary, A from the trust (Section 1, Part I: 9.2.5). Most of the respondents (a mean score of 4.80 in section 5.5.9.9 in Chapter 5) and four of the participants who answered this question (see section 6.5.9.6 in Chapter 6) disagreed that if the DTC's recommendations were to be implemented, the above trustees' action would result in a paragraph 11(1)(*g*) disposal. The cross-tabulation results show that all six of the respondents (100%) and all the participants (100%) agreed with the statement. The Fisher's exact P-value could not be calculated as there are no variances for this sub-question since the respondents' and the experts' answers were the same.

Respondents and the participants who have not examined the DTC's recommendations in detail, did not answer this question. The DTC's recommendations for discretionary trusts require that any capital gain would first be taxed in the trust. The capital assets remain in the trust, and no real or vested rights are changed when a discretionary beneficiary is removed from a discretionary trust. The discretionary beneficiary is only forfeiting a *spes* which has no value or market value and does not result in any changes in the market value for any of the beneficiaries. Beneficiary A no longer retains an interest in the trust, which is required in terms of the definition of a VSA in paragraph 1 of the Eighth Schedule to take place. The removal of a discretionary beneficiary from a trust will not result in a VSA if the DTC's recommendations are implemented.

7.2.9.7 Appointing a trustee

Appointing a new trustee to the trust (Section 1, Part I: 9.2.6). Most of the respondents (a mean score of 4.80 in section 5.5.9.9 in Chapter 5) and four of the participants, who answered this question (see section 6.5.9.7 in Chapter 6), disagreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal if the DTC's recommendations were to be implemented. The cross-tabulation results show that all the respondents (100%) and all the participants (100%), who answered this question, disagreed with this statement. The Fisher's exact P-value could not be calculated as there are no variances for this sub-question since both the respondents' and the participants' answers were the same.

Respondents and the participants who have not examined the DTC's recommendations in detail, did not answer this question. The capital assets remain in the trust and will only be taxed in the trust when a disposal takes place in terms of paragraph 11(1)(*g*) of the Eighth Schedule. For the discretionary trust structure, participant six stated that *"the appointment of a trustees will not have a value shifting implication. The trustees have no rights or value attached to the shares held in the trust."* The appointment of a trustee to a trust has no bearing on the market value of any of the connected parties in the trust structure examined, and no VSA, in terms of paragraph 1 of the Eighth Schedule, will occur. The appointment of a new trustee will not result in a VSA if the DTC's recommendations are implemented.

7.2.9.8 Removing a trustee

Removing a trustee from the trust (Section I, Part 1: 9.2.7). Most of the respondents (a mean score of 4.80 in section 5.5.9.9 in Chapter 5) and four of the participants who answered this question (see section 6.5.9.8 in Chapter 6) disagreed that if the DTC's recommendations were to be implemented, the above trustees' action would result in a paragraph 11(1)(*g*) disposal. The cross-tabulation results show that all the respondents (100%) and all four of the participants (100%), who answered this question, disagreed with the statement. The Fisher's exact P-value could not be calculated as there are no variances for this sub-question since the respondents' and the participants' answers were the same.

The capital assets remain in the trust and will only be taxed when a disposal takes place in terms of paragraph 11(1)(*g*) of the Eighth Schedule. Participant six observed that for the discretionary trust structure *"the removal of a trustee from a trust will not [sic] have a value shifting implication. The trustees have no rights or value attached to the shares held in the trust."* Trustees have no rights to the trust's income or capital and are not exposed to any tax implications in their capacity as trustees of the trust. The removal of a trustee from a trust has no bearing on the market value of any of the connected parties in the trust structure examined, thus, no VSA, in terms of paragraph 1 of the Eighth Schedule, will occur. Respondents and the participants who have not examined the DTC's recommendations in detail, did not answer this question. The removal of a trustee from a trust will not result in a VSA if the DTC's recommendations are implemented.

7.2.9.9 Summary of the results for a discretionary trust (Section1, Part I)

The following is a summary of the results for discretionary trusts for Part I of the online questionnaire and interview guide:

- If the recommendations of the DTC for discretionary trusts were implemented, all the taxable income and capital gains of the trust will be taxed in the trust, up and until the time that such assets have been irrevocably vested in the beneficiary (P-value not applicable).

- If the DTC's recommendations were implemented for discretionary trusts, the vesting or distribution of a capital asset from such trusts will be taxed in the trust, and no VSA will occur (P-value > 0.05).
- If the DTC's recommendations were implemented for discretionary trusts, the sale of a capital asset and the subsequent vesting or distribution of a capital gain or cash in or to the beneficiary, will not result in a VSA (P-value > 0.05).
- If the DTC's recommendations were implemented for discretionary trusts, the adding or removal of a beneficiary to or from a discretionary trust will not result in a VSA (P-value not applicable).
- If the DTC's recommendations were implemented for discretionary trusts, the appointment or removal of a trustee to or from a trust will not result in a VSA (P-value not applicable).
- The conclusions are also supported by the doctrinal analysis in section 3.7.3 of Chapter 3.

7.2.10 Part J: Additional comments

Respondents and participants were requested to add any additional relevant comments which may be applicable to VSAs in trusts (Research question 10). The additional comments are numbered 7.2.10.1 to 7.2.10.5 for part J (see section 6.5.10.1 in Chapter 6 and 5.5.10. in Chapter 5) and are summarised in Table 7.11 below.

Table 7.11: Summary of additional comments and results for Part J

Comments	Subject	Summary of findings
7.2.10.1	DTC Recommendations	The participants' comments are generally opposed to the implementation of the DTC recommendations on Discretionary Trusts, at it will cause fundamental changes to the taxation of trusts
7.2.10.2	Tax Compliance	The misuse and abuse of trusts may be addressed by improved compliance measures and knowledge on the taxation of trusts.
7.2.10.3	Trust Amendments	The trustees' actions should be permissible within the trust deeds, the beneficiary's consent may be required in some instances and even a variation of the trust deed may be required.
7.2.10.4	General anti-avoidance rules	The GAAR may be applied to the trustees' actions and should also be considered.
7.2.10.5	Trust Clauses	The trust deeds are contracts which contain a multitude of clauses, which deal with the trustees' actions in different ways.

7.2.10.1 The DTC's recommendations

The respondents and the participants' comments regarding the implementation of the DTC's recommendations are summarised below:

- The DTC's policy on discretionary trusts, if implemented, will result in a policy change of taxing the trust rather than the beneficiary when a beneficiary derives a benefit from the trust.
- Many practitioners have objected to the implementation, as it would create practical difficulties.
- Increasing the tax collection without controlling irregular spending by the state would not solve the country's financial affairs.
- Already the distribution or vesting of both income and capital gains is taxed in the beneficiary's hands.
- Also, once a capital gain has been attributed to a beneficiary, it will form part of the beneficiary's estate.

From the above comments it is evident that the proposed recommendations of the DTC are aimed at increasing the revenue that is collected from discretionary trusts, by taxing capital gains at the highest maximum income tax rate (currently 45%) with the highest inclusion rate (currently 80%). The implementation of the DTC's recommendations would be considered a fundamental change in the current income tax structure which has developed over the years, whereby the conduit principle and attributions rules of the normal gross income or capital gains would be abolished. Participant six stated that by removing the conduit principle, the following would be created: *"It would not be fair to do fundamental changes to the taxation of trusts, which would for example infringe on the rights of persons who have reached the age of 80 and have been planning of [sic] their estates for their entire working life. Any radical change should therefore have a transitional period to allow taxpayers to rearrange their trusts without any unfair treatment, without any punitive damages."*

One of the most compelling arguments against the possibility of taxing taxpayers at higher income tax rates to increase the collections, would be for the government to

curb irregular spending. Without proper management of financial resources, a simple increase of taxes will not resolve any of the country's financial woes. If the tax compliance is not improved and a fair and equitable solution is not found, it would not solve the current threats of junk status for the South African economy. Increasing the tax rates of tax compliant persons who have unique skills and are entrepreneurs, may further increase the exodus of these skills which are required to stimulate the economy and to create jobs. This study excludes any investigation into any remedy on how the South African government can fairly address the urgent financial needs of the country in a fair and equitable manner, which can create financial stability and address the needs of the unemployed and vulnerable persons of the country.

The researcher submits that the improved tax compliance of trusts, coupled with controlled government spending, without fundamental changes to the existing tax law of trusts may be preferred above the DTC's recommendations, which would represent a fundamental change in tax law for trusts.

7.2.10.2 Tax compliance

Participant six stated that, *"instead of the changes of the fundamental tax structure recommended by the DTC, it would [sic] be logical and fair to pursue the current focus on non-compliance of taxpayers when using trusts."* In the Tax Faculty's Webinar on Completing ITR12T returns for trusts (March 2023), presented by Van der Spy, it was reported that for the 2015 tax year only, 12% to 14% of the trusts were tax compliant, and that an estimated R58 billion in distributions by trusts was not reported by beneficiaries, which is a major concern. Chebusit *et al*. (2014:60), in a study of small and medium enterprises in Kenya, found that tax compliance costs, fines, penalties and attitudes of taxpayers have a significant relationship with tax compliance; they also recommended that tax returns should be made easy to complete, and they promoted educational programmes for taxpayers to understand their rights and obligations.

Participant six believed a **"***lack of knowledge is one of the factors for non-compliance of trusts."* Bandara and Weerasoorija (2019:140) found that an increase

in tax information resulted in an increase in tax compliance, and the opposite holds that an increase in complexity of tax law results in a decrease in tax knowledge, which may be a contributing factor to the poor tax compliance percentages for trusts, as reported by Van der Spy (2023). An increase in tax rates, results in a decrease in tax compliance, according to Bandara and Weerasoorija (2019:140), which may be one of the reasons why the DTC's recommendations for discretionary trusts have not been implemented yet. Gcabo and Robinson (2007:361) suggested that both economic and psychological factors should also be considered when examining non-compliance through tax evasion in South Africa. They mentioned factors such as the growing disrespect for the tax system, increasing complex tax legislation, the uneconomical re- or misallocation of resources, an unfair shifting of the tax burden, and a weakening of the ability of Parliament and the National Treasury to set and implement economic policy. Borrego *et.al*. (2016:29), in a study conducted in Portugal, also confirmed that a complex tax system may result in both involuntary non-compliance and aggressive tax behaviour.

According to Van der Spy (2023), there have been several enhancements to the income tax returns for trusts. One enhancement is for example the requirement of disclosing all the details of the beneficiaries and both income and capital gains distributed to beneficiaries. SARS also intends to keep record of all newly registered beneficial owners of trusts. Amendments to the Trust Property Control Act, 1988 (Act No. 57 of 1988) by the General Laws (Anti Money-Laundering and Combating Terrorism Financing) Amendment Act, 2022 (Act No. 22 of 2022) ("the Amendment Act") have come into effect on 1 April 2023, announcing the trustees' responsibilities of keeping a register of beneficial owners and lodging such a register with the Department of Justice, increased measures for trusts to combat money-laundering and terrorism financing crime (Department of Justice & Constitutional Development Media Statement, May 2023). In terms of section 180 of the TAA persons who are responsible for the management of the taxpayer's tax affairs, may be personally liable for any outstanding debt of the taxpayer if they are negligent or acted fraudulently regarding the payment of tax of the taxpayer, which exposes trustees to a potential personal liability to the tax debt of trusts (Stiglingh *et al.*, 2026:1283). Arendse *et al.* (2024:9.14) also stated that the representative taxpayer becomes liable in terms of section 155 of the TAA if the tax could have been paid to

SARS but was not; or if the amount in respect of which the tax was chargeable, was disposed of, which also exposes the tax representatives to a potential tax liability. Without any guidance or examples published on a VSA, it may result in non-compliance regarding the disclosure of a VSA related to trusts.

7.2.10.3 Trust amendments

The beneficiaries of a trust are identified in the trust deed (Olivier *et al*., 2023:9.212). The adding of a new beneficiary to a trust will require an amendment to the trust deed. According to participant three, "*the trustees may not be able to unilaterally, add any additional discretionary beneficiaries to a trust. It is not possible to add an additional beneficiary other than by way of an agreement between the founder, the trustees and all the beneficiaries who have accepted the benefits stipulated for them in the relevant trust deed." (*See Hofer and others v. Kevitt N.O. and others 1998(1) (SA) (382) (SCA)). According to Pace and Van Der Westhuizen, (2023:B18), one should always examine the variation clause contained in the trust deed before amending the trust deed. The trustees would be able to amend the trust deed to accommodate the adding of a new beneficiary as follows:

- Prior to the beneficiaries having accepted benefits from the trust, the beneficiaries' consent would not be required to amend the trust deed.
- After the beneficiaries have accepted benefits from the trust, the beneficiaries' consent is required to amend the trust deed.
- There appears to be uncertainty when the trust deeds contain an express condition which allows the trustees to unilaterally amend the trust deed, and if the beneficiaries have previously accepted benefits from the trust. Lotter *et al*. (2018:232) suggested that the beneficiaries would not be able to veto the trustees' amendment if contemplated within the provisos of the trust deed.

When discussing a potential donation of a discretionary interest taking place, participant two also commented that besides the necessary beneficiary consent to the donation, one had to *"assume that the trust deed makes provision for such a transaction*." For some of the trustees' actions both the trustees' consent would be

required, and the conditions contained in the deed would have to be considered. In both research instruments it was stated that for both the online questionnaire and the participant interview guides, respondents and participants could assume the following regarding the trust deed and beneficiaries' consent:

- Trust deed variation*: "Assume that all the specific trustees' actions which are investigated are permissible within the parameters of the trust deeds and when necessary, with the trust deed amendments"* (General information).
- Beneficiaries' consent: "W*hen necessary, you may assume that all the beneficiaries have consented in writing to the trustees' actions and all legal formalities are met, unless stated to the contrary*" (Section 1, after the definition of a discretionary trust).

Although the requirements of the variation of the trust deed are discussed in this study, a full analysis of the requirements of the variation of the trust deed and the legal rights of the beneficiaries are outside the scope of this study.

7.2.10.4 General anti-tax avoidance

Participant two stated the following regarding the possibility of a VSA for a discretionary trust: "*Where a discretionary trust is concerned, I see only the application of GAAR having any significance as explained above, by virtue of the fact that a spes has no value."* Both the definition of a VSA (paragraph 1 of the Eighth Schedule) and an impermissible arrangement (section 80A of the Act) contains the word 'arrangement'. The Eighth Schedule does not define an "arrangement," but section 80L of the Act states which deals with impermissible transactions defines an arrangement as any transaction, scheme, agreement, or understanding (enforceable or not) that may include steps or parts of such actions, including those involving property alienation.

According to the Eighth Schedule, a VSA is defined as involving one connected person experiencing a decrease in market value within a trust, while another connected person experiences an increase in market value in the same trust. This

reduction in market value may lead to the alienation of property. The analysis indicates that trustees' actions whether they involve a single transaction, such as distributing an asset to a beneficiary, or a series of transactions which may require an amendment of the trust deeds and could also be subject to GAAR.

Section 80A defines impermissible tax avoidance arrangements as those primarily designed to secure a tax benefit and not entered into for genuine reasons, especially if they create unusual terms among unrelated parties or abuse the Act's provisions. Section 80L applies to any tax, levy, or duty imposed under this or related Acts, making CGT a tax benefit for anti-tax avoidance purposes. From Meyerowitz v. CIR 1963 (3) SA 863(A) (25 SATC 287), which dealt with tax avoidance schemes, it was held that an author who had ceded his rights to royalties to a company for no consideration, and the company then ceded the same rights to a family trust for no consideration, would be abnormal on the following grounds:

- A transaction, operation or scheme could be a single transaction or a series of transactions.
- The cession of income for no consideration created rights which were not normal for persons transacting at arm's length.
- The sole or main purpose of the arrangement was that of tax avoidance. The royalties are eventually taxed in the hands of the beneficiaries of the family trust at a lower tax rate than they would have been taxed in the author's hands.

Although the Meyerowitz case did not deal with CGT, it is evident that the cession of income resulting in a lower effective income tax rate and a tax benefit could lead to the application of the current GAAR. If a VSA creates rights which are abnormal between connected parties of the trust, and results in a tax benefit, GAAR may also apply to a VSA.

7.2.10.5 Trust deed clauses

Participant five believed that, in the event of the removal of a beneficiary from a trust, *"the trust deed may contain a clause which allows the trustees to make a*

distribution to a beneficiary and then determine that the beneficiary is no longer a beneficiary. The distribution will be exempt from donations tax, but it will be subject to capital gains tax." The possibility of inserting a multitude of clauses in the trust deed, which could have a bearing on a VSA, is outside the scope of this study. Pace and Van der Westhuizen (2023:B5.2) described an *inter vivos* trust as a *stipulation alteri* which is a contract for the benefit of a third person. Davis *et al.* (2024:5.6) also stated that due to the flexibility of drafting a trust deed, *a wide* range of powers regarding the beneficiaries' rights can be created. In two trust structures described in this study an extremely basic trust structure was provided, in which the trustees' powers were limited, with three beneficiaries A, B and C, and no class of beneficiaries which included blood relatives, adoptive children and spouses of existing beneficiaries, were examined. The basic trust structures were provided in both the online respondents' questionnaire and the participants interview guides. One of the limitations of this study is that it would not be possible to cover all types of possible imaginable clauses that could have a bearing on the trustees' actions.

7.2.10.6 Summary of results for a discretionary trust (Section 1, Part J)

The DTC's recommendations - comments

Both respondents and participants indicated that the DTC's recommendations could result in structural changes to the tax system. They suggested that significant tax law reforms should include a transition period, allowing taxpayers time to adjust trusts and minimise unintended effects. Additionally, both groups observed that addressing irregular government spending, rather than increasing taxes, might impact economic activity and skilled migration.

Tax compliance

Both respondents and participants provided commentary on tax compliance as it pertains to trusts. A lack of sufficient knowledge has been identified as a contributing factor to trust tax non-compliance. Enhancing the clarity of guidance regarding trusts and their tax obligations may improve overall tax compliance rates. It is further recommended that university tax curricula incorporate specialised content on trust

taxation. Trustees should note that, under the TAA section 180, they may be held personally liable for trust tax debts arising from negligence or fraud, which heightens their responsibility in fulfilling payment obligations to SARS.

Trust amendments

The following observations were provided by both respondents and participants in relation to trust amendments. If beneficiaries have previously accepted benefits from the trust, their consent would be necessary. Further investigation may be warranted into trustees' *ultra vires* actions and the associated CGT implications of such conduct.

General anti-tax avoidance

The respondents and participants commented on general anti-tax avoidance, noting that the application of GAAR to a VSA is possible for certain trustee actions (Meyerowitz v. CIR 1963 (3) SA 863(A) (25 SATC 287)).

Trust deed clauses

This study is limited to the trust's structure as defined by the research instruments and does not consider alternative trust deed clauses.

7.3 COMPARATIVE OVERVIEW OF SA AND FOREIGN DISCRETIONARY TRUSTS

Are there examples of VSAs in the foreign revenue guides for trusts in Australia and the UK that can apply to South African trusts (Research question 11)? The analysis follows the structure of Parts A, B, C, D, E, F, and H which are used as labels for the research questions, the online questionnaire, and the interview guides. These sections correspond to the research questions (see Chapter 1, section 1.5.2) as well as to the Australian Interview Guide (Appendix C: section 2) and the UK Interview Guide (Appendix D: section 2). In Parts A and C, only donation sub-questions relevant to tax legislation in both countries were included.

Foreign interview results for trusts in Australia and the UK are compared with trust results for SA trusts cross-tabulation of quantitative and qualitative findings. For SA trusts, acceptance or rejection of the null hypothesis is consistent between the respondents and the participants. Each table summarises the sub-question, notes foreign participant consensus, and reports combined SA questionnaire and participant interview guides, data with Fisher's exact value (see section 4.1.5.4, Chapter 4).

Table 7.12: Part A comparison of foreign and SA discretionary trust results

Statement	Australian Discretionary Trust	UK Discretionary Trust	SA Discretionary Trust	
			Respondents and Participants	Null Hypothesis
1.1 The disposal of a capital asset of a discretionary trust could result in either a capital gain or a capital loss.	AGREE	AGREE	AGREE	ACCEPT
1.2 The revenue or capital nature of a discretionary trust's assets or proceeds of such trust's assets can be ascertained by the tests developed in case law.	AGREE	AGREE	AGREE	ACCEPT
1.3 A capital asset of a discretionary trust for capital gains purposes, would be the same as an revenue asset for income tax purposes.	DISAGREE	DISAGREE	DISAGREE	ACCEPT

The foreign participants for foreign discretionary trusts, as well as the SA respondents and participants for SA discretionary trusts, agreed that for both foreign and SA discretionary trusts, selling a capital asset may result in a capital gain or loss, with case law determining the revenue nature of trust proceeds from such assets. However, both groups disagreed that a capital asset would be treated the same as a revenue asset for CGT purposes. Acceptance of the null hypothesis for all sub-questions in part A indicates that SA respondents and participants had consistent responses concerning SA discretionary trusts.

Table 7.13: Part B comparison of foreign and SA discretionary trust results

Statement	Australian Discretionary Trust	UK Discretionary Trust	SA Discretionary Trust	
			Respondents and Participants	Null Hypothesis
2.1 The trustees vest capital assets (80 shares) in beneficiary A.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
2.2 The trustees distribute capital assets (80 shares) to beneficiary A.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
2.3 The trustees sell trust's capital assets (80 shares) at market value of (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
2.4 Adding a new beneficiary to the trust.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
2.5 Removing beneficiary A from the trust.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
2.6 Appointing a new trustee to the trust.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
2.7 Removing a trustee from the trust.	DISAGREE	DISAGREE	DISAGREE	ACCEPT

The foreign participants disagreed for foreign discretionary trusts and the SA respondents and participants for SA discretionary trusts that vesting or distributing capital assets, selling a capital asset and distributing the resulting capital gain to beneficiary A, and the adding or removal of beneficiaries or the appointment or removal of trustees would result in an income tax (exclusive of capital gains) implication. Acceptance of the null hypothesis for all sub-questions in part B indicates that SA respondents and participants had consistent responses concerning SA discretionary trusts.

Table 7.14: Part C comparison of foreign and SA discretionary trust results

Statement	Australian Discretionary Trust	UK Discretionary Trust	SA Discretionary Trust	
			Respondents and Participants	Null Hypothesis
3.1.1 If beneficiaries donate of a discretionary interest, from one beneficiary to another, donations tax could be applicable.	N/A	N/A	DISAGREE	ACCEPT
3.2 If a beneficiary donates a discretionary interest from one beneficiary to another beneficiary at full market value, an ordinary disposal captal gains disposal would occur.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
3.3 If a beneficiary donates a discretionary interest from one beneficiary to another at an indaquate value, a VSA would occur.	DISAGREE	DISAGREE	DISAGREE	ACCEPT

The foreign participants disagreed for foreign discretionary trusts and the SA respondents and participants for SA discretionary trusts that if one beneficiary donates a discretionary interest to another beneficiary a capital gain or VSA would occur. Acceptance of the null hypothesis for all sub-questions in part C indicates that SA respondents and participants had consistent responses concerning SA discretionary trusts.

Table 7.15: Part D comparison of foreign and SA discretionary trust results

Statement£	Australian Discretionary Trust	UK Discretionary Trust	SA Discretionary Trust	
			Respondents and Participants	Null Hypothesis
4.1 The trustees vest capital assets (80 shares) in beneficiary A.	AGREE	AGREE	AGREE	ACCEPT
4.2 The trustees distribute capital assets (80 shares) to beneficiary A.	AGREE	AGREE	AGREE	ACCEPT
4.3 The trustees sell trust's capital assets (80 shares) at market value ($/£/R1 200 000), and immediately vest or distribute the capital gain ($/£/R800 000) to beneficiary A.	AGREE	AGREE	AGREE	ACCEPT
4.4 Adding a new beneficiary to the trust.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
4.5 Removing beneficiary A from the trust.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
4.6 Appointing a new trustee to the trust.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
4.7 Removing a trustee from the trust.	DISAGREE	DISAGREE	DISAGREE	ACCEPT

The foreign participants for foreign discretionary trusts, as well as the SA respondents and participants for SA discretionary trusts, agreed that for both foreign and SA discretionary trusts, that vesting or distributing a discretionary trust asset to a beneficiary, or selling a capital asset may result in a capital gain or loss would result in an ordinary disposal. The foreign participants for foreign discretionary trusts, as well as the SA respondents and participants for SA discretionary trusts, disagreed that for both foreign and SA discretionary trusts adding or removing a beneficiary or appointing or removing a trustee to or from a trust would result in an ordinary disposal. The acceptance of the null hypothesis for the cross-tabulation results indicates consistent findings between the SA respondents and participants for SA discretionary trusts.

Table 7.16: Part E comparison of foreign and SA discretionary trust results

Statement	Australian Discretionary Trust	UK Discretionary Trust	SA Discretionary Trust	
			Respondents and Participants	Null Hypothesis
5.1 A disposal of discretionary interest in a trust's capital asset by a beneficiary, could result in a capital gain or a capital loss for the beneficiary.	NO	NO	AGREE	ACCEPT

The foreign participants for foreign discretionary trusts disagreed that for both foreign that a disposal of a capital asset in a trust could result in a capital gain or loss for the beneficiary. The SA respondents and participants for SA discretionary trusts, agreed that a disposal of a discretionary interest in a trust could result in a capital gain or loss for the beneficiary. In the SA context a discretionary interest in a trust is deemed to have a zero value (paragraph of the Eighth Schedule) and if the beneficiary receives any consideration for the disposal of an interest in a discretionary trust, a capital gain will result. Acceptance of the null hypothesis for all sub-question in part E indicates that SA respondents and participants had consistent responses concerning SA discretionary trusts.

Table 7.17: Part F comparison of foreign and SA discretionary trust results

Statement	Australian Discretionary Trust	UK Discretionary Trust	SA Discretionary Trust	
			Respondents and Participants	Null Hypothesis
6.1 The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	DISAREE	DISAREE	INCONCLUSIVE	REJECT
6.2 A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	DISAREE	DISAREE	DISAGREE	ACCEPT
6.3 The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets before any of the seven trustees' actions mentioned previously can be measured.	DISAREE	DISAREE	INCONCLUSIVE	REJECT

The foreign participants for foreign discretionary trusts disagreed that market value and base cost before and after the seven trustees' actions could be measured, and that a reduction in market value of the discretionary interest could be measured for foreign discretionary trust. The SA respondents and participants regarding SA discretionary trusts did not concur that a decline in the market value of discretionary interests is measurable for the SA discretionary trusts. There was no significant difference between SA respondents and participants about a reduced value in a beneficiary's interest in SA discretionary trusts, as indicated by the acceptance of the null hypothesis in the cross-tabulation analysis. The SA respondents and participants had different opinions regarding the measurement of the market value and base cost of the beneficiary's interest in SA discretionary trusts before and after the seven trustees' actions. Cross-tabulation analysis shows that SA respondents and participants differ in their assessments of beneficiaries' interests in discretionary trusts before and after the seven trustees' actions. The doctrinal analysis in section 3.6.3.1 and 3.6.3.3) of Chapter 3, indicates that market value and base cost of a beneficiaries' discretionary interest cannot measured before and after a VSA. Paragraph 80(1) of the Eighth Schedule specifies a zero value for discretionary rights, and their market value is challenging to determine.

Table 7.18: Part G comparison of foreign and SA discretionary trust results

Statement	Australian Discretionary Trust	UK Discretionary Trust	SA Discretionary Trust	
			Respondents and Participants	Null Hypothesis
7.1 The trustees vest capital assets (80 shares) in beneficiary A.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
7.2 The trustees distribute capital assets (80 shares) to beneficiary A.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
7.3 The trustees sell trust's capital assets (80 shares) at market value ($/£/R1 200 000), and immediately vest or distribute the capital gain ($/£/R800 000) to beneficiary A.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
7.4 Adding a new beneficiary to the trust.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
7.5 Removing beneficiary A from the trust.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
7.6 Appointing a new trustee to the trust.	DISAGREE	DISAGREE	DISAGREE	ACCEPT
7.7 Removing a trustee from the trust.	DISAGREE	DISAGREE	DISAGREE	ACCEPT

The foreign participants for foreign discretionary trusts, as well as the SA respondents and participants for SA discretionary trusts, disagreed that for both foreign and SA discretionary trusts, vesting or distributing a discretionary trust asset to a beneficiary, selling a capital asset of the trust an either vesting or distributing the capital gain in or to a beneficiary, the appointing or removing either a beneficiary or trustee to or from a foreign or discretionary trust would result in a VSA. Acceptance of the null hypothesis for all sub-questions in part G indicates that SA respondents and participants had consistent responses concerning SA discretionary trusts.

Part H: Comparison of foreign and SA discretionary trust results

The foreign participants for foreign discretionary trusts, as well as the SA respondents and participants for SA discretionary trusts did not provide any additional examples of trustee's actions which could result in a VSA.

7.4 DISCUSSION AND SUMMARY

The discussion examines SA discretionary trusts in the SA context under sections (Part A through to Part J, with Part K) including comparisons to foreign trusts. It outlines whether the research questions and findings from the online questionnaire and participant interviews address the research objectives for each section (Parts A to K) related to discretionary trusts.

7.4.1 Research objectives

The primary and secondary research objectives (see section 1.5 in Chapter 1) are presented below for ease of reference. The primary research objective for this study was to determine, from the perceptions of the respondents and participants, how CGT could be triggered by a VSA when trustees vest or distribute a trust asset to one of the beneficiaries of a trust used in a South African estate-planning exercise. The secondary research objectives (see section 1.5 in Chapter 1) formulated for this study are the following:

- To determine whether the trustees' action of the sale of a capital asset and the vesting or distribution of the capital gain in or to a beneficiary of a trust would result in a VSA from the perspective of the respondents and participants who participated in this study (1).
- To determine whether the trustees' action of adding additional beneficiaries to the trust would result in a VSA from the perspective of the respondents and participants who participated in this study (2).
- To determine whether the trustees' action of removing beneficiaries from a trust would result in a VSA from the perspective of the respondents and participants who participated in this study (3).
- To determine whether the trustees' action of appointing new trustees to the trust would result in a VSA from the perspective of the respondents and participants who participated in this study (4).
- To determine whether the trustees' action of removing trustees from the trust would result in a VSA from the perspective of the respondents and participants who participated in this study (5).
- To determine whether the trustees' action of donating a beneficiary's interest in a trust (with the consent of the beneficiaries) would result in a VSA from the perspective of the respondents and participants who participated in this study (6).
- To determine if other trustees' actions, not covered in the primary or secondary research objectives 1 to 6, would result in a VSA from the perspective respondents and participants who participated in this study (7).
  To determine whether the recommendations of the DTC's Report on the Feasibility of Wealth Tax in South Africa (DTC, 2018:81) would have any impact on a VSA from the perspective of the respondents and participants who participated in this study (8).

7.4.2 Conclusion

Below are the conclusions for research questions A to J within the SA context. For question K, conclusions compare foreign, and SA discretionary trusts based on questions A to H (excluding question I, as it applies only to South Africa). Each

research question concludes whether its related primary or secondary research objectives are met.

7.4.2.1 Nature of a trust's assets (Part A)

How is the nature of trusts' assets determined? Is there any similarity in the definition of assets or property for income tax, donations tax, CGT, and estate duty purposes? Both the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 7.4.1) are examined in part A. The nature of the trust's assets can be sufficiently determined for income tax, donations tax, CGT, and estate duty purposes, which may indicate that such assets are susceptible to a VSA. The high P-values of 1 (P-value > 0.05) and no P-values calculated (P-value not applicable) for all the sub-questions in part A show a strong agreement between both the online questionnaire and the interview guide results for discretionary trusts in part A of two research instruments.

The capital nature of a discretionary trust's asset can be determined using both case law and current legislation. The trustees' or beneficiaries' disposal of a capital asset in a trust or a discretionary interest in a trust could result in a capital gain or a loss. Comparing asset and property definitions for CGT, donations tax, and estate duty purposes shows that a discretionary beneficiary's right to trust assets may qualify as an asset for CGT purposes. A trust interest should also be considered a capital asset as described in section 1.1.2 of Chapter 1 for CGT events. The primary research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part A. The capital nature of both an asset and a discretionary interest in a trust can be determined by case law for CGT purposes and therefore may have VSA consequences.

7.4.2.2 Income tax (excluding capital gains) implications (Part B)

Do any of the trustees' actions result in any income tax implications? Both the main and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 7.4.1) are examined in part B, to determine if any of the trustees' actions result in gross income and income tax (excluding capital gains) implication or if a possible VSA will occur.

From both the analysis of the respondents' and the participants' results it is evident (P-values > 0.05, or not applicable) that no normal income tax implications will occur because of the trustees' actions.

None of the seven trustees' actions examined would result in a revenue receipt or accrual as the trust's assets are of a capital nature (definition of gross income in the Act). Only if the trustees were to change the nature of the trust's assets by converting a capital asset into trading stock, for example, will any subsequent trustees' action related to the trading stock have gross income implications (Natal Estates Ltd v. CIR (1975 A) (37 SATC 193)) (see section 2.2 in Chapter 2). The primary research and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part B. The trustees' actions can be excluded from a VSA on the basis that the trustees' actions related to a capital asset will not result in gross income.

7.4.2.3 Donations tax implications (Part C)

Do any of the trustees' actions or consent of the beneficiaries result in any donations tax implications? Both the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 7.4.1) are examined in part C. A reduction in the beneficiaries' interest in a trust, which is like a donation, is necessary for a VSA to occur. From both the analysis of the respondents' and the participants' results it is evident (P-values > 0.05, or not applicable) that no donations tax implications are applicable to discretionary interests held in trust.

The trustees and the beneficiaries would not be able to donate a *spes* which is merely a hope in a discretionary trust's assets. The beneficiaries' consent would be required for a valid donation to be affected by the beneficiary. The exclusion of donations which are deemed to take place at full market value (paragraph 38 of the Eighth Schedule) from the definition of a VSA, allows for the measurement of the proceeds of a VSA in terms of paragraph of 35(2) of the Eighth Schedule, which is the difference in the market value before and after the VSA takes place. Trustees vesting or distributing a capital asset or a capital gain from a trust in or to a beneficiary, will not result in donations tax implications due to the section 56(1)(l)

exemption. All the trustees' actions examined will not result in a donation or a reduction in the value of any of the beneficiaries of a discretionary trust, as required in the definition of a VSA (paragraph 1 of the Eighth Schedule), which reduces the possibility of a VSA. The primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part C of the research instruments.

7.4.2.4 Ordinary disposal implications (Part D)

Do any of the of the trustees' actions fall under paragraph 11(1)(*a*) to (*f*) of the Eighth Schedule? Both the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 7.4.1) are examined in part D. If an ordinary disposal takes place in terms of paragraph 11(1)(*a*) to (*f*) of the Eighth Schedule, then the possibility of a VSA, as required in the research objectives, falls away. From both the analysis of the respondents' findings and the participants' findings it is evident (P-values > 0.05, or not applicable) that the vesting or distribution or the sale of capital assets and the distribution of a capital gain will result in an ordinary disposal. The adding or removal of beneficiaries to and from a trust will not result in an ordinary disposal.

The vesting or distribution of capital assets from a discretionary trust to a beneficiary will result in a paragraph 11(1)(*d*) disposal. The sale of a capital asset and vesting or distribution of the capital gain from a discretionary trust to a beneficiary will result in a paragraph 11(1)(*a*) disposal. The adding or removal of a beneficiary to or from a discretionary trust will not result in an ordinary disposal (the beneficiaries' interest in the trust is a *spes* with no value) unless the main objective of the trust is changed. The appointment or removal of trustees to or from a discretionary trust will not result in an ordinary disposal, as the trustees have no rights to the trust's assets. The primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part D of the questionnaire, as some of the trustees' actions have been identified as an ordinary disposal, which reduces the possibility of a VSA occurring for a discretionary trust.

7.4.2.5 Beneficiaries' interest in a trust (Part E)

Are the beneficiaries' interests in a trust, as defined in the definition of a VSA, considered to be a capital asset of the beneficiary for CGT purposes for a discretionary trust? Both the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 7.4.1) are examined in part E. A beneficiary's interest in a trust could be considered a capital asset of a beneficiary and have VSA implications. From both the analysis of the respondents' findings and the participants' findings it is evident (P-values > 0.05) that a discretionary interest in a trust could be considered as a capital asset of a beneficiary and therefore be subject to a VSA.

A discretionary interest could be included in the definition of an asset for CGT purposes (paragraph 1 of the Eighth Schedule). A discretionary interest in a trust has a deemed base cost of zero (paragraph 81 of the Eighth Schedule). A fiduciary right in an interest in a trust could be considered as an asset for CGT purposes (SARS, 2020:49). The main research objective and secondary research objectives 1, 2, 3, 4 and 5 are adequately addressed for part E of the research instruments. A discretionary interest in a trust is considered as a capital asset for CGT purposes and therefore susceptible to a VSA.

7.4.2.6 Measuring a VSA (Part F)

What is meant by "value shifting," and how is it measured in the context of trusts? How are the proceeds and base cost determined in a VSA? Both the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 7.4.1) are examined in part F of the research instruments. The proceeds (paragraph 35(2)) and base cost (paragraph 23(2)) of a VSA should be measurable for each of the trustees' actions to take place. From both the analysis of the respondents' findings and the participants' findings it is evident (P-values > 0.05) that no reduction in the market value in the discretionary beneficiaries can be measured before and after the trustees' actions. The respondents agreed that the market value and the base cost of a discretionary interest could be measured before the VSA occurs, whilst the participants disagreed with both these statements.

The respondents may have taken the view that discretionary beneficiaries' interest is a *spes,* and therefore both the market value and the base cost are measured at a zero value. The participants' view may have been that it would not be technically possible to measure a *spes* which is only a hope or expectation. A discretionary interest in a trust has a deemed base cost of zero. Paragraph 81 of the Eighth Schedule deems the base cost of a discretionary intertest in a trust to have zero value, which eliminates the need to measure the base cost of a discretionary interest. Although it may not be possible to technically measure the market value of a discretionary interest in a trust, a *spes* or hope has no market value and therefore there is no reduction in the market value of the discretionary interests before and after the trustees' actions take place. The primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part E of the research instruments. A reduction in the market value or value shift cannot be measured for the purposes of paragraph 35(2) by measuring the proceeds of a VSA resulting from the trustees' actions examined in this study.

7.4.2.7 Value shifting disposal implications (Part G)

Do any of the trustees' actions meet the definition of a VSA, and does it fall under paragraph 11(1)(*g*) of the Eighth Schedule? Both the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 7.4.1) are examined in part G. All the elements of the definition of a VSA should be present before any of the trustees' actions could result in a VSA. From both the analysis of the respondents' findings and the participants' findings it is evident (P-values > 0.05, or not applicable) that not all the elements of the definition of a VSA were present when the trustees' actions were examined. No value decrease with a corresponding increase in the market value occurs before and after the trustees' actions, and the proceeds of a VSA cannot be measured. The primary and the secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part G. No VSA occurs as no value shift, as required in the definition of a VSA, takes place.

7.4.2.8 Other trustees' actions (Part H)

Do any of the trustees' actions meet the definition of a VSA, and does it fall under paragraph 11(1)(*g*) of the Eighth Schedule? Both the respondents and the participants did not provide any other trustees' actions which could result in a VSA. It is therefore unlikely that any trustees' actions related to discretionary trusts could result in a VSA. Research objective 4 is adequately addressed for part H of the research instruments, since no VSA occurs as no value shift, as required in the definition of a VSA, takes place.

7.4.2.9 The DTC's recommendations (Part I)

What are the implications of the DTC's recommendations on VSAs? The secondary research objective 8 is examined in part I of the questionnaire. All the elements of the definition of a VSA should be present before any of the trustees' actions could result in a VSA. From both the analysis of the respondents' findings and the participants' findings it is evident (P-values > 0.05), or not applicable that no VSA will occur from any of the trustees' actions examined.

The DTC's recommendations require that before the vesting of the trust's assets in the beneficiaries, any capital gain should be first taxed in the trust, which eliminates the possibility of a value shift occurring, as required in the definition of a VSA. No VSA is likely to occur, which is the same as Part G section 7.2.4.7 above. Secondary research objective 8 is adequately addressed for part I of the research instruments, because no VSA occurs as no value shift, as required in the definition of a VSA, takes place.

7.4.2.10 Additional comments (Part J)

The additional comments from the research participants led to the following conclusions:

- Increased tax compliance on trusts would reduce the need for increasing the effective income tax rates for trust income and capital gains as proposed in the DTC's recommendations for discretionary trusts.
- Further research would be required on the application of GAAR in relation to the trustees' actions, which may already address a VSA.
- Further research would be useful to establish trust deed clauses which may be used to minimise CGT exposure of trusts to VSA.
- A full analysis of trust deed amendments and any *ultra vires* amendments which may impact on VSAs may be a subject for future research.

7.4.2.11 Foreign value shifting alternatives (Part K)

Part A: Nature of assets

Foreign participants, and SA respondents and participants, agreed that selling a capital asset in a discretionary trust may lead to a capital gain or loss, with the nature of the proceeds determined by case law. However, they disagreed that capital and revenue assets should be treated the same for CGT purposes. Notably, the comparison between foreign and SA perceptions provides valuable insight and assists in achieving the primary and secondary research objectives of the study. The primary research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part A.

Part B: Income tax (excluding capital gains) implications

Foreign participants, and SA respondents and participants, disagreed that various trustees' actions involving discretionary trust assets or changes to beneficiaries or trustees would result in gross income, separate from capital gains. Notably, the comparison of foreign participants' perceptions for part B also provides valuable insights and supports the achievement of both the primary and secondary research objectives of the study. The primary research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part A.

Part C: Donations tax implications

Foreign participants, and SA respondents and participants agreed that donating a discretionary interest between beneficiaries does not trigger a capital gain or a VSA. Notably, the comparison of foreign participants' perceptions for part C also provides valuable insights and supports the achievement of both the primary and secondary research objectives of the study. The primary research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part A.

Part D: Ordinary disposal implications

Both foreign participants and SA respondents and participants agreed that selling or distributing a discretionary trust asset to a beneficiary may result in a capital gain or loss, which is treated as an ordinary disposal. However, they disagreed that adding or removing a beneficiary or appointing or removing a trustee would constitute an ordinary disposal for either foreign or SA discretionary trusts. Notably, the comparison of foreign participants' perceptions for part B also provides valuable insights and supports the achievement of both the primary and secondary research objectives of the study. The primary research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part A.

Part E: Nature of a discretionary trust's assets

Foreign participants disagreed, while SA respondents and participants agreed, that disposing of a discretionary trust interest could result in a capital gain or loss for the beneficiary. While the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part A, the perceptions of foreign and SA participants differ. When directly comparing the foreign and SA contexts for discretionary trusts, the results remain inconclusive, highlighting the complexities and nuances in interpreting and applying these principles across tax jurisdictions.

Part F: Measuring a VSA

The foreign participants, as well as SA respondents and participants, disagreed that a reduction in the beneficiary's interest in both foreign and SA discretionary trusts can be measured before and after the various trustees' actions analysed in this study. Additionally, foreign participants and SA respondents and participants expressed differing perceptions regarding the measurement of market value and the basis of an interest in a discretionary trust both before and after trustees' actions. It is important to note that the analysis conducted in section 3.1.3 of chapter 3 highlighted that VSAs are measured differently in the Australian tax jurisdiction when compared to the SA context. These differences underscore the intricate challenges encountered when assessing both the timing and method of such measurements across tax jurisdictions. Notably, the comparison of foreign participants' perceptions for part F also provides valuable insights and supports the achievement of both the primary and secondary research objectives of the study. The primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part A.

Part G: VSA disposals implications

The foreign participants, and SA respondents and participants, disagreed that for both foreign and SA discretionary trusts, actions like vesting or distributing trust assets, selling a capital asset, or changing beneficiaries or trustees could trigger a VSA. Notably, the comparison of foreign participants' perceptions for part G also provides valuable insights and supports the achievement of both the primary and secondary research objectives of the study. The primary research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part G.

Part H: Other trustees' actions

From the results in this chapter, the VSA applicability to discretionary trusts is limited.

7.5 SUMMARY

This chapter provided a comprehensive analysis of the research findings on discretionary trusts, comparing responses from RSA online questionnaire respondents and the interview participants, as well as foreign participants. The analysis incorporated both quantitative and qualitative data to ensure a thorough examination of the subject matter. The study explored the tax implications of various trustees' actions, including vesting, distributing, selling assets, and changes to beneficiaries or trustees, focusing on income tax (excluding capital gains), donations tax, ordinary disposals, and VSAs. The results indicate a strong consensus that trustees' actions involving capital assets result in ordinary disposals for CGT purposes, and not VSAs, and that discretionary interests being a mere hope or *spes* do not have a measurable market value or base cost, precluding the occurrence of a VSA. Both RSA and foreign participants agreed that most trustees' actions do not trigger donations tax implications, nor do they meet the requirements of a VSA under current legislation. The findings in this chapter were triangulated with the doctrinal analysis set out in Chapter 3 to ensure consistency and robustness of the conclusions. The findings also highlighted that the DTC's proposed reforms would fundamentally alter the taxation of trusts but would not change the VSA implications for discretionary trusts. Overall, the chapter concludes that, given the nature of a contingent right in a discretionary trust, the risk of VSAs arising from trustees' actions in discretionary trusts is minimal, and no significant differences were found between RSA and foreign trust practices for the scenarios examined. In the next chapter the analysis of the research results for the vested trusts will be presented and discussed.

CHAPTER 8

ANALYSIS OF THE RESEARCH RESULTS FOR NON-DISCRETIONARY TRUSTS

8.1 INTRODUCTION

This chapter synthesises the triangulated findings for vested or fixed trusts to evaluate the extent to which each research objective has been achieved, providing a consolidated assessment of the study's overall contribution. It deepens this assessment by integrating the doctrinal and empirical findings on vested (fixed) rights in non-discretionary trusts through methodological triangulation, thereby reinforcing the robustness of the conclusions reached. It also presents the cross tabulated results of the SA online questionnaire (Chapter 5) from the respondents and the interview guides (Chapter 6) from the participants on non-discretionary (vested) trusts, consolidating the principal findings and results from both data sources. The chapter further compares the outcomes of the foreign non-discretionary interviews with the SA vested trust results to establish points of convergence and divergence. Where discrepancies arise between questionnaire and interview findings, supplementary evidence and the doctrinal analysis in Chapter 3 are used to triangulate and validate the conclusions. Adopting a convergent mixed methods design, the chapter analyses how the respondents and the participants addressed the same research questions (see section 4.1.2.3 in Chapter 4). The chapter is structured into an analysis of SA vested trusts (section 8.2), a comparative analysis of SA and foreign non-discretionary trusts (section 8.3), and a discussion and summary of SA and foreign non-discretionary trusts (section 8.4).

8.2 ANALYSIS OF SA VESTED TRUSTS

The analysis is organised under Parts A, B, C, D, E, F, G, H and I, which correspond to the research questions (see section 1.5.2 in Chapter 1) and the categories used in both the SA Online Questionnaire (Appendix A) and the SA Interview Guide (Appendix B).

8.2.1 Part A: Nature of a trust's assets

Are the beneficiaries' rights or interest to or in a trust asset regarded as an asset in terms of the underlying definitions of an 'asset' or 'property' in section 1(1) of the Act (Gross Income), section 55(1) of the Act (Donations Tax), section 3(2) of the Estate Duty Act (Estate Duty) or Paragraph 1 of the Eighth Schedule (CGT) (Research question 1)? The respondents had to agree or disagree with each separate statement below, which examines the nature of an asset. The cross tabulation of all the sub-questions for part A is summarised in Table 8.1 below.

Table 8.1: Summary of the cross-tabulation results for Part A

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
1.1 The disposal of a capital asset of a vested trust could result in either a capital gain or a capital loss.	95,8%	4,2%	24	100%	0%	6	1
1.2 The revenue or capital nature of a vested trust's assets or proceeds of such trust's assets can be ascertained by the tests developed in case law.	91,7%	8,3%	24	100%	0%	6	1
1.3 A capital asset of a vested trust for capital gains purposes, would be the same as a revenue asset for income tax purposes.	4,2%	95,8%	24	0%	100%	5	1
1.4 Capital assets of a vested trust for capital gains purposes, would be the same as property for donations tax purposes.	91,7%	8,3%	24	100%	0%	6	1
1.5 Capital assets of a vested trust for capital gains purposes, would the same be as property for estate duty purposes.	91,3%	8,7%	23	100%	0%	5	1

8.2.1.1 Disposal of an asset

The disposal of a capital asset of a vested trust could result in either a capital gain or a loss (Section 2, Part A: 1.1). Most of the respondents (a mean score of 1.17 in section 5.6.1.6 in Chapter 5) and all six of the participants (see section 6.6.1.1 in Chapter 6) agreed that a disposal of a vested trust's capital assets could result in a capital gain or a loss. The cross-tabulation results show that a high percentage of the respondents (95.8%) and all the participants (100%) agreed with the statement. The Fisher's test P-value of 1 for this sub-question, which is greater than 0.05, demonstrates that the comparison between the respondents' questionnaire and the participants' interview responses is statistically insignificant.

Participant six stated that for the two trusts examined in this study, *"an asset disposal from a trust can result in a capital gain or a loss. A capital gain or a loss can occur in any of these trusts, if we have a capital asset, a disposal of the capital*

asset, measurable proceeds, and a base cost." Paragraph 3 of the Eighth Schedule states that a capital gain occurs when the proceeds exceed the base cost of a capital asset disposed. A capital loss, on the other hand, occurs when the base cost exceeds the proceeds of a capital asset disposed (paragraph 3 of the Eighth Schedule). If the asset is disposed and the proceeds are equal to the base cost, no capital gain or loss will occur. The disposal of a vested trust's capital assets could result in a capital gain or a loss.

8.2.1.2 Capital nature of an asset

The revenue or capital nature of a vested trust's assets or proceeds of such trust's assets can be ascertained by the tests developed in case law (Section 2, Part A: 1.2). Most of the respondents (a mean score of 1.33 in section 5.6.1.6 in Chapter 5) and all six of the participants (see section 6.6.1.2 in Chapter 6) agreed that the capital nature of a vested trust's assets can be ascertained by case law. The cross-tabulation results show that a high percentage of the respondents (91.7%) and all the participants (100%) agreed with the statement. The Fisher's P-value of 1 for this sub-question, which is greater than 0.05, demonstrates that the comparison between the respondents' questionnaire responses and the participants' interview responses is statistically insignificant.

According to participant six, "*the capital nature of the trust's assets can be determined by case law. The tests for the capital nature of an asset, irrespective in which trust the asset is held in has developed over time and [sic] decided in the various court cases."* The tests apply to all types of entities which include both trusts examined in this study. During the interviews reference was made to two such cases, (Natal Estates Ltd. v. CIR (*1975 (A)*), which found that the company had changed a revenue asset into a capital asset, by the taxpayer's actions (Stiglingh *et al*., 2026:49). One would also have to examine the trustees' actions regarding the trust's assets which would be stipulated in the trust deed. According to participant six, "*a capital asset is for example an investment property purchased for investment purposes. A revenue asset is for example an item of stock. An asset can be either capital or revenue, depending upon the point of time one is examining the asset"*, which summarised the findings of the Natal Estates case, in which the farmland was initially

used as an investment (farming activities), and subsequently by the company directors' actions, the farmland was divided into stands and sold as trading stock. Also, the example of the tree and the fruit, as alluded to in the case of CIR v. Visser (1937 TPD), where a tree is seen as the capital asset and the fruit as the revenue asset (Olivier, 2012:173). None of the participants had any contrary views to the findings in these cases and acknowledged that the tests laid down by the courts were sufficient to establish the capital nature of an asset. It is not within the scope of this study to fully examine all cases that dealt with the various aspects of the revenue and capital nature of assets.

Participant five stated that "*besides case law legislation also defines/prescribes the differences between revenue and capital assets"*. The tax legislation only prescribes the different tax treatments of a revenue asset and a capital asset, as a capital asset is not defined in the Act. The analysis of a capital asset requires an understanding of what is meant by capital, and what constitutes an asset. The Eighth Schedule adopts "*property"* as the foundational concept, defining an asset as both property of any nature and any right or interest in such property. These provisions demonstrate a consistent legislative practice of using "*property"* as an expansive term encompassing both tangible items and rights or interests in them. Accordingly, in this Chapter, the terms "*asset"* and "*property"* are used interchangeably. A comparison of the definition of an asset in the Eighth Schedule, an asset or property for donations tax purposes and an asset or property for estate duty purposes, may assist with an understanding if a vested interest could be considered as an asset for CGT purposes. The capital nature of assets held in vested trusts can be ascertained by case law.

8.2.1.3 Capital asset compared to a revenue asset

The definition of a capital asset of a vested trust for CGT purposes would be the same as an asset for income tax purposes (before any disposal or deemed disposal in terms of the Eighth Schedule to the Act) (Section 2, Part A: 1.3). Most of the respondents (a mean score of 4.83 in section 5.6.1.6 in Chapter 5) and five of the six participants (see section 6.6.1.3 in Chapter 6) disagreed that the definition of a capital asset of a vested trust for CGT purposes would be the same as an asset for

gross income or income tax purposes**.** The cross-tabulation results show that a high percentage of the respondents (95.8%) and all the participants (100%) disagreed with the statement. The Fisher's test P-value of 1 for this sub-question, which is greater than 0.05, demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Participant five observed that, in determining the nature of a capital asset, "besides case law, also legislation defines a capital asset." This necessitates grounding the inquiry in the statutory definition contained in the Eighth Schedule. That definition employs *property* as the foundational concept, and authoritative commentary confirms that, within this context, the terms *property* and *asset* operate synonymously (Olivier 2007:37). 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."

Both subparagraphs explicitly anchor the notion of an "asset" in the concept of "property," thereby collapsing any conceptual distinction between the two for CGT purposes. Accordingly, for the analytical purposes of this Chapter, the terms "*asset"* and "*property"* are employed interchangeably, consistent with the statutory text and the interpretive approach adopted in the literature.

Five of the participants viewed capital assets and revenue assets as being mutually exclusive. Capital gains arising from the disposal of capital assets are dealt with exclusively in the Eighth Schedule, and the taxable income arising from any disposal of a revenue asset is found in the remaining schedule of the Act. Participant six provided an example of fixed property which could be either of a capital or a revenue nature, depending on the motive of acquiring the property, which could be either to earn rental income *(investment purpose*) or resell the property *(speculative profit motive*). An asset can either be capital or revenue in nature, depending on the

point in time one is examining the disposal of the asset. A capital gain realised on the disposal of a capital asset is included in income in terms of section 26A of the Act; the amount received or accrued from the disposal of a revenue asset is included in gross income (section 1(1) of the Act, “gross income” definition). One participant did not answer this question, and the possible explanations are as follows:

- The statement mentioned that the definition of a capital asset should be compared to that of a revenue asset. Whilst a capital asset is defined in the Eighth Schedule, a revenue asset is not defined in the Act.
- When a capital asset, which was subject to a wear-and-tear allowance, is disposed of, the portion of the proceeds, which is recouped under section 8(4)(*a*) of the Act, is included in gross income and is not part of the capital gain.
- When an asset is purchased with mixed intentions, that is both for speculative and investment purposes, then the dominant objective should be applied. Insufficient information is provided in the question regarding the nature of the asset. Even in cases where mixed intentions are present, the dominant intention should still apply (COT v. Levy 1952 (2) SA 413).
- Also, the participant’s uncertainty could be because of how he understood the question. The same asset could for example be either a capital asset or a revenue asset. It is only when applying the subjective and objective tests developed by case law to the asset that one can classify it as a capital or revenue asset for tax purposes.

The analysis confirmed that a capital asset is not a revenue asset; the disposal of a capital asset has a CGT consequence, and the sale of a revenue asset will result in a gross income consequence.

8.2.1.4 Capital gains asset compared to a donations tax property

Capital assets of a vested trust for CGT purposes would also be considered similar to property for donations tax purposes (Section 2, Part A: 1.4). Most of the respondents (a mean score of 1.38 in section 5.6.1.6 in Chapter 5) and all six of the participants (see section 6.6.1.4 in Chapter 6) agreed that capital assets of a vested

trust for CGT purposes, would also be considered similar to property for donations tax purposes. The cross-tabulation results show that a high percentage of the respondents (91.7%) and all the participants (100%) agreed with the statement. The Fisher's P-value of 1 for this sub-question, which is greater than 0.05, demonstrates that the comparison between the respondents' online questionnaire responses and the participant's interview responses is statistically insignificant.

Section 55(1) of the Act defines "property" for donations tax purposes as follows: *"property" means any right in or to property movable or immovable, corporeal, or incorporeal, wheresoever situated",* which is similar to sub-paragraphs (*a*) and (*b*) of paragraph 1 of the Eighth Schedule's definition of an asset for CGT purposes. The CGT definition provided above includes the words "*movable or immovable property,"* which supports the respondents and participants' assertion that an asset for CGT purposes have similarities to property for donations tax purposes. According to Olivier (2007:37) the definition of an asset for CGT purposes was derived from the definition of property for donations tax purposes. The participants did not mention that the converse statement is not correct. Property for donations tax purposes is not always an asset for CGT purposes, as property for donations tax purposes include both revenue assets and capital assets. Participant five also pointed out that farmland property is only valued at 70% of the market value for donations tax purposes (section 55(1)(*b*) of the Act), and at full market value for CGT purposes. The valuation of farmland property for donations tax purposes and CGT purposes is not the same. A capital asset for CGT purposes could be considered as property for donations tax purposes.

8.2.1.5 Capital gains asset compared to an estate duty property

Capital assets of a vested trust for CGT purposes would also be considered similar to property for estate duty purposes (Section 2, Part A:1.5). Most of the respondents (a mean score of 1.46 in section 5.6.1.6 in Chapter 5) and five of the participants who answered the question (see section 6.6.1.5 in Chapter 6) agreed that capital assets of a vested trust for CGT purposes, would also be considered similar to property for estate duty purposes. The cross-tabulation results show that a high percentage of the respondents (91.3%) and all the participants who answered

(100%) agreed with the statement. The Fisher's P-value of 1 for this sub-question, which is greater than 0.05, demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Participant four both agreed with the statement and disagreed depending upon the wording of the trust deed: *"If the trust deed stipulated that upon the death of a beneficiary prior to distribution the vested interest would devolve upon the remaining beneficiaries alive, then I would disagree with the statement*." His response was omitted from the cross-tabulation as his answer was neutral. The trust structure did not mention the above restriction. The remaining participants agreed that a vested interest could be considered as property for estate duty purposes. Pace and Van der Westhuizen (2023:23.2.3) also confirmed that a vested interest in a trust may be included in the definition of property for estate duty purposes.

A comparison of the definition of an asset for CGT purposes in paragraph 1 of the Eighth Schedule and the definition of property for estate duty purposes supports the participants' view that an asset is the same in most instances. Section 3(2) of the EDA defines an asset or property as follows: *"Property" means any right in or to property, movable or immovable, corporeal or incorporeal, and includes- (a) any fiduciary, usufructuary or other like interest in property (including a right to an annuity charged upon property) held by the deceased immediately prior to his death; (b) any right to an annuity (other than a right to an annuity charged upon any property) enjoyed by the deceased"*. Both the CGT and the estate duty definitions refer to movable and immovable assets, and both definitions include the rights to or in property.

Participant five mentioned an exception in the way farmland property is valued at 70% of the market value for estate duty purposes, and the full market value is used to determine the proceeds for CGT purposes. The same farmland property held in a vested trust, if it were held by a natural person, could have both estate duty and CGT consequences for a natural person. The participants did not mention the exception that property for estate duty purposes is not always an asset for CGT purposes. Property for estate duty purposes include both revenue assets and

capital assets. A capital asset for CGT purposes could also be considered as property for estate duty purposes.

8.2.1.6 Summary of the results for a vested trust (Section 2, Part A)

The following is a summary of the research results for a vested trust for Part A:

- A disposal of a capital asset could result in a capital gain or a loss if the proceeds of a capital asset is different from the base cost (P-value > 0.05).
- The court decisions can be used to determine the capital nature of an asset in a vested trust, and the beneficiary's right in relation to the trust's assets (P-value > 0.05).
- The definition of an "asset" and "property" for CGT, donations tax and estate duty purposes are similar, in that they include an interest or right, in or to property (P-value > 0.05).
- Property for donations tax and estate duty purposes include both revenue and capital assets; assets for CGT purposes only include assets that are of a capital nature.
- A beneficiary's interest in a vested trust's asset can be included in the definition of an asset in terms of the Eighth Schedule.
- These conclusions are also supported by the analysis in section 3.2.5 of Chapter 3.

8.2.2 Part B: Income tax (excluding capital gains) implications

Do any of the actions taken by the trustees, as mentioned in the primary and secondary research objectives 1 to 7, result in gross income and income tax (excluding capital gains) implications, and should they therefore be excluded from a VSA (Research question 2)? The respondents and the participants had to agree or disagree that the trustees' actions below would result in gross income and be excluded from CGT. The cross tabulation of all the sub-questions for part B is summarised in Table 8.2 below.

Table 8.2: Summary of the cross-tabulation results for Part B

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
2.1 The trustees vest capital assets (80 shares) in beneficiary A.	4,2%	95,8%	24	0%	100%	6	1
2.2 The trustees distribute capital assets (80 shares) to beneficiary A.	0%	100%	24	0%	100%	6	N/A
2.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	4,2%	95,8%	24	0%	100%	6	1
2.4 Adding a new beneficiary to the trust.	0%	100%	24	0%	100%	6	N/A
2.5 Removing beneficiary A from the trust.	4,2%	95,8%	24	0%	100%	6	1
2.6 Appointing a trustee to the trust.	0%	100%	24	0%	100%	6	N/A
2.7 Removing a trustee from the trust.	4,2%	95,8%	24	0%	100%	6	0,133

8.2.2.1 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 2, Part B: 2.1). Most of the respondents (a mean score of 4.79 in section 5.6.2.8 in Chapter 5) and all the participants (see section 6.6.2.1 in Chapter 6) disagreed that the above trustees' action would result in an income tax (gross income) consequence. The cross-tabulation results show that a high percentage of the respondents (95.8%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants interview responses is statistically insignificant.

An additional 40 vested shares should be allocated to beneficiary A, who already has 40 vested shares, to make up the 80 shares vested in beneficiary A. According to participant one, the additional 40 shares could be ceded to beneficiary A; beneficiaries B and C would have to relinquish an equivalent of 40 shares to beneficiary A. Alternatively, the vested rights of the beneficiaries, in terms of the trust deed, would have to be changed with the consent of the beneficiaries. The change in the vesting of the 40 shares which is a capital asset, could result in a capital gain, and will be taxed in terms of the Eighth Schedule and section 26A of the Act (according to participant six). The change of the vesting rights of capital assets will have CGT consequences and will be excluded from gross income.

8.2.2.2 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 2, Part B: 2.2). Most of the respondents (a mean score of 4.96 in section 5.6.2.8 in Chapter 5) and all the participants (see section 6.6.2.2 in Chapter 6) disagreed that the above trustees' action would result in an income tax (gross income) consequence. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) disagreed with the statement. The Fisher's exact score could not be calculated, as there are no variances for this sub-question. The respondents' and participants' answers were the same.

According to participant two, 40 of the 80 shares are already vested in beneficiary A, and the distribution of these shares to beneficiary A will have no CGT consequences. The additional 40 shares distributed to beneficiary A, and previously vested in beneficiaries B and C, will have to be transferred to beneficiary A. The distribution of the additional 40 shares to beneficiary A would require either a change in vesting rights or a cession of shares from beneficiaries B and C to beneficiary A. According to participant six, the change in vesting rights or cession of a capital gain will be taxed in terms of the Eighth Schedule and section 26A of the Act. A distribution of a vested trust's capital assets which would require a change in vesting rights could have CGT consequences and but not gross income consequences.

8.2.2.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell the trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 2, Part B:2.3). Most of the respondents (a mean score of 4.88 in section 5.6.2.8 in Chapter 5) and all six of the participants (see section 6.6.2.3 in Chapter 6) disagreed that the above trustees' action would result in an income tax (gross income) consequence. The cross-tabulation results show that a high percentage of the respondents (95.8%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and

demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The receipt or accrual from the sale of a capital asset is excluded from gross income in terms of the definition of gross income as contained in section 1 of the Act. The disposal of a capital asset will result in a capital gain if the proceeds of the asset exceed the base cost (paragraph 3(*a*) of the Eighth Schedule). In the vested trust structure provided, the shares are defined as a capital asset, which can only be subject to CGT consequences in terms of the Eighth Schedule. A capital gain of R400 000 from the original 40 shares could be taxed in beneficiary A's hands. The vesting or distribution of the additional R400 000 that was previously vested in beneficiaries B and C, would require a change in vesting rights to facilitate the full vesting or distribution of the R800 000 capital gain in or to beneficiary A. The distribution of the cash gain will not in itself result in a capital gain, as currency is not an asset as defined for the purposes of the Eighth Schedule to the Act, according to participant two. The sale and subsequent distribution of a capital gain will be excluded from gross income.

8.2.2.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 2, Part B:2.4). All the respondents (a mean score of 5.00 in section 5.6.2.8 in Chapter 5) and all the participants (see section 6.6.2.4 in Chapter 6) disagreed that the above trustees' action would result in an income tax (gross income) consequence. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) disagreed with the statement. The Fisher's exact score was not calculated, as there are no variances for this sub-question. The respondents' and participants' answers were the same.

From a legal standpoint, the trustees would not be able to add a new vested beneficiary to a trust. The consent of the existing beneficiaries would have to be obtained. To add a vested beneficiary to the trust, the trustees would need to change the vesting rights of the existing beneficiaries of the trust. The adding of a vested beneficiary to a trust that holds only capital assets would not have any gross income implications.

8.2.2.5 Removing a beneficiary

Removing beneficiary, A from the trust (Section 2, Part B:2.5). Most of the respondents (a mean score of 4.88 in section 5.6.2.8 in Chapter 5) and all the participants (see section 6.6.2.5 in Chapter 6) disagreed that the above trustees' action would result in an income tax (gross income) consequence. The cross-tabulation results show that a high percentage of the respondents (95.8%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

In the vested trust structure provided, the shares are capital assets, which can only be subject to CGT consequences in terms of the Eighth Schedule. The removed beneficiary A would forfeit a vested right at market value and technically dispose of an asset resulting in a capital loss in his/her hands. The removal of vested beneficiaries from a trust should be within the parameters of the trust deed, and the beneficiaries would have to consent thereto. According to participant two, if the removal of vested beneficiaries changes the objective and purpose of a trust, there may in fact be a 'disposal' by the 'old trust' to the 'new trust' for CGT purposes. If that is the case, one would have to consider whether the deemed disposal at market value rules, contained in paragraph 38 of the Eighth Schedule to the Act, could be applicable. The removal of a vested beneficiary from a trust that holds only capital assets would not have any gross income implications.

8.2.2.6 Appointing a trustee

Appointing a new trustee to the trust (Section 2, Part B: 2.6). All the respondents (a mean score of 5.00 in section 5.6.2.8 in Chapter 5) and all six of the participants (see section 6.6.2.6 in Chapter 6) disagreed that the above trustees' action would result in an income tax (gross income) consequence. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) disagreed with the statement. The Fisher's exact score was not calculated as there are no

variances for this sub-question, as the respondents' and participants' answers were the same.

The assets in the trust structure are of a capital nature, which normally excludes any possibility of a gross income implication in terms of section 1(1) of the Act. The trustees are not beneficiaries and have no rights to the trust's assets. The trustees administer the trust's assets for the beneficiaries in terms of the trust deed. No CGT and no income tax implications will occur when a new trustee is added to the trust.

8.2.2.7 Removing a trustee

Removing a trustee from the trust (Section 2, Part B: 2.7). Most of the respondents (a mean score of 4.83 in section 5.6.2.8 in Chapter 5) and all the participants (see section 6.6.2.7 in Chapter 6) disagreed that the above trustees' action would result in an income tax (gross income) consequence. The cross-tabulation results show that a high percentage of the respondents (95.8%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The assets in the trust structure are of a capital nature, which reduces the possibility of any gross income consequences. The trustees are not beneficiaries and have no rights whatsoever to any of the trust's assets. If a trustee is removed from a vested trust and receives consideration for such a removal, it will have income tax consequences for the trustee. No CGT and no income tax implications will occur when a trustee is removed from a trust.

8.2.2.8 Summary of results for a vested trust (Section 2, Part B)

The following is a summary of the research results for a vested trust for Part B:

- The vesting (P-value > 0.05) or distribution (P-value not applicable) of a capital asset already vested in the beneficiary, and the change in vesting to facilitate the distribution of a capital assets will result in gross income consequences.
- The sale of a capital asset, and the subsequent vesting or distribution of the resulting capital gain will not result in gross income consequences (P-value > 0.05).
- The adding (P-value not applicable) or removal (P-value > 0.05) of a vested beneficiary to a trust holding only capital assets will not have gross income consequences.
- The appointment (P-value not applicable) or removal (P-value > 0.05) of a trustee to or from a trust will have no gross income consequences.
- The conclusions are also supported by the analysis in section 3.3.1.1 of Chapter 3.

8.2.3 Part C: Donations tax implications

Do any of the selected trustees' actions mentioned in the primary and secondary research objectives 1 to 7 result in donations tax, and should they therefore by implication be excluded from a VSA (Research question 3)? Respondents and participants had to agree or disagree to the first four general statements relating to donations tax and the last seven statements which evaluate the donations tax implications for a vested trust in Part C. The cross tabulation of all the sub-questions for Part C is summarised in Table 8.3 below.

Table 8.3: Summary of the cross-tabulation results for Part C

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
3.1.1 If beneficiaries donate of a vested interest, from one beneficiary to another beneficiary, donations tax could be applicable.	95,8%	4,2%	24	100%	0%	6	1
3.1.2 If the trustees donate of a vested interest from one beneficiary to another beneficiary, without the consent of the beneficiaries, donations tax could be applicable.	57,9%	42,1%	19	0%	100%	6	0,020
3.1.3 If a donation of a vested interest from one beneficiaries to another beneficiary at full market value, a disposal in terms of paragraph of 11(1)(*a*) of the Eighth Schedule would occur.	95,8%	4,2%	24	100%	0%	6	1
3.1.4 if a donation of a vested interest from one beneficiary to another beneficiary at an inadequate value, a disposal in terms of paragraph of 11(1)(*g*) of the Eighth Schedule would occur.	35%	65%	20	80%	20%	5	0,133
3.2.1 The trustees vest capital assets (80 shares) in beneficiary A.	87,5%	12,5%	24	100%	0%	6	1
3.2.2 The trustees distribute capital assets (80 shares) to beneficiary	87,5%	12,5%	24	100%	0%	6	1
3.2.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	87,0%	13,0%	23	100%	0%	6	1
3.2.4 Adding a new beneficiary to the trust.	87,0%	13,0%	23	83,3%	16,7%	6	1
3.2.5 Removing beneficiary A from the trust.	87,5%	12,5%	24	100%	0%	6	1
3.2.6 Appointing a new trustee to the trust.	0%	100%	24	0%	100%	6	N/A
3.2.7 Removing a trustee from the trust.	4,2%	95,8%	24	0%	100%	6	N/A

8.2.3.1 Donating a vested interest with consent

A donation of a vested interest from one beneficiary to another beneficiary for no or an inadequate consideration will have donations tax implications (Section 2, Part C: 3.1.1). Most of the respondents (a mean score of 1.25 in section 5.6.3.12 in Chapter 5) and all the participants (see section 6.6.3.1 in Chapter 6) agreed that the donation of a vested interest from one beneficiary to another beneficiary for no or an inadequate consideration, will have donations tax implications. The cross-tabulation results show that a high percentage of the respondents (95.8%) and (100%) all the participants agreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

According to participants three, *"after an asset has been vested in a beneficiary it has value,"* which means that a beneficiary could potentially donate a vested right to another vested beneficiary of the trust. De Koker and Williams (2024:23.3) submitted that a vested right of a beneficiary could be considered as property or assets for donations tax purposes. Participant three also suggested that the beneficiary who donated his or her vested interest will lose value, and the

beneficiary receiving a vested interest will receive value. Participant four also mentioned that he has not seen such a donation taking place in practice, and it may be possible to conduct such a disposal of vested rights. As the donation of the vested interest will result in the future delivery of the trust's asset, such a donation needs to be in writing (according to participant five). A donation of a vested interest from one beneficiary to another beneficiary for no or an inadequate consideration, will have donations tax implications.

8.2.3.2 Donating a vested interest without consent

If the trustees donate a vested interest from one beneficiary to another beneficiary, without the consent of the beneficiaries, a donations tax implication could still occur (Section 2, Part C: 3.1.2). Most of the respondents (a mean score of 2.79 in section 5.6.3.12 in Chapter 5) disagreed and all the participants (see section 6.6.3.2 in Chapter 6) disagreed that the above trustees' action would result in donations tax implications. The cross-tabulation results show that the respondents and the participants do not have the same responses for this question; when one looks at the majority within each group; 57.9% of respondents agreed, whereas 100% of the participants disagreed with this statement. The Fisher's P-value is 0.02 for this sub-question, which is less than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically significant.

The respondents' mean score of 2.79 indicates that they may have been uncertain regarding this question. Five of the respondents did not answer this question, as they may have considered it impossible for the trustees to donate a vested interest from one beneficiary to another beneficiary without the consent of the donor beneficiary. It may be argued that the trustees made an illegal donation (*ultra vires donation)* without the consent of the beneficiaries. The question specifically stated that the beneficiaries did not consent to the donation, which means that an illegal donation could have occurred if a court of law found that, based on a previous legality, the vesting of the trust assets was not fair and equitable, and a court orders a change of the vesting rights. However, based on the findings of Welsch's Estate v. CSIR ([2004] 2 All SA 586 (SCA) 66 SATC 303), a court order enforcing the

trustees to dispose of trust assets to the trust founder's ex-spouse and minor children would not constitute a donation, as the trustees were compelled to do as instructed by the court and did not do so as an act of generosity.

Participant four stated that "*it is not possible to donate a vested interest without the consent of the donor. It would be an illegal act. No donations tax is possible."* In Income Tax Case No. 1840 (72 SATC 79) the trustees sold the trust's assets from the original trust, equally divided amongst the six new trusts formed for each of the beneficiaries of the original trust. Each of the original beneficiaries were made a beneficiary of a new trust. The sale to each of the six new trusts was on a loan account at market value. The trustees then wrote off the loan accounts between the original trust and the six newly created trusts. The court had to decide whether the loan write-off between the original trust and the newly formed trusts were subject to donations tax, or not. The findings were as follows:

- The loan write-off was a disposal of property as required by section 55 of the Act.
- A gratuitous disposal of property occurred as required by section 54 of the Act.
- The donation or loan write-off was not in pursuance of the trust, and therefore not exempt from donations tax in terms of section 56(1)(l) of the Act (the donation was not to the beneficiaries, but to the newly formed trusts).
- Based on the findings of MP Finance Group CC (In Liquidation) v. CSARS (69 SATC 141), the court held that an illegal act can still have income tax consequences, in the same way the *ultra vires* act was held to have donations tax implications.
- The court also found that the trustees did not reinstate the loan accounts in the trust's annual financial statements, after becoming aware that their actions were *ultra vires* and not valid, which meant that a donation had been completed.

When comparing the circumstances in this sub-question to the findings of Income Tax Case No. 1840 (72 SATC 79), the following parallels can be drawn:

- The vested rights in the trust are considered property, meeting the requirements of section 55(1) of the Act.
- A gratuitous disposal of property, as required by section 55(1) of the Act, occurred; the trustees were not compelled to make the donation.
- A donation of property, which is not in accordance with the vesting rights of the trust and therefore not in pursuance of the trust, occurred. Therefore, a section 56(1)(l) exemption of the Act will not apply.
- The trustees' action of changing the vesting rights to make the donation, would be *ultra vires*.

The circumstances in Income Tax Case No. 1840 (72 SATC 79) differ from those in the vested trust structure being examined, as the original trust may have been a vested trust, which allowed the trustees to sell the trust's assets to the new beneficiaries. The beneficiaries of the six new trusts would not object to the loan write-offs, as they indirectly benefited the beneficiary of each new trust. According to participant one, the beneficiaries could object to the donation and given the fiduciary obligations of the trustees to act in good faith in relation to the vested trust assets of the beneficiaries, such donation would be most unlikely. The trust deed would have to be amended to allow a donation of the vested interest from one beneficiary to another beneficiary, which would not be possible without the beneficiary's consent. The result is inconclusive due to differing interpretations: respondents believe trustees donated the trust property, while participants argue such a donation between beneficiaries without consent is not legally valid.

8.2.3.3 Donating a vested interest a paragraph 11(1)(*a*) disposal

A donation of a vested interest from one beneficiary to another beneficiary at market value would result in disposal in terms of paragraph 11(1)(*a*) of the Eighth Schedule to the Act (Section 2, Part C: 3.1.3). Most of the respondents (a mean score of 1.21 in section 5.6.3.12 in Chapter 5) and all the participants (see section 6.6.3.3 in Chapter 6) agreed that the above trustees' action would result in donations tax implications. The cross-tabulation results show that a high percentage of the respondents (95.8%) and all the participants (100%) agreed with the statement. The

Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The donation would be deemed to take place at full market value for donations tax purposes and CGT purposes. The donor beneficiaries' vested interest in the trust is reduced, which could be described as a donation and a paragraph 11(1)(*a*) disposal. The relevance of excluding a donation at market value from the definition of a VSA have three possible explanations: (1) it could be a result of changes to the definition of a VSA in the Eighth Schedule, which excludes donations at market value, maybe before the promulgation of the Eighth Schedule or any subsequent amendments; (2) if the donation is made at market value, it is excluded from a VSA; (3) a VSA is not measured at the full market value as in the case of all other disposals, and the proceeds for a VSA is the difference between the market value before and immediately after the value shifting takes place.

SARS (2020:5) lists several amendments to the Eighth Schedule to the Act, for example the Tax Laws Amendment Act No. 5 of 2001, which inserts the Eighth Schedule to the Act, and which indicates that both definitions of a VSA in paragraph 1 and paragraph 38 were promulgated at the same time. CGT applies retrospectively from 1 October 2001, and no mention is made of any exclusion of donations from the definition prior to the promulgated of the Eighth Schedule. All VSAs require a gratuitous value shift in which one of the beneficiaries' interests would automatically be reduced in terms of the definition of a VSA in paragraph 1 of the Eighth Schedule. Donations between connected parties are deemed to take place at market value according to paragraph 38 of the Eighth Schedule, excluding donations at a deemed market value from a VSA, which would eliminate the possibility of a VSA taking place. Participant two explained the exclusion of paragraph 38 donations at market value from the definition of a VSA as follows: "*The reference to paragraph 38 is to ensure that the proceeds of a VSA are only measured in terms of paragraph 35(2). Both paragraph 38 and 35 should be compared as they deal with the proceeds of disposals at an inadequate value. The logical link between these two paragraphs should be examined. Paragraph 35(2) specifically looks at the comparison of the market value before and after the VSA.*

Paragraph 38 also deals with establishing of the proceeds of the disposal between connected persons at an inadequate value and the time of measurement is when the disposal takes place". The researcher submits that the explanation provided by participant two is the most plausible explanation of the three provided above. The donation of the vested interest would be subject to CGT, and a paragraph 11(1)(*a*) disposal would occur.

8.2.3.4 Donating a vested interest a paragraph 11(1)(*g*) disposal

A donation of a vested interest from one beneficiary to another beneficiary at an inadequate consideration would result in disposal in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act (Section 2, Part C: 3.1.4). Most of the respondents (a mean score of 3.46 in section 5.6.3.12 in Chapter 5) disagreed, and four of the five participants (see section 6.6.3.4 in Chapter 6) agreed that the above trustees' action would result in a paragraph 11(1)(*g*) disposal. The cross-tabulation results show that the respondents and the participants do not have the same responses for this question; when one looks at the majority within each group; 65% of the respondents disagreed, whereas 80% of the participants agreed with this statement. The Fisher's P-value is 0.133 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The respondents disagreed that a donation of a vested interest could result in a paragraph 11(1)(*g*) disposal, as they may believe the donation would fall under a paragraph 11(1)(*a*) disposal. A donation of a capital asset between two parties at an inadequate consideration will be deemed to be at market value for donations tax purposes (section 58 of the Act), and the proceeds of a donation between connected parties will be deemed to be at market value for CGT purposes (paragraph 38(*a*) of the Eighth Schedule). The donation, definition of a donation (section 55(1) of the Act) and the definition of a VSA (paragraph 1 of the Eighth Schedule), require that the donor beneficiary has a gratuitous reduction in the value of the asset donated or disposed.

According to participant five, *paragraphs 11(1)(a) and 11(1)(g) are not mutually exclusive, all disposals have an element of value shifting. A value shifting arrangement contains certain elements which are not considered in a normal disposal, which are the decrease and corresponding increase in value between connected parties.* The participant indicated the different requirements for a VSA (paragraph 11(1)(*g*)) as follows: A VSA requires a decrease and a reciprocal increase in the market value between connected parties or beneficiaries. The beneficiaries are required to retain an interest in the trust after a VSA occurs. From participant five's comment it is quite possible that a donation of a vested interest between beneficiaries could be both a paragraph 11(1)(*a*) and 11(1)(*g*) disposal.

If more than one outcome is possible in the law, the most explicit option or disposal should be selected under the "*unius est exclusio alterius"* legal principle. One would examine the trustees and beneficiaries' actions to establish which sub-paragraph of 11(1)(*a*) to (*g*) best describes the trustees' actions in conjunction with the beneficiaries' actions. However, the analysis of the definition of a VSA in section 3.5.1 of Chapter 3 indicates that the application of paragraph 11(1)(*g*), should only be applied after consideration of all the ordinary disposals.

The Fisher exact value is greater than 0.05, the inconclusive results may be explained by the different interpretation between the respondents and participants either a paragraph 11(1)(*a*) or (*g*) disposal when a vested interest is donated from one beneficiary to another beneficiary at an inadequate consideration.

8.2.3.5 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 2, Part C:3.2.1). Most of the respondents (a mean score of 1.54 in section 5.6.3.12 in Chapter 5) and all the participants (see section 6.6.3.5 in Chapter 6) agreed that the above trustees' action would result in donations tax implications. The cross-tabulation results show that a high percentage of the respondents (87.5%) and all the participants (100%) agreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison

between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Prior to the vesting taking place, the shares are vested equally in the beneficiaries, and each beneficiary is entitled to 40 shares. Beneficiary A will receive an additional 40 shares to his or her entitlement, and beneficiaries B and C would have to forfeit these shares, to allow for the full 80 shares to be vested in beneficiary A. A change in the vesting rights of the trust's asset would be required to facilitate the new vesting of the trust's assets. It would be exceedingly difficult from a legal standpoint for the trustees to change the vesting rights of the trust's assets. A valid donation would require a delivery, such as the registration of the shares in the name of beneficiaries B and C. If the donation will be delivered at a future date it needs to be stipulated in writing. Beneficiaries B and C would have to cede, donate, or agree to the change in the vesting rights, which would result in a gratuitous disposal of their vested shares. The vesting of the additional shares is not within the normal activities of the trust, and therefore not exempt from donations tax implications (section 56(1)(l) of the Act). The change of vested rights in a trust could have donations tax implications.

8.2.3.6 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 2, Part C: 3.2.2). Most of the respondents (a mean score of 1.54 in section 5.6.3.12 in Chapter 5) and all the participants (see section 6.6.3.6 in Chapter 6) agreed that the above trustees' action would result in donations tax implications. The cross-tabulation results show that a high percentage of the respondents (87.5%) and all the participants (100%) agreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Prior to the distribution taking place, the shares are vested equally in the beneficiaries, and each beneficiary is entitled to 40 shares. The transfer of the 40 shares already vested in beneficiary A will be exempted from donations tax in terms

of section 56(1)(l) of the Act. Beneficiary A will receive an additional 40 shares over and above his/her entitlement. Beneficiaries B and C would have to forfeit these shares to allow for the full 80 shares to be distributed to beneficiary A. The delivery or registration of the shares to or in the name of beneficiary A, which were previously vested in beneficiaries B and C, would constitute a donation. The distribution of the additional shares is not within the normal parameters of the conduction of the trust's activities and therefore may not be exempted from donations tax implications. The distribution of assets from a vested trust to beneficiaries, which requires a change in the vested right, could have donations tax implications.

8.2.3.7 Sale of an asset and vesting or distributing the capital gain

The trustees sell a trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 2, Part C:3.2.3). Most of the respondents (a mean score of 1.71 in section 5.6.3.12 in Chapter 5) and all the participants (see section 6.6.3.7 in Chapter 6) agreed that the above trustees' action would result in donations tax implications. The cross-tabulation results show that a high percentage of the respondents (87%) and all (100%) the participants agreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The sale of the shares at market value will not result in a donation. The vesting conditions and the trust deed should permit the trustees to sell the trust's assets. The sale of 80 shares results in a capital profit of R800 000 (80 shares x R10 000 capital gain per share). The vesting of 80 shares or R800 000 of the capital gain to beneficiary A would result in beneficiary A acquiring an additional capital gain of R400 000 (40 shares x R10 000 capital gain per share), and beneficiaries B and C would thereby lose R400 000. Beneficiaries B and C would have to consent to the transfer of the capital gain of R400 000 from their previously vested shares to beneficiary A, which would result in donations tax implications.

8.2.3.8 Adding a beneficiary

Adding a new beneficiary to the trust (Section 2, Part C: 3.2.4). Most of the respondents (a mean score of 1.83 in section 5.6.3.12 in Chapter 5) and five of the participants (see section 6.6.3.8 in Chapter 6) agreed that the above trustees' action would result in donations tax implications. The cross-tabulation results show that a high percentage of both the respondents (87%) and the participants (83.3%) agreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' questionnaire responses and the participants' interview responses is statistically insignificant.

According to participant three, *"it is not possible to add an additional beneficiary other than by way of an agreement between the founder, the trustees and all beneficiaries who have accepted the benefits stipulated for them in the relevant trust deed. (See Hofer and others v. Kevitt N.O. and others 1998(1) (SA)(382)(SCA))",* and therefore he disagreed that donations tax would arise when a vested beneficiary is appointed to the trust. The remaining participants accepted that the necessary consent was obtained before the new vested beneficiary was added to the trust. The newly added beneficiary acquires a vested interest in the shares, and the existing beneficiaries' consent to the relinquishment of their vested shares to the new beneficiary, which results in a donation. The adding of a vested beneficiary to a trust could result in donations tax implications.

8.2.3.9 Removing a beneficiary

Removing beneficiary, A from the trust (Section 2, Part C: 3.2.5). Most of the respondents (a mean score of 1.67 in section 5.6.3.12 in Chapter 5) and all six of the participants (see section 6.6.3.9 in Chapter 6) agreed that the above trustees' action would result in donations tax implications. The cross-tabulation results show that a high percentage of the respondents (87.5%) and all the participants (100%) agreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents'

online questionnaire responses and the participants' interview responses is statistically insignificant.

The removed vested beneficiary will forfeit vested rights to the trust's assets and thereby lose value; this will result in the vested rights being transferred to the remaining beneficiaries whose value in the trust's assets will increase. Beneficiary A would have to consent to the removal, which will result in a donation. The donation is not within the normal parameters of running the trust; hence, the section 56(1)(l) exemption will not be applicable. The removal of a vested beneficiary from a trust with an inadequate consideration or no consideration could have donations tax consequences.

8.2.3.10 Appointing a trustee

Appointing a new trustee to the trust (Section 2, Part C: 3.2.6). All the respondents (a mean score of 5.00 in section 5.6.3.12 in Chapter 5) and all the participants (see section 6.6.3.10 in Chapter 6) disagreed that the above trustees' action would result in donations tax implications. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) disagreed with the statement. The Fisher's P-value was not calculated, as the response percentages for this question were the same for both the respondents and the participants.

The trustees do not have any rights to or in the trust's assets; consequently, the appointment of a trustee to a trust will have no donations tax implications. There will be no change in value (or rights) of the vested trust's assets, and no donation can take place. No gratuitous disposal of any assets will occur when a trustee is appointed to a trust, and therefore no donations tax consequences will arise.

8.2.3.11 Removing a trustee

Removing a trustee from the trust (Section 2, Part C: 3.2.7). Most of the respondents (a mean score of 4.83 in section 5.6.3.12 in Chapter 5) and all six of the participants (see section 6.6.3.11 in Chapter 6) disagreed that the above trustees' action would result in donations tax implications. The cross-tabulation results show that a high

percentage of the respondents (95.8%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The removal of a trustee from a vested trust will not result in any change of the assets held in the trust. The trustees do not have any rights to the trust's assets, and no transfer of value will occur when a trustee is removed from a trust. No gratuitous disposal of any assets will occur when a trustee is removed from a trust, and therefore no donations tax consequences will arise.

8.2.3.12 Summary of results for a vested trust (Section 2, Part C)

The following is a summary of the research results for a vested trust for Part C:

- The donation of a vested interest from one beneficiary to another beneficiary for no or an inadequate consideration could have donations tax implications (P-value > 0.05).
- The donation of a vested interest (without consent) from one beneficiary to another beneficiary resulting in donations tax implications is inconclusive, as the donation may be legally possible (P-value < 0.05).
- The donation of a vested interest from one beneficiary to another beneficiary for no or an inadequate consideration could result in a paragraph 11(1)(*a*) disposal (P-value > 0.05).
- The donation of a vested interest from one beneficiary to another beneficiary for no or an inadequate consideration that could result in a paragraph 11(1)(*g*) disposal is inconclusive (P-value < 0.05), based on the analysis of the definition of a VSA the researcher submits that the ordinary paragraph 11(1)(*a*) disposal will preclude a paragraph 11(1)(*g*) disposal (see section 3.6.1.1 above).
- The change in the vesting right of the trust's capital assets could result in donations tax implications (P-value > 0.05).

- The distribution of the capital assets of a trust which requires a change in the vesting rights of the trust's assets could result in donations tax implications (P-value > 0.05).
- The sale of a capital asset at market value, and the subsequent vesting or distribution of the capital gain not in accordance with the original vesting formula of the trust's assets, could result in donations tax implications (P-value > 0.05).
- The adding or removal of a vested beneficiary to or from a vested trust, could have donations tax implications (P-value > 0.05).
- The appointment (P-value not applicable) or removal (P-value > 0.05) of a trustee to or from a vested trust will have no donations tax implications.
- The conclusions are also supported by the analysis for vested rights in section 3.4.2.6 of Chapter 3.

8.2.4 Part D: Ordinary disposal implications

Do any of the selected trustees' actions mentioned in the primary and secondary research objectives 1 to 7 result in a paragraph 11(1)(*a*) to (*d*) ordinary disposal of the Eighth Schedule of the Act, and should they therefore be excluded from a VSA (Research question 4)? The respondents and the participants had to agree or disagree that the seven trustees' actions below would result in a paragraph 11(1)(*a*) to (*f*) disposal in terms of the Eighth Schedule. The cross tabulation of all the sub-questions for part D is summarised in Table 8.4 below.

Table 8.4: Summary of the cross-tabulation results for Part D

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
4.1 The trustees vest capital assets (80 shares) in beneficiary A.	100%	0%	24	83,3%	16,7%	6	0,200
4.2 The trustees distribute capital assets (80 shares) to beneficiary A.	95,8%	4,2%	24	83,3%	16,7%	6	0,366
4.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	100%	0%	24	83,3%	16,7%	6	0,200
4.4 Adding a new beneficiary to the trust.	91,7%	8,3%	24	66,7%	33,3%	6	0,169
4.5 Removing beneficiary A from the trust.	79,2%	20,8%	24	100%	0%	6	0,553
4.6 Appointing a new trustee to the trust.	0%	100%	24	0%	100%	6	N/A
4.7 Removing a trustee from the trust.	4,2%	95,8%	24	0%	100%	6	1

8.2.4.1 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 2, Part D: 4.1). All the respondents (a mean score of 1.04 in section 5.6.4.8 in Chapter 5) and five of the participants (see section 6.6.4.1 in Chapter 6), agreed and one participant disagreed that the above trustees' actions would result in an ordinary disposal. The cross-tabulation results show that all the respondents (100%) and most of the participants (83.3%) agreed with the statement. The Fisher's P-value is 0.200 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The trustees would have to increase beneficiary A's vested shares from 40 to 80, to achieve the above objective which could result in an ordinary or a VSA disposal. Only participant two disagreed, stating that a paragraph 11(1)(*g*) disposal could also most likely occur, as the additional 40 shares vested in beneficiary A would result in an increase in beneficiary A's interest in the trust, with a corresponding reduction in the interests of beneficiaries B and C in the trust. All the elements of a VSA are present, provided that all the beneficiaries retain an interest in the trust after the change in the vesting rights occurred. When more than one possibility exists, one should select the one which best fits the circumstances and ignore the other, according to the legal principle *unius est exclusio alterius*.

Participant one suggested that beneficiaries B and C could, for example, cede 40 of their vested shares to beneficiary A (a paragraph 11(1)(*a*) disposal). Both beneficiaries B and C would have to agree to the reduction in their vested rights, that may appear to be a paragraph 11(1)(*b*) disposal which includes, amongst others: a forfeiture, redemption, relinquishment, or an abandonment of an asset as a disposal. An amendment to the trust deed, and a reduction of beneficiaries B and C's interest may appear as an ordinary disposal. The SARS (2020:726) states that a VSA will only occur if an ordinary disposal is not present, which may explain the logic of both the respondents' and the participants' preference of an ordinary disposal over a VSA in this case. An ordinary disposal could occur when the trustees change the vesting rights of the beneficiaries.

8.2.4.2 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 2, Part D: 4.2). Most of the respondents (a mean score of 1.25 in section 5.6.4.8 in Chapter 5) and five of the six participants (see section 6.6.4.2 in Chapter 6) agreed that the above trustees' action would result in an ordinary disposal. The cross-tabulation results show that a high percentage of the respondents (95.8%) and a high percentage of the participants (83.3%) agreed with the statement. The Fisher's P-value is 0.366 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The distribution of the original 40 shares vested in beneficiary A, will have no income tax consequences. The distribution of 80 shares in a different ratio to that of the original vesting ratio, would require a change in the vesting rights to accommodate the additional 40 shares not previously vested in beneficiary A. Before these shares can be distributed, beneficiaries B and C should consent thereto, and a disposal in terms of paragraph 11(1)(*a*) or 11(1)(*b*) could arise. If the beneficiaries do a formal cession of their vested rights to beneficiary A, to facilitate the distribution of the additional shares which were not previously vested in beneficiary A, a paragraph 11(1)(*b*) disposal could occur.

Participant two stated that the change in the vesting rights to accommodate the distribution of the additional shares to beneficiary A would result in a paragraph 11(1)(*g*) disposal. The only problem with this argument is that if beneficiary A no longer has a vested right in the trust after the share distribution, no VSA will take place. An ordinary disposal could occur when trustees change the vesting rights of beneficiaries to distribute the trust's assets (Eighth Schedule, paragraph 1 definition of a VSA).

8.2.4.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell a trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 2,

Part D: 4.3). Most of the respondents (a mean score of 1.08 in section 5.6.4.8 in Chapter 5) and five of the six participants (see section 6.6.4.3 in Chapter 6) agreed that the above trustees' action would result in an ordinary disposal. The cross-tabulation results show that all the respondents (100%) and a high percentage of the participants (83.3%) agreed with the statement. The Fisher's P-value is 0.200 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The sale of the 80 shares will result in a paragraph 11(1)(*a*) disposal. Accommodating the vesting or distribution of the capital gains arising from the shares that were previously vested in beneficiaries B and C could potentially also result in a CGT disposal. However, the cash distribution would not result in disposal, as currency is excluded from the definition of an asset for CGT purposes (Eighth Schedule, paragraph 1 definition of an "asset"). The capital gain from the sale arising from the original 40 shares vested in beneficiary A will be taxed in beneficiary A's hands. The capital gain resulting from the shares previously vested in beneficiaries B and C would be taxed in their hands. The diversion of the capital gain from beneficiaries B and C from their vested shares to beneficiary A could have GAAR implications (see section 8.2.10.6). An ordinary disposal could occur when trustees sell the vested trust's assets and subsequently vest or distribute the capital gain not in accordance with the original vesting rights.

8.2.4.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 2, Part D: 4.4). Most of the respondents (a mean score of 1.46 in section 5.6.4.8 in Chapter 5) and four of the six participants (see section 6.6.4.4 in Chapter 6) agreed that the above trustees' action would result in an ordinary disposal. Two participants disagreed that it would be possible to add a beneficiary to the vested trust, as the already accepted benefits from the trust and the necessary consent required for the removal of the beneficiary were not obtained. The cross-tabulation results show that a high percentage of the respondents (91.7%) and most of the participants (66.7%) agreed with the statement. The Fisher's P-value is 0.169 for this sub-question, which is greater than

0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

In the discussions it was assumed that after the new beneficiary is added, the trust's assets will vest equally amongst the four beneficiaries. Beneficiaries A, B and C would have to each forfeit 10 of their vested shares to the new beneficiary, leaving all four beneficiaries with 30 shares each. A second participant disagreed that an ordinary disposal would occur, on the basis that paragraph 11(1)(*g*) would best describe the value shifting occurring when a vested beneficiary is added to a trust. The adding of a new vested beneficiary to a trust could meet the perquisites of the definition of a VSA (paragraph 1 of the Eighth Schedule). Most of the participants and the respondents may have considered the reduction of beneficiaries A, B and C's vested interests as an ordinary disposal. The change in vesting rights to accommodate the adding of a new vested beneficiary to a trust could be described as a disposal in terms of paragraphs 11(1)(*a*) to (*f*).

8.2.4.5 Removing a beneficiary

Removing beneficiary, A from the trust (Section 2, Part D: 4.5). Most of the respondents (a mean score of 1.88 in section 5.6.4.8 in Chapter 5) and all six participants (see section 6.6.4.5 in Chapter 6) agreed that the above trustees' action would result in a normal disposal. The cross-tabulation results show that a high percentage of the respondents (79.2%) and all the participants (100%) agreed with the statement. The Fisher's P-value is 0.533 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Beneficiary A would be relinquishing, ceding, donating, or abandoning 40 shares to the remaining beneficiaries B and C of the trust (paragraph 11(1)(*a*) to (*f*)). Beneficiaries B and C would each acquire vested rights in an additional 20 shares. Although there is a decrease in beneficiary A's market value in the trust, with a corresponding increase in beneficiaries B and C 's market value in the trust,

beneficiary A no longer retains an interest in the trust, which is one of the requirements of a VSA (definition of a VSA, paragraph 1). The removal of a vested beneficiary from a trust will result in an ordinary disposal and not a paragraph 11(1)(*g*) disposal.

8.2.4.6 Appointing a trustee

Appointing a new trustee to the trust (Section 2, Part D: 4.6). All the respondents (a mean score of 5.00 in section 5.6.4.8 in Chapter 5) and all the participants (see section 6.6.4.6 in Chapter 6) disagreed that the above trustees' action would result in a normal disposal. The cross-tabulation results show that all the respondents (100%) and all the experts (100%) disagreed with this statement. The Fisher's P-value could not be calculated, as the response percentages for this question were the same for the respondents and the experts, and no statistical variances were found.

Both the respondents and the participants strongly disagreed that a paragraph 11(1)(*a*) to (*f*) disposal of the Eighth Schedule will occur, because the trustees have no real or personal rights attached to the capital assets held in a trust. Without a capital asset being affected by the appointment of a trustee to a trust, no CGT consequences will occur. No ordinary disposal will occur when a trustee is appointed to a vested trust.

8.2.4.7 Removing a trustee

Removing a trustee from the trust (Section 2, Part D: 4.7). Most of the respondents (a mean score of 4.83 in section 5.6.4.8 in Chapter 5) and all the participants (see section 6.6.4.7 in Chapter 6) disagreed that the above trustees' action would result in a normal disposal. The cross-tabulation results show that a high percentage of the respondents (95.8%) and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Both the respondents and the participants strongly disagreed that a paragraph 11(1)(*a*) to (*f*) disposal of the Eighth Schedule will occur, because the trustees have no real or personal rights attached to the capital assets held in a trust. Without a capital asset being affected by the removal of a trustee from a trust, no CGT consequences will occur. No ordinary disposal will occur when a trustee is removed from a vested trust.

8.2.4.8 Summary of the results for a vested trust (Section 2, Part D)

The following is a summary of the research results for a vested trust for Part D:

- The vesting or distribution of capital assets not according to the vesting rights of the beneficiaries could result in an ordinary disposal (P-value > 0.05).
- The sale of vested assets and the subsequent vesting or distribution of the capital gain would result in a paragraph 11(1)(*a*) disposal (P-value > 0.05).
- The adding or removal of a beneficiary to or from a vested trust could result in an ordinary disposal (P-value > 0.05).
- The appointment (P-value not applicable) or removal (P-value > 0.05) of a trustee to and from a vested trust will not result in an ordinary disposal.
- The conclusions are also supported by the doctrinal analysis in section 3.5.2.4 of Chapter 3.

8.2.5 Part E: Beneficiaries' interest in a trust

Are the beneficiaries' interests in a trust, as referred to in the definition of a "VSA" in paragraph 1 of the Eighth Schedule to the Act, considered to be a capital asset for CGT purposes pertaining to trust beneficiaries in discretionary or vested trusts (Research question 5)? The respondents and the participants had to agree or disagree that the disposal of a vested interest in a trust would result in a capital gain or a loss. The cross tabulation of all the sub-questions for part E is summarised in Table 8.5 below.

Table 8.5: Summary of the cross-tabulation results for Part E

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Aree	Disagree		
5.1 A disposal of a vested interest in a trust's capital asset by a beneficiary, could result in a capital gain or a capital loss for the beneficiary.	100%	0%	24	83,3%	16,7%	6	0,200

8.2.5.1 Vested interest in a trust

A capital gain or a loss can only occur after a disposal of a capital asset. Add any commentary explaining whether you agree with the statements below. Any vested interest in a trust's capital assets is considered a capital asset of a beneficiary (Section 2, Part E: 5.1). Most of the respondents (a mean score of 1.04 in section 5.6.5.2 in Chapter 5) and five of the six participants (see section 6.6.5.1 in Chapter 6) agreed that a disposal of a vested interest in a trust could result in a capital gain or a loss. The cross-tabulation results show that all the respondents (100%) and a high percentage of the participants (83.3%) agreed with the statement. The Fisher's P-value is 0.200 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Participant four disagreed with the statement on the basis that the trustees of a vested trust are the owners of the trust's assets, which is the correct view when looking at the definition of a vested trust. However, the question focused on the vested interest as an asset for CGT purposes. Participant three described a vested trust as follows: *"In a vested trust the trustees are the owners of the trust assets, the trust assets are vested in the beneficiaries. The beneficiaries have a personal right vis-à-vis the trustees to, depending on the provisions of the trust deed, enforce the transfer of the relevant assets to them. The beneficiary does not have a real right in the trust assets which can be enforced against the world."* A vested beneficiary has a personal right against the trustees regarding the assets held in the trust, and not a real right in the vested trust assets. From participant three's description of a vested trust, the beneficiaries do not have a real right to the trust assets, and the trustees' ownership role is temporary. The beneficiaries have personal rights against the trustees regarding the trust's assets. Both real and

vested rights are considered an asset for CGT purposes (SARS, 2020:49), and a vested interest in a trust is an asset for CGT purposes.

Participant six described a vesting right as *"an irrevocable right in terms of the trust deed or an irrevocable resolution passed by the trustees of a discretionary trust,"* which could be either vested in specifically identified beneficiaries or a class of beneficiaries. Participant three also described vesting rights of a collective investment trust, which type of trust is not covered in this study. A vested interest in a trust, which specifically vest assets in specific beneficiaries, could be considered a capital asset of a beneficiary for CGT purposes (see section 8.2.10.1).

8.2.5.2 Summary of the results for a vested trust (Section 2, Part E)

The following is a summary of the research results for a vested trust for Part E:

- A vested interest in a trust provides the beneficiary with a personal right against the trustees of the trust regarding the management of the trust's asset and could be considered a capital asset of the beneficiary for CGT purposes (P-value > 0.05).
- This conclusion is also supported by the doctrinal analysis in section 3.2.5 of Chapter 3.

8.2.6 Part F: Measuring a VSA

How are proceeds and base costs measured in a trust VSA? Are there examples of VSAs related to trusts, companies, or partnerships in the SARS guides that can help with this measurement? The respondents and the participants had to agree or disagree with statements that cover various components of calculating the proceeds (paragraph 35(2)) and the base cost (paragraph 23(*a*)) (base cost) as contained in the Eighth Schedule, and in relation to the trustees' actions evaluated in this study. The cross tabulation of all the sub-questions for part F is summarised in Table 8.6 below.

Table 8.6: Summary of the cross-tabulation results for Part F

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
6.1 The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	100%	0%	24	83,3%	16,7%	6	0,200
6.2 A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	95,8%	4,2%	24	100%	0%	6	1,000
6.3 The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before any of the seven trustees' actions mentioned previously can be measured.	100%	0%	24	100%	0%	6	N/A

8.2.6.1 Measuring the market value of a VSA

The market value of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously, can be measured (Section 2, Part F: 6.1). Most of the respondents (a mean score of 1.04 in section 5.6.5.2 in Chapter 5) and all the participants (see section 6.6.6.1 in Chapter 6) agreed with the above statement. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) agreed with the statement. The Fisher's P-value could not be calculated, as the response percentages for this question were the same for the respondents and the participants, and no statistical variances were found.

From the analysis in section 8.2.3.12 it is evident that a vested interest in a vested trust structure has value and could therefore be subjected to donations tax. Van Zyl (2019:726) described a vested right as a right that is measurable in money. The present value of a vested interest can be calculated; therefore, a vested interest and a vested right can have both donations tax and CGT consequences. Also, the vested beneficiary's rights do have a value for estate duty purposes and is included in the estate duty calculation as a vested interest. The market value of each of the beneficiaries' vested interests in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously, can be measured.

8.2.6.2 Measuring the value shift of a VSA

A possible reduction in the market value of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously, can be measured (Section 2, Part F: 6.2). All the respondents (a mean score of 1.25 in section 5.6.6.4 in Chapter 5) and all the participants (see section 6.6.6.2 in Chapter 6) agreed with the above statement. The cross-tabulation results show that all the respondents (100%) and all the experts (100%) agreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the experts' interview responses is statistically insignificant.

In terms of paragraph 35(2) the "proceeds" of a VSA is the difference in the market value of an interest in a trust before and after a VSA takes place. If the trustees are permitted to change the vesting rights so that beneficiary A acquires 20 of the shares previously vested in beneficiaries B and C for no consideration, beneficiaries B and C's market value would be reduced to R300 000 (R15 000 x 20 shares). Prior to the change in the vesting rights, both beneficiaries B and C's market value in the trust was R600 000 (R15 000 x 40 shares). Beneficiaries B and C's market value in the trust is each reduced from R600 000 (R15 000 x 20 shares) to R300 000 (R15 000 x 20 shares) after the trustees' actions take place. It could be possible to measure a reduction in the market value of a vested beneficiary's interest in a trust before or after any trustees' action changing the vesting rights of beneficiaries in the trust (paragraph 35(2)). Paragraph 11(1)(*g*) of the Eighth Schedule recognises a disposal when a decrease in the value of a person's interest in a trust occurs because of a VSA. The capital gain for such disposal is attributable to the person who has a reduction in value in the trust. From the paragraph 35(2) of the Eighth Schedule measurement of the proceeds of a VSA, the capital gain is attributed to any beneficiary who has a reduction in the market value in a trust, which in this hypothetical trust structure are beneficiaries B and C.

8.2.6.3 Measuring the base cost of a VSA

The base cost of each of the beneficiaries' interests (beneficiaries A, B and C) in the underlying trust's assets before any of the seven trustees' actions mentioned previously, can be measured (Section 2, Part F: 6.3). All the respondents (a mean score of 1.08 in section 5.6.6.4 in Chapter 5) and all the participants (see section 6.6.6.3 in Chapter 6) agreed with the above statement. The cross-tabulation results show that all the respondents (100 %) and all the participants (100%) agreed with the statement. The Fisher's P-value could not be calculated, as the response percentages for this question were the same for the respondents and the participants. No statistical variances were found.

When trustees reduce beneficiary C's vested shares from 40 to 20 in a VSA, the base cost of the remaining 20 shares can be calculated using the formula in paragraph 23(*a*) of the Eighth Schedule. Specifically, the calculation is Y = [(A - C) / A] x B, where A is the market value of the beneficiary's interests before disposal which is R600 000 (R15 000 x 40 shares), B is the beneficiary's base cost before disposal which is R200 000 (R5 000 x 40 shares), and C is the market value after disposal which is R300 000 (R15 000 x 20 shares). Applying the formula yields a base cost of R100 000 for the 20 shares: Y = [(R600 000 – R300 000) / R600 000] x R200 000. This demonstrates that it is possible to measure the base cost of a vested beneficiary's interest in a trust when vesting rights change because of a VSA, in accordance with the requirements of paragraph 23(*a*). From the paragraph 23(*a*) of the Eighth Schedule measurement of the base cost of a VSA, the base cost is attributed to any beneficiary who has a reduction in the market value in a trust, which in this hypothetical trust structure are beneficiaries B and C.

8.2.6.4 Summary of the results for a vested trust (Section 2, Part F)

The following is a summary of the research results for a vested trust for Part F:

- The market value of each of the beneficiary's interests in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured (P-value not applicable).

- A possible reduction in the market value (paragraph 35(2)) of each of the beneficiaries' interests in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured, except when a trustee is appointed to or removed from a trust (P-value not applicable). In such instances, the reduction in market-value interest is assessed only in respect of those beneficiaries to whom the relevant portion of the trust capital is attributable and whose interests are reduced because of a VSA.
- The base cost of each of the beneficiaries' interests in the underlying trust's assets before any of the seven trustees' actions mentioned previously can be measured in terms of the formula described in paragraph 23(*g*) of the Eighth Schedule for a VSA (P-value not applicable).
- This conclusion is also supported by the analysis in section 3.6.4 of Chapter 3.

8.2.7 Part G: Value shifting disposal implications

Do any of the trustees' actions mentioned in the research objectives meet the definition of a VSA, and does it fall under paragraph 11(1)(*g*) of the Eighth Schedule of the Act (Research question 7)? The respondents and the participants had to agree or disagree that the seven trustees' actions below would result in a paragraph 11(1)(*g*) disposal of the Eighth Schedule. The cross tabulation of all the sub-questions for part G is summarised in Table 8.7 below.

Table 8.7: Summary of the cross-tabulation results for Part G

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
7.1 The trustees vest capital assets (80 shares) in beneficiary A.	29,2%	70,8%	24	100%	0%	5	0,007
7.2 The trustees distribute capital assets (80 shares) to beneficiary A.	25,0%	75%	24	100%	0%	5	0,004
7.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	29,2%	70,8%	24	60%	40%	5	0,306
7.4 Adding a new beneficiary to the trust.	37,5%	62,5%	24	80%	20%	5	0,144
7.5 Removing beneficiary A from the trust.	4,2%	95,8%	24	80%	20%	5	0,001
7.6 Appointing a new trustee to the trust.	0%	100%	24	0%	100%	6	N/A
7.7 Removing a trustee from the trust.	4,2%	95,8%	24	0%	100%	6	1,000

8.2.7.1 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 2, Part G: 7.1). Most of the respondents (a mean score of 3.79 in section 5.6.7.8 in

Chapter 5) disagreed, and five of the participants (see section 6.6.7.1 in Chapter 6) agreed that the above trustees' action would result in a VSA. One participant stated that either an ordinary disposal or a paragraph 11(1)(*g*) disposal was possible when 80 of the 120 shares are vested in beneficiary A. This response was therefore excluded from the cross-tabulation process. The cross-tabulation results show that the respondents and the participants do not have the same responses for this question, as 70,8% of the respondents disagreed with the statement, whereas 100% of the participants agreed with this statement. The Fisher's P-value is 0.007 for this sub-question, which is less than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically significant.

Forty shares are already vested in beneficiary A, and an additional 40 shares from beneficiaries B and C are transferred to beneficiary A, so that beneficiary A has a total of 80 vested shares that requires an analysis. Participant one stated that either an ordinary disposal or a paragraph 11(1)(*g*) disposal could occur, depending on if a cession agreement was carried out or not. This response was therefore excluded from the cross-tabulation process. The questionnaire respondents viewed the changed in vesting rights as an ordinary disposal, which excludes a paragraph 11(1)(*g*) disposal. The SARS (2020:776) describes a VSA as follows: "Value shifting involves the effective transfer of value from one entity to another without constituting an ordinary disposal for CGT purposes," which may explain the respondents' views. The participants, on the other hand, may have followed the legal principle *unius est exclusio alterius* as described by participant two, which may assume that all the elements of a VSA were present, and the trustees' action in this instance is best described in paragraph 11(1)(*g*). In table 8.8 below the possible VSA is explained.

Table 8.8: Trustees vest or distribute 80 shares in or to beneficiary A

Beneficiary	Market value of vested Interest before trustees' action	Market value of vested Interest after trustees' action	Potential Value shift
Beneficiary A	R600 000	R1 200 000	R600 000
Beneficiary B	R600 000	R300 000	(R300 000)
Beneficiary C	R600 000	R300 000	(R300 000)

Each beneficiary has a market value of R600 000 (R15 000 x 40 shares), before the vesting or distribution of 80 shares occurs. Assuming both beneficiaries B and C's vesting is reduced by 20 shares each, which are then vested to beneficiary A, they will each be left with 20 shares, which have a market value of R300 000 (R15 000 x 20 shares). There is a decrease in the market value of the vested interests for beneficiaries B and C of R300 000 each, and a corresponding increase of R600 000 in the market value of the vested interest for beneficiary A occurs. Consequently, the proceeds of a VSA, as defined in paragraph 35(2) of the Eighth Schedule, can be measured as R300 000 for beneficiaries B and C respectively, which is the difference in the market value before and after the VSA (R600 000 - R300 000) for the above-mentioned trustees' action. The base cost for the reduction of the 20 vested shares of a beneficiary in terms of paragraph 23(*g*) is R100 000 (see the calculation done in section 7.3.6.3 in Chapter 7). According to participant two, one should also consider the GAAR rules which may apply when a change in vesting rights take place (see section 8.2.10.6). The above analysis is inconclusive when the vesting rights are changed, as either an ordinary disposal or a paragraph 11(1)(*g*) disposal may occur.

8.2.7.2 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 2, Part G: 7.2). Most of the respondents (a mean score of 3.96 in section 5.6.7.8 in Chapter 5) disagreed, and five of the six participants (see section 6.6.7.2 in Chapter 6) agreed that the above trustees' action would result in a VSA. One participant stated that either an ordinary disposal or a paragraph 11(1)(*g*) disposal was possible This response was therefore excluded from the cross-tabulation process. The cross-tabulation results show that the respondents and the participants do not have the same responses for this question; 75% of respondents disagreed, whereas 100% of the participants agreed with this statement. The Fisher's P-value is 0.004 for this sub-question, which is less than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically significant.

The distribution of the original 40 vested shares already vested in beneficiary A will not have CGT consequences and is confirmed by Williams (2005:43). The change of the vesting rights to enable the trustees to distribute an additional 40 shares to beneficiary A, could result in either a paragraph 11(1)(*g*) disposal (see Table 8.8 above) or a paragraph 11(1)(*a*) to (*f*) disposal. According to participant five, *"If the beneficiary does not know about the trustees' action it will be value shifting. It may not be legally carried out, but value shifting,"* if the vesting rights are changed without the beneficiary's consent, it would be difficult to argue that the beneficiary has ceded, donated, or abandoned any rights to an asset. Even if beneficiaries do consent or tacitly consent to the trustees changing the vesting rights, it does not necessarily mean that a VSA does not take place. In the VSA example provided by SARS (2020:776), the sole shareholder would have to agree to the dilution of his shares (see section 8.2.10.4).

Most of the elements of the definition of a VSA in terms of paragraph 1 of the Eighth Schedule are met, except if beneficiary A, upon receipt of all his/her vested rights in the trust, no longer holds any vested interests in the trust. The above analysis is inconclusive when the distribution of a vested trust asset results in a change in the vesting rights, as either an ordinary disposal or a paragraph 11(1)(*g*) disposal may occur.

8.2.7.3 Sale of an asset and vesting or distributing the capital gain

The trustees sell a trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 2, Part G: 7.3). Most of the respondents (a mean score of 3.79 in section 5.6.7.8 in Chapter 5) disagreed, and three of the five participants (see section 6.6.7.3 in Chapter 6) agreed and two disagreed that the above trustees' action would result in a VSA. One participant stated that either an ordinary disposal or a paragraph 11(1)(*g*) disposal was possible. This participant's response was therefore excluded from the cross-tabulation process. The cross-tabulation results show that the respondents and the participants do not have the same responses for this question; 70.8% of the respondents disagreed, whereas 60% of the participants agreed with this statement. The Fisher's P-value is 0.306 for this sub-question, which is less

than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

The respondents who have indicated that no VSA would occur may have considered the timing of the sale occurring before the vesting or distribution of the capital gain in or to beneficiary A. According to SARS (2020:168) the timing of a sale would be when a change in ownership occurs. If the disposal of the assets to a third party is completed before the capital gain is vested or distributed to beneficiary A, a paragraph 11(1)(*a*) disposal would occur. If the vesting rights are changed to accommodate the vesting or distribution of the capital gain or cash profit before the sale occurs, then it is possible that a VSA may occur when the vested rights (the additional 40 shares) of beneficiaries B and C are transferred to beneficiary A. The capital gain from the sale of the original 40 shares which previously were vested in beneficiary A, would not require any change in the vested rights.

According to participant two, "*currency is not generally an asset, as defined for the purposes of the Eighth Schedule to the Act. The vesting or distribution of currency or money to a beneficiary by a trust will not attract capital gains tax*. *However, an attribution rule needs to be considered as to which entity should be taxed."* According to paragraph 80(2) of the Eighth Schedule, it should be taxed in the beneficiary's hands if the beneficiary has a vested right to the trust capital. Any disposal of an asset in which beneficiaries have vested rights is ignored in the trust and taxed in the beneficiaries' hands (SARS, 2020:602). One would have to establish who had vesting rights at the time of the sale, to determine who would be taxed on the capital gain arising from the sale. Once the capital gain has been taxed, the subsequent distribution of the capital gain will not be taxed (according to participant two). The sale of a capital asset and a change in the vesting rights to accommodate either vesting or distribution of the capital gain to beneficiary A, could result in either an ordinary disposal or a paragraph 11(1)(*g*) disposal.

8.2.7.4 Adding a beneficiary

Adding a new beneficiary to the trust (Section 2, Part G: 7.4). The respondents (a mean score of 3.50 in section 5.6.7.8 in Chapter 5) disagreed, and four of the participants (see section 6.6.7.4 in Chapter 6) agreed and one disagreed that the above trustees' action would result in a VSA. One participant stated that either an ordinary disposal or a paragraph 11(1)(*g*) disposal was possible, and his response was therefore excluded from the cross-tabulation process. The cross-tabulation results show that the respondents and participants did not have the same responses for this question; 62.5% of the respondents disagreed, whereas 80% of the participants agreed with this statement. The Fisher's P-value is 0.144 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Participant three disagreed that the trustees would be able to legally add a new vested beneficiary without the consent of the other beneficiaries and therefore disagreed that a VSA would occur. The five remaining participants accepted that the beneficiaries' consent was to be obtained (see section 7.3.10.3 in Chapter 7). Either the trust deed or the resolution which originally vested the shares equally would have to be amended, to allow the trustees to add a new vested beneficiary with equal vested shares as the existing beneficiaries. The respondents may have interpreted this as a waiver, cession, donation, or abandonment of an asset which results in an ordinary disposal. The participants may have considered that all the elements of a VSA are present when, for example, 10 shares of each of the original vested beneficiaries are allocated to the new beneficiary, as described in Table 8.9 below.

Table 8.9: Trustees add a beneficiary to the trust

Beneficiary	Market value of vested Interest before trustees' action	Market value of vested Interest after trustees'action	Potential Value shift
Beneficiary A	R600 000	R450 000	(R150 000)
Beneficiary B	R600 000	R450 000	(R150 000)
Beneficiary C	R600 000	R450 000	(R150 000)
New Beneficiary	R0	R450 000	R450 000

Beneficiaries A, B and C will each have reduced their market value in the trust's assets by R150 000 (R15 000 x 10 shares). The new beneficiary will acquire an increase in value of R150 000 (R15 000 x 10 shares) from each beneficiary, and a total increased value of R450 000 (3 x R150 000). The proceeds (paragraph 35(2) of the Eighth Schedule) of R150 000 (R600 000 – R450 000) for each of the old beneficiaries can be measured for a possible VSA. The base cost (paragraph of 23(*g*) of the Eighth Schedule) of 10 shares of the beneficiaries for a VSA is R50 000 (Y = [(A -C) /A] X B = [(R600 000 – R450 000) / R600 000] X R200 000). The adding of a vested beneficiary to a trust could result in either an ordinary or a paragraph 11(1)(*g*) disposal.

8.2.7.5 Removing a beneficiary

Removing beneficiary, A from the trust (Section 2, Part G: 7.5). Most of the respondents (a mean score of 4.63 in section 5.6.7.8 in Chapter 5) disagreed, and four participants (see section 6.7.7.5 in Chapter 6) agreed that the above trustees' action would result in a VSA. One participant stated that either an ordinary disposal or a paragraph 11(1)(*g*) disposal was possible, and this response was therefore excluded from the cross-tabulation process. The cross-tabulation results show that the respondents and participants did not have the same responses for this question; 95,8% of the respondents disagreed, whereas 80% of the participants agreed with this statement. The Fisher's P-value is 0.001 for this sub-question, which is less than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the experts' interview responses is statistically significant.

According to participant two, when a beneficiary is removed from a vested trust, "*beneficiary A no longer has a vested interest in the trust which is a prerequisite in the definition of a VSA."* The respondents may have disagreed that a VSA will occur when a vested beneficiary is removed, as the removed beneficiary no longer retains an interest in the trust, as depicted in the Table 8.10 below.

Table 8.10: Trustees removing beneficiary A from the trust

Beneficiary	Market value of vested Interest before trustees' action	Market value of vested Interest after trustees' action	Potential Value shift	Does the beneficiary retain an interest in the trust after the trustees' action?
Beneficiary A	R600 000	R0	(R600 000)	No
Beneficiary B	R600 000	R900 000	R300 000	Yes
Beneficiary C	R600 000	R900 000	R300 000	Yes

If beneficiary A's vested rights to 40 shares is reduced, so that an additional 20 vested shares are allocated to beneficiaries B and C, then beneficiary A will have a reduction in value of R300 000 (R15 000 x 20 shares) to beneficiaries B and C respectively, and a total reduction of R600 000. The market value of the vested right of beneficiary A, after being removed from the trust, is nil. The researcher submits that although both the proceeds (paragraph 35(2)) and the base cost (paragraph 23(*a*)) can be determined in the scenario described for a potential VSA, a VSA does not take place if beneficiary A does not retain a vested interest in the trust. According to the analysis of the definition of VSA in section 3.6.2.2 of Chapter 3, removing a vested beneficiary from a trust does not result in a disposal under paragraph 11(1)(*g*).

8.2.7.6 Appointing a trustee

Appointing a new trustee to the trust (Section 2, Part G: 7.6). All the respondents (a mean score of 5.00 in section 5.6.7.8 in Chapter 5) and all six participants (see section 6.7.7.6 in Chapter 6) disagreed that the above trustees' action would result in a VSA. The cross-tabulation results showed that all the respondents (100%) and the participants (100%) disagreed with the statement. The Fisher's P-value could not be calculated, as the response percentages for this question were the same for the respondents and the participants, and no statistical variances were found.

According to participants six, *"no disposal occurs as the trustees have no interest in the trust,"* which means that the trustees have no value in a trust, and no change in the market value occurs when a trustee is appointed to a trust. Without any change in the market value occurring between connected parties to the trust, no VSA is possible (paragraph 1 of the Eighth Schedule definition of a VSA). The appointment of a trustee to a trust would not result in a paragraph 11(1)(*g*) disposal.

8.2.7.7 Removing a trustee

Removing a trustee from the trust (Section 2, Part G: 7.7). Most of the respondents (a mean score of 4.83 in section 5.6.7.7 in Chapter 5) and all six participants (see section 6.7.7.7 in Chapter 6) disagreed that the above trustees' action would result in a VSA. The cross-tabulation results show a high percentage of the respondents (95.8%), and all the participants (100%) disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

According to participant six, *"no disposal occurs as the trustees have no interest in the trust,"* which means that no change in value occurs when a trustee is removed from a trust. Without any change in the market value occurring between connected parties to the trust, no VSA is possible (paragraph 1 of the Eighth Schedule definition of a VSA). The removal of a trustee from a trust would not result in a paragraph 11(1)(*g*) disposal.

8.2.7.8 Summary of the results for a vested trust (Section 2, Part G)

The following is a summary of the research results for a vested trust for Part G:

- When the trustees change the vesting rights or distributing an asset to a beneficiary in such a way that it requires an altering of the vesting rights of the beneficiaries it produces inconclusive results regarding whether this constitutes a paragraph 11(1)(*g*) disposal (P-value < 0.05).
- The sale of capital vested assets, vesting or distribution of the capital gain could result in either an ordinary disposal or a paragraph 11(1)(*a*) disposal (P-value > 0.05).
- The adding of a vested beneficiary to a trust could result in an ordinary disposal or a paragraph 11(1)(*g*) disposal (P value > 0.05).
- The results on whether removing a vested beneficiary triggers paragraph 11(1)(*g*) from a trust are inconclusive (P-value < 0.05), but based on Chapter

3, section 3.6.2.2, the researcher concludes that no paragraph 11(1)(*g*) disposal occurs.

- A paragraph 11(1)(*g*) disposal can overlap with an ordinary disposal paragraph 11(1)(*a*) to (*d*) vested rights as supported in the analysis of sections 3.5.1, 3.5.1.1 and 3.6.4 of Chapter 3, in which case an ordinary disposal will preclude a paragraph 11(1)(*g*) disposal.
- The appointment (P-value not applicable) and the removal (P-value >0.05) of a trustee to or from a trust will not result in a paragraph 11(1)(*g*) disposal. (The trustees have no rights to the trust's assets supported in section 3.6.2 of Chapter 3).

8.2.8 Part H: Other trustees' actions

Do any of the trustees' actions not mentioned in the primary and secondary research objectives 1 to 6 constitute a VSA (Research question 8)? Respondents and participants were requested to discuss and provide examples of any other trustees' actions in detail (excluding the seven trustees' actions examined in the previous sections and donations of vested interests between beneficiaries) for a vested trust that may result in a VSA, in terms of paragraph 11(1)(*g*) of the Eighth Schedule to the Act (1, Part H: 8.1). Other examples of a VSA provided by the respondents (see section 5.6.8 Chapter 5) and participants (see section Chapter 6.6.8 in Chapter 6) regarding vested trusts are summarise in Table 8.11 below.

Table 8.11: Summary of additional examples for Part H

Examples	Trustee Action	Possible VSA
8.2.8.1	Sale of a beneficiary interest	If the beneficiary sells portion his interest to another beneficiary under market value.
8.2.8.2	Amendment	If the trust deed is amended resulting in the changes of vesting interests of the beneficiaries.
8.2.8.3	Creating Suspensive Rights	Mainly any suspension of rights attached to the trust's capital asset. The vesting of property, for example the sale of property or sale of property with suspensive conditions.
8.2.8.4	Usufructs over trust's assets	The creating of a usufruct over trust's assets, depending upon the ages to the usufructuary and bare dominion holder.
8.2.8.5	Free use of assets	If the trustees, give a beneficiary life use or exclusive use over vested assets held in the trust.
8.2.8.6	Amending share rights	The trustees amend the rights of the preference or ordinary shares held in company by the trust, thereby changing value vested value of the specific shares held by the different shares.
8.2.8.7	Change in vesting rights of income	The change in vesting income (excluding capital gains) could also be VSA.

8.2.8.1 Sale of a beneficiary's interest

The sale of a beneficiary's interest at a discounted price would result in a decrease in the market value of the selling beneficiary's interest, and an increase in the market value of the purchasing beneficiary. Both the selling and purchasing beneficiaries are connected parties, and if both beneficiaries retain an interest in the trust after the sale, all the elements of a VSA may be present. The sale of the vested interest will be deemed to be at market value in terms of paragraph 38 of the Eighth Schedule. The sale could also be described as an ordinary disposal in terms of paragraph 11(1)(*a*) of the Eighth Schedule. The sale of a vested beneficiary's interest at a discounted price to another beneficiary could result in an ordinary or a VSA disposal.

8.2.8.2 Amendments

Participant two described all the prerequisites of a VSA as follows: *"Paragraph 11(1)(g) provides for a deemed disposal in terms of a value shifting arrangement where the transferor's interest in a trust, which he retains, decreases and a connected party's interest in the trust in relation to the transferor's interest, increases"*. Any trust deed amendment which results in the market value of a beneficiary's value to decrease*,* with a corresponding increase in the market value for another beneficiary, could result in a VSA. The beneficiaries of the trust are automatically connected persons for tax purposes and provided they retain an interest in the trust, it could result in a VSA. This is a broad description of a VSA, which would be included in some of the trustees' actions already examined in this study. The participants did not discuss a possible reversal of vesting rights which were previously created by means of a trustees' resolution as a potential VSA (see section 8.2.10.3). A change in the capital vesting rights of beneficiaries with or without the consent of the beneficiaries, if possible, may result in a VSA instead of an ordinary disposal.

8.2.8.3 Creating suspensive rights

Any trustees' action which creates suspensive conditions attached to the vested assets, may impact the market value of the vested interests between beneficiaries and result in a VSA. Assuming for example, that a trust owns a rental property as a capital asset which is vested equally in three beneficiaries. The trustees sell the rental property to a third party, subject to a lease at a nominal value for ten years in favour of one of the three vested beneficiaries. The beneficiary who has the favourable lease will have an increase in value and the other two beneficiaries a decrease in value. The trustees would not normally be able to attach suspensive rights to vested assets without the consent of the beneficiaries. Suspensive rights which are attached to capital assets may result in a VSA.

8.2.8.4 Usufructs over trust's assets

Depending on the ages of the beneficiaries, a usufruct created on a trust asset could result in a VSA, and the market value of the bare dominion could be manipulated. The beneficiaries would be in breach of their fiduciary duties towards all the vested beneficiaries who have a personal right against them regarding the management of the trust's assets (according to participant three) if they create a usufruct without the proper consent of the beneficiaries. If the trustees create a usufruct over an asset in the trust in favour of one of the vested beneficiaries of a trust, a VSA could occur.

8.2.8.5 Free use of assets

If the trustees of a vested trust allow one of the beneficiaries of the vested trust exclusive use of the trust's assets, it may result in a VSA. If a residential property vests equally in, for example, three beneficiaries, and the trustees allow one of the beneficiaries to have an exclusive free right to the property which has a market value of R9 000 000, a VSA could occur. Two of the beneficiaries will experience a combined reduction in the market value of R6 000 000 (R 3 000 000 each), and the beneficiary who has free use has an increase in value of R6 000 000 (R3 000 000

+ R3 000 000). If the trustees grant the long-term free use of a vested asset to another beneficiary, a VSA may occur.

8.2.8.6 Amending share rights

The trustees may be in the position to amend the shares attached to both ordinary shares and preference shares held in a private company by the trust. If the trustees exercised sufficient control of the private company, it would be possible for the trustees to issue shares at a discount in favour of one of the existing beneficiaries of a trust, as described in the example provided in SARS (2020:776). The trust's market value held in the trust would reduce, and the beneficiary (connected person) would have an increase in the market value in the company (see section 7.3.10.4 in Chapter 7). The dilution of shares would be related to the company, and not to the trust. The examination of a VSA of companies is outside the scope of this study. If the trustees exercised sufficient control over shares held in a private company, it may be possible for the trustees to manipulate the shares in favour of a beneficiary, which may result in a VSA in the company.

8.2.8.7 Change of vesting rights to income

In his master's thesis titled "*Reconciling the taxation of partnerships in South Africa relative to its legal recognition*," Haupt (2019:36) discussed a change in partnership profit sharing ratio as a possible VSA, which may also be possible in the case of a trust. The right to income in an asset, and the change in the right to such income would result in a value shift according to the tax case, CIR v. Visser (1937 TPD). If one beneficiary's vested long-term right to income (not capital income) is reduced and another beneficiary's vested rights to the trust's income is increased, there would be a change in the market value between the beneficiaries' interest in the trust, which is like a change in the partnership sharing ratio. Sections 7(*a*) and 7(*b*) of the Act deems certain investments (dividends, rent, interest and royalties) to accrue to the donor if such income is ceded to another party. Vested income, which is ceded, may be deemed to be taxable in the donor's hands (De Koker & Williams, 2024:4.67A). The examination of a VSA of an interest in a partnership is excluded from this study. If the trustees can change the vested rights to income, a VSA may

occur, provided section 7(7) of the Act does not apply. Below is a summary of some of the possible trustees' actions as provided to the research participants which may result in a VSA.

8.2.8.8 Summary of the results for a vested trust (Section 2, Part H)

The following is a summary of the research results for a vested trust for Part H:

- If the trustees assist the beneficiaries with the sale of a vested interest at a discount, a paragraph 11(1)(*g*) disposal may occur.
- If the trustees amend the trust deed, which results in a change of the vested rights of beneficiaries with or without the consent of the beneficiaries, a paragraph 11(1)(*g*) disposal may occur.
- If it is legally possible for the trustees to attach suspensive rights to any vested assets in a trust in favour of one of the beneficiaries of a vested trust, a potential VSA may occur.
- If it is legally possible to create a usufruct over a vested asset held in a trust in favour of one of the beneficiaries of a vested trust, a possible VSA may occur.
- If the trustees of a vested trust allow one of the beneficiaries of the vested trust the exclusive use of the trust's asset for a prolonged period, a VSA may occur.
- If the trustees can amend the rights to shares attached to both ordinary shares and preference shares held in a private company by the trust, in favour of one of the beneficiary's holding shares in the same company, a possible VSA in the company may occur.
- A change in the vesting right to income (not capital income), without any compensation could result in a VSA, provided section 7(7) of the Act is not applicable.

8.2.9 Part I: The DTC's recommendations implications

What are the implications for trustees' actions if the recommendations of the Davis Tax Committee's Report on the Feasibility of Wealth Tax in South Africa (DTC, 2018:81) in relation to VSAs are implemented in South Africa on VSAs (Research

question 9)? The respondents and participants had to agree or disagree to a specific question relating to their understanding of the DTC's recommendations; followed by seven questions on whether the trustees' actions below would result in a paragraph 11(1)(*g*) disposal in terms of the Eighth Schedule if the DTC's recommendations for trusts would be implemented. The cross tabulation of all the sub-questions for part I are summarised in Table 8.12 below.

Table 8.12: Summary of the cross-tabulation results for Part I

Statement	Online Questionnaire			Interview Guide			Exact Sig. (2-sided)
	Percentage Response		Total Respondents	Percentage Response		Total Participants	
	Agree	Disagree		Agree	Disagree		
9.1 If the above DTC Recommendations were to be implemented, beneficiaries of vested trusts (with the indisputable and irrevocable vested right to a trust's taxable income or capital income), would be taxed on taxable income and capital income from such trust.	100%	0%	24	100%	0%	5	N/A
9.2.1 The trustees vest trust's capital assets (80 shares) in beneficiary A.	12,5%	87,5%	24	100%	0%	3	0,007
9.2.2. The trustees distribute trust's capital assets (80 shares) to beneficiary A.	8,3%	91,7%	24	100%	0%	3	0,003
9.2.3 The trustees sell trust assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R400 000) to beneficiary A.	12,5%	87,5%	24	66,7%	33,3%	3	0,079
9.2.4 Adding a new beneficiary to the trust.	20,8%	79,2%	24	66,7%	33,3%	3	0,156
9.2.5 Removing beneficiary A from the trust.	12,5%	87,5%	24	66,7%	33,3%	3	0,079
9.2.6 Appointing a new trustee to the trust.	0%	100%	24	0%	100%	4	N/A
9.2.7 Removing an existing trustee from the trust.	4,2%	95,8%	24	0%	100%	4	N/A

8.2.9.1 Understanding of the DTC's recommendations

Respondents and participants were requested to add any commentary explaining whether they agree with the statement below (Section 2, Part I: 9.1.1). If the DTC's recommendations were implemented, beneficiaries of vested trusts (beneficiaries with the indisputable and irrevocable vested right to both the capital and income) would be taxed on both the capital and income of such a trust. All the respondents (a mean score of 1.04 in section 5.6.9.9 in Chapter 5) and all five of the participants who answered this question (see section 6.6.9.1 in Chapter 6) agreed to the statement. One participant who had not examined the DTC's recommendations in detail, did not answer this question. The cross-tabulation results show that all the respondents (100%) and all the participants (100%) agreed with the statement. The Fisher's P-value could not be calculated, as the response percentages for this question were the same for the respondents and the participants, and no statistical variances were found.

According to participant two, the "*DTC wants the capital gains from vested trusts to be taxed in the hands of the beneficiaries;"* thus, any capital gain arising in a vested trust should therefore be taxed in the hands of the beneficiaries. SARS (2020:617) provides an example of a capital asset which is disposed in the trust, and the capital gains are taxed in the vested beneficiaries' hands. If the DTC's recommendations on trusts were to be implemented in their current format, the capital gains will still be taxed in the hands of the beneficiaries, as is the currently the case. According to participant six, the attribution rules of paragraph 80(2) have the same effect as the DTC's recommendations for vested trusts. The DTC's recommendations for vested trusts are to tax all capital gains arising from the trust in the hands of the beneficiaries.

If the DTC's recommendations on the taxation of the vested trust structure provided would be implemented, would any of the seven following trustees' actions (with the consent of the beneficiaries in writing) result in a VSA?

8.2.9.2 Vesting an asset

The trustees vest the trust's capital assets (80 shares) in beneficiary A (Section 2, Part I: 9.2.1). Most of the respondents (a mean score of 4.54 in section 5.6.9.9 in Chapter 5) disagreed, and three of the participants who answered this question (see section 6.6.9.2 in Chapter 6) agreed that the above trustees' action would result in a VSA. Three of the participants who have not examined the DTC's recommendations in detail, did not answer this question. The cross-tabulation results show that the respondents and the participants do not have the same responses for this question; 87.5% of the respondents disagreed, whereas 100% of the participants, who answered this question, agreed with this statement. The Fisher's P-value is 0.007 for this sub-question, which is less than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically significant.

The respondents may have believed the change in the vesting rights would require the beneficiaries' consent, resulting in an abandonment of an asset, which would lead to an ordinary disposal. According to participant two, "*the fact that the DTC*

wants all the vested capital gains to be taxed in the hands of the beneficiaries, would not necessarily imply that there is a strong possibility that the paragraph 11(1)(a) or (b) disposal would apply. Prior to vesting: A, B, and C each hold 40 shares. After vesting: A has 80 shares; B and C have 20 each, triggering a VSA. B and C's share values reduced by R300 000 each (20 x R15 000), while A's increased by R600 000 (40 x R15 000). All requirements for a VSA, as per paragraph 1 of the Eighth Schedule, are satisfied. The above analysis is inconclusive when the vesting rights are changed, as either an ordinary disposal or a paragraph 11(1)(*g*) disposal may occur, even if the DTC's recommendations were implemented.

8.2.9.3 Distributing an asset

The trustees distribute the trust's capital assets (80 shares) to beneficiary A (Section 2, Part I: 9.2.2). Most of the respondents (a mean score of 4.71 in section 5.6.9.9 in Chapter 5) disagreed, and three of the participants who answered this question (see section 6.6.9.3 in Chapter 6) agreed that the above trustees' action would result in a VSA. Three of the participants who have not examined the DTC's recommendations in detail, did not answer this question. The cross-tabulation results show that the respondents and the participants did not have the same responses for this question; 91.7% of the respondents disagreed, whereas 100% of the participants, who answered this question, agreed with this statement. The Fisher's P-value is 0.003 for this sub-question is less than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically significant.

The distribution of the 40 shares already vested in beneficiary A would have no CGT consequences. The respondents may have taken the view that the beneficiaries ceded or donated their vested rights to beneficiary A, before the distribution of the additional 40 shares to beneficiary A, and therefore the cession would be an ordinary disposal. The participants regarded the change in vesting rights to accommodate the distribution of the vested shares of beneficiaries B and C to beneficiary A as a value shift, as required in the definition of a VSA (paragraph 1 of the Eighth Schedule). The above analysis is inconclusive regarding the distribution of the trust's assets which results in a change of the vesting rights, as it will either

result in an ordinary disposal or a paragraph 11(1)(*g*) disposal if the DTC's recommendations are to be implemented.

8.2.9.4 Sale of an asset and vesting or distributing the capital gain

The trustees sell a trust's capital assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A (Section 2, Part I: 9.2.3). Most of the respondents (a mean score of 4.54 in section 5.6.9.9 in Chapter 5) disagreed, and two participants (see section 6.6.9.4 in Chapter 6) agreed and one disagreed that the above trustees' action would result in a VSA. The remaining three of the participants who have not examined the DTC's recommendations in detail, did not answer this question. The cross-tabulation results show that the respondents and the participants did not have the same responses for this question; 87.5% of the respondents disagreed, whereas 66.7% of the participants who answered this question, agreed with this statement. The Fisher's P-value is 0.079 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Depending on the sequence of the trustees' actions a paragraph 11(1)(*a*) disposal or a paragraph 11(1)(*g*) disposal would occur. If the sale takes place before the distribution or vesting of the capital, a paragraph 11(1)(*a*) disposal will take place, and the capital gain should be taxed in the hands of the beneficiaries (the respondents' view). If the beneficiaries' vested rights were changed to accommodate the subsequent vesting or distribution of the capital from the shares previously vested in beneficiaries B and C, to beneficiary A, then a possible VSA could occur. The interview participants may have argued that the trustees changed the vesting rights of the additional 40 shares which were previously vested in beneficiaries B and C, to allow the full R800 000 capital gain to be either vested in or distributed to beneficiary A. The sale of vested assets and the vesting or distribution of the resulting capital gain could result in either an ordinary disposal or a paragraph 11(1)(*g*) disposal if the DTC's recommendations were to be implemented.

8.2.9.5 Adding a beneficiary

Adding a new beneficiary to the trust (Section 2, Part I: 9.2.4). Most of the respondents (a mean score of 4.38 in section 5.6.9.9 in Chapter 5) disagreed, and two of the participants (see section 6.6.9.5 in Chapter 6) agreed that the above trustees' action would result in a VSA. Three of the participants who have not examined the DTC's recommendations in detail, did not answer this question. The cross-tabulation results show that the respondents and the participants did not have the same responses for this question; 79.2% of the respondents disagreed, whereas 66.7% of the participants, who answered this question, agreed with this statement. The Fisher's P-value is 0.156 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

According to participant three, the existing beneficiaries would have to consent to the addition of the new beneficiary to the trust. To facilitate the adding of a new vested beneficiary, the existing vested beneficiaries would have to forfeit some of their shares to the new beneficiary. The respondents viewed this an ordinary disposal or a donation, cession, or abandonment of an asset. The participants viewed the decrease of the existing beneficiaries' market value and the corresponding increase in the market value of the new beneficiary added to the trust, as a VSA. The addition of a new vested beneficiary to a trust would result in either an ordinary disposal or a paragraph 11(1)(*g*) disposal if the DTC's recommendations were to be implemented.

8.2.9.6 Removing a beneficiary

Removing beneficiary, A from the trust (Section 2, Part I: 9.2.5). Most of the respondents (a mean score of 4.54 in section 5.6.9.9 in Chapter 5) disagreed, and two of the participants (see section 6.6.9.6 in Chapter 6) agreed and one disagreed that the above trustees' action would result in a VSA. Three of the participants who have not examined the DTC's recommendations in detail, did not answer this question. The cross-tabulation results show that the respondents and the

participants did not have the same responses for this question; 87.5% of respondents disagreed, whereas 66.7% of the participants, who answered this question, agreed with this statement. The Fisher's P-value is 0.079 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

According to the respondents, the removal of a vested beneficiary, if legally possible, would result in either a paragraph 11(1)(*a*) or (*b*) disposal. Participant one stated that, if beneficiary A ceded his or her vested shares to beneficiaries B and C, a paragraph 11(1)(*a*) disposal would take place. The two participants who agreed with the statement viewed the decrease in the market value of beneficiary A, and the corresponding increase in the market value for beneficiaries B and C, as a VSA. The definition of a VSA (paragraph 1 of the Eighth Schedule) requires that all the beneficiaries retain an interest in a trust after the VSA occurs. Beneficiary A no longer retains an interest in the trust, which supports the respondents' view that no VSA will occur (see section 3.6.2.2 of Chapter 3). The removal of a vested beneficiary from a trust will not result in a paragraph 11(1)(*g*) disposal if the DTC's recommendations were to be implemented.

8.2.9.7 Appointing a trustee

Appointing a new trustee to the trust (Section 2, Part I: 9.2.6). All the respondents (a mean score of 5.00 in section 5.6.9.9 in Chapter 5) and the four of the participants who answered this question (see section 6.6.9.7) disagreed that the above trustees' action would result in a VSA. Two of the participants who have not examined the DTC's recommendations in detail, did not answer this question. The cross-tabulation results show that all the respondents (100%) and all the participants who answered this question (100%) disagreed with the statement. The Fisher's P-value could not be calculated, as the response percentages for this question were the same for the respondents and the participants, and no statistical variances were found.

Irrespective of whether the DTC's recommendations were implemented or not, trustees do not have any interest in the vested assets of a trust. The appointment of a new trustee to a vested trust will therefore not result in any value shifting. Without any decrease with a corresponding increase in the market value, no paragraph 11(1)(*g*) disposal can occur. The appointment of a trustee to a trust would not result in a paragraph 11(1)(*g*) disposal if the DTC's recommendations were to be implemented.

8.2.9.8 Removing a trustee

Removing a trustee from the trust (Section 2, Part I: 9.2.7). All the respondents (a mean score of 4.83 in section 5.6.9.9 in Chapter 5) and four of the participants who answered this question (see section 6.6.9.8 in Chapter 6) disagreed that the above trustees' action would result in a VSA. Two of the participants who have not examined the DTC's recommendations in detail, did not answer this question. The cross-tabulation results show that all the respondents (95,8%) and all the participants (100%) who answered this question, disagreed with the statement. The Fisher's P-value is 1 for this sub-question, which is greater than 0.05; and demonstrates that the comparison between the respondents' online questionnaire responses and the participants' interview responses is statistically insignificant.

Irrespective of whether the DTC's recommendations were implemented or not, trustees do not have any interest in the vested assets of a trust. The removal of trustee from the vested trust will therefore not result in any value shifting. Without any decrease with a corresponding increase in the market value, no paragraph 11(1)(*g*) disposal can occur. The removal of a trustee from a trust would not result in a paragraph 11(1)(*g*) disposal if the DTC's recommendations were to be implemented.

8.2.9.9 Summary of the results for a vested trust (Section 2, Part I)

The following is a summary of the research results for a vested trust for Part I:

- The DTC's recommendations for vested trusts are to tax all capital gains arising from the trust in the hands of the beneficiaries (P-value not applicable).
- When the trustees change the vesting rights or distributing an asset to a beneficiary in such a way that it requires an altering the vesting rights of the beneficiaries produces inconclusive results regarding whether this constitutes a paragraph 11(1)(*g*) disposal if the DTC's recommendations are adopted (P-value < 0.05).
- If the trustees change the vesting rights of the beneficiaries or distribute the vested trust's assets, which may require a change in the vesting rights, it may result in either an ordinary disposal or a paragraph 11(1)(*g*) disposal if the DTC's recommendations are adopted (P-value < 0.05).
- The sale of vested assets and the vesting or distribution of the capital gain may result in either a paragraph 11(1)(*a*) disposal or 11(1)(*g*) disposal if the DTC's recommendations are implemented (P-value > 0.05).
- The addition of a new vested beneficiary to the vested trust could result in a paragraph 11(1)(*g*) disposal or an ordinary disposal if the DTC's recommendations are implemented (P-value > 0.05).
- The removal of a beneficiary from a vested trust will not result in a paragraph 11(1)(*g*) disposal if the DTC's recommendations are implemented (P-value > 0.05), but based on Chapter 3, section 3.6.2.2, the researcher concludes that no paragraph 11(1)(*g*) disposal occurs.
- The appointment or removal of trustees to and from a trust will have no CGT consequences if the DTC's recommendations are implemented (P-value not applicable).
- These conclusions for the trustees' actions are confirmed in section 3.7.3 of Chapter 3 and are the same as in section 8.2.7.8 above.

8.2.10 Part J: Additional comments

Are there any additional relevant comments which may be applicable to VSAs in trusts (Research question 10)? Other comments relating to VSA in trusts provided by the respondents (see section 5.6.10 Chapter 5) and participants (see section

Chapter 6.6.10 in Chapter 6) regarding vested trusts are summarised in Table 8.13 below.

Table 8.13: Summary of additional comments for Part J

Comments	Subject	Summary of findings
8.2.10.1	Specific and vestiing formula	The vesting requirements may allow trustees to sell and reinvest the proceeds of sale of assets, provided the trust capital is distributed to the beneficiaries in accordance with a prescribed formula, The beneficiaries may sell or purchase a vested interst in such trust.
8.2.10.2	Amending trust deeds	The beneficiaries who have accepted benefits from a trust are required to consent to changes to the trust deed. A court order may also be required to amend a trust deed.
8.2.10.3	Trustees' resolutions	Trustees' resolutions may result in discretionary trust's assets being vested in a beneficiary, and are important in the management of the trust' affairs. Trustees resolutions can be reversed.
8.3.10.4	Significance of beneficiaries's consent	What are the implications on VSA if the beneficiaries consent to a variation of the trust deed to allow for a change in vesting rights or cession of vesting rights on VSA
8.2.10.5	Repudiation of benefits	If a beneficiary repudiates benefits from a trust no CGT consequences can arise.
8.2.10.6	General Anti-tax avoidance rules	GAAR are also applicable to vested trusts .
8.2.10.7	Tax compliance	Tax compliance of vested trusts are also important for vested trust.

8.2.10.1 Specific and formula vesting

Participant three explained that analysing the trust deed is necessary to determine the type of trust and nature of vesting. In a non-discretionary vested trust, trustees hold assets for specific beneficiaries (e.g., farm A goes to Jannie, farm B to Piet). In a discretionary-vested trust, trustees have limited discretion to sell assets, with proceeds or vested capital distributed to beneficiaries according to a set formula or percentage. In this study, to facilitate the calculations of the changes in the market value in the trust and allow the sale of assets in the examples examined, the trust assets were vested in terms of a formula. It should be noted that both specific vesting and vesting by means of a formula are included within the scope of vested rights in a vested trust as covered in this study.

8.2.10.2 Amending trust deeds

Participant three stated that, according to case law, if the beneficiaries have accepted benefits from a trust, the founder, the trustees, and the beneficiaries must consent to the amendments of trust deeds. Participant six described an amendment to a trust deed as follows: **"***In practice an adopted child had to be added as a beneficiary to a trust that was drawn up over a hundred years ago. The trust deeds*

in those days did not include adoptive children as a beneficiary of the trust. Only blood line descendants [sic] were included as beneficiaries of the trust. The trust deed did not have any variation clause, so a High Court order had to be obtained, and all the beneficiaries had to sign for the amendment of the trust deed to accept the inclusion of the adoptive child as a beneficiary." From this example the variation of a trust deed can be carried out if the trust deed contains a variation clause and the beneficiaries' consent to the variation. The participant did state that if the beneficiaries had accepted benefits in the vested trust described above, they would have to approve to the amendments of the trust deed. The court found the exclusion of adopted beneficiaries to be unfair**.** Van Zyl (2019:726) stated that a vested beneficiary cannot be deprived of any vested interests in a trust without agreeing thereto or receiving compensation. Participant six also stated that, *"currently trust deeds all have a variation clause allowing the trustees various degrees of flexibility to alter the trust deed. Also, due to the ever-changing legislation, it would be necessary for the trustees to have a certain amount of flexibility in the drafting of trust deeds."*

Both the online questionnaire and interview guide stated that trustees could amend the vested trust deed where possible to facilitate the trustees' actions:

- Trust deed variation*: "Assume that all the specific trustees' actions which are investigated are permissible within the parameters of the trust deeds and when necessary, with the trust deed amendments"* (General Information).
- Beneficiaries' consent: "W*hen necessary, you may assume that all the beneficiaries have consented in writing to the trustees' actions and all legal formalities are met, unless stated to the contrary*" (Section 2, after the definition of a vested trust). A full analysis of trust deed amendments is outside the scope of the study, and it is assumed that the trust deeds can be amended for most of the trustees' actions covered in this study.

8.2.10.3 Trustees' resolutions

Participant six described the importance of trustees' resolutions as follows*: "The compliance requirements imposed by SARS now make it more important than ever to keep records of all trustees' resolutions."* According to participant five, *"a resolution can be varied if all the trustees agree to the variation of the resolution. Once the beneficiaries have accepted a distribution, the resolution cannot be reversed. A distribution reflected in the Annual Financial Statements (the AFS), and the AFS are signed by the trustees would be difficult to reverse. Once the beneficiaries have accepted any assets which has [sic] been distributed to them, the resolution or vesting cannot be reversed."* This is in line with the discussion of participant one who stated that for a paragraph 11(1)(*d*) vesting disposal to take place, *"the vesting had to be certain which would include a certain date for the distribution or the delivery of the asset" and* confirmed by Nel (2024:SAICA Tax Business Breakfast). A resolution recording of the trustees' actions before the actual delivery of an asset to the beneficiary, could be reversed. To assist trustees and tax practitioners with tax compliance and the preparation and recording of CGT consequences of trustees' actions, further research may be required.

8.2.10.4 Significance of beneficiaries' consent

When discussing a change of vesting rights resulting in a VSA, participant five commented that, **"***if the beneficiary does not know about the trustees action it will be value shifting. It may not be legally carried out, but a value shifting arrangement will occur*," which leads to the question: Is there any relevance if the beneficiaries' consent were acquired when it comes to the analysis of a VSA? One may argue that, as soon as a beneficiary consents to a change in his or her vesting rights, the beneficiary may have relinquished or abandoned an asset, leading to a disposal in terms of paragraph 11(1)(*b*) and not a paragraph 11(1)(*g*) disposal of the Eighth Schedule. In the only example of a VSA provided by SARS (2020:776), it demonstrates a VSA whereby a father's shares (sole shareholder) in a private company are issued at a discounted price to his daughter. One can speculate if the father's consent was necessary for the arrangement to take place. Section 42 of the Co Act No. 71 of 2008 requires that a special resolution be taken for shares to be

issued to a related party to the company or a director of the company. The father in this example would have to vote on the issue of the shares. The father could also be the sole director of the company and be responsible for the entire shares issue process.

In his master's thesis titled "*Reconciling the taxation of partnerships in South Africa relative to its legal recognition*," Haupt (2019:35), described the renegotiation of a profit-sharing ratio in a partnership as a possible VSA, since the partners would have to at least agree to the change in profit-sharing ratio. From the above discussion of the two examples, it is evident that, if the beneficiaries of a trust agree or tacitly agree to an arrangement, it would not necessarily be excluded from the definition of a VSA. A detailed comparison of the taxation of trusts to partnerships and companies is outside the scope of this study.

8.2.10.5 Repudiation of vested interests

Participant three stated that, based on case law, if a beneficiary repudiates a vested interest in a deceased estate, the beneficiary will not be subject to CGT. Botha (2023), in a document titled "SAIT News and Opinions New Binding Private Ruling (BPR 151) Tax Consequences of the Renunciation of an Inheritance" confirmed the SARS Binding Private Ruling 151 that a repudiation of a vested interest from a deceased estate will not attract CGT or donations tax consequences. The position is different when a beneficiary repudiates a vested interest in an *inter vivos* trust, where both CGT and donations tax consequences could be applicable (Van Zyl, 2019:726).

8.2.10.6 GAAR

When discussing the trustees changing the vesting rights in a vested trust, participant two mentioned that GAAR may also apply to such trustees' actions. In the Meyerowitz v. CIR 1963 (3) SA 863(A) (25 SATC 287) case, the cession of income from an individual to a discretionary trust was subject to the GAAR (see section 7.2.10.4 in Chapter 7). GAAR could also apply to vested trusts. According to the definition of tax for the purposes of GAAR in section 80L of the Act, all taxes

administered by the Commissioner are included within the ambit of GAAR which would therefore include any capital gains emanating from the Eighth Schedule of the Act. Any changing of vested rights attached to capital assets may be subject to GAAR. This study excludes a full comparison of a VSA to GAAR for vested trusts.

8.2.10.7 Tax compliance

During the Tax Faculty Webinar on Completing ITR12 Income Tax Returns for Trusts (March 2023), Van der Spy reported that only 12% to 14% of trusts were tax compliant in 2015. A detailed breakdown regarding the categories of non-compliant trusts was not provided. Numerous factors may contribute to tax non-compliance, with complex tax legislation such as VSAs potentially playing a role (see section 7.2.10.2 in Chapter 7). Establishing a framework to address VSAs within trusts would support trustees and tax practitioners in accurately disclosing the implications of VSAs, thereby enhancing tax compliance among trusts.

8.2.10.8 Summary of the results for a vested trust (Section 2, Part J)

The following is a summary of the research results for a vested trust for Part J:

- Discretionary-vested trust and collective investment trusts are excluded from this study.
- In the two trust structures examined in this study, it was assumed that the trustees could amend the trust deeds, and if required, the beneficiaries would consent thereto.
- Even if the parties to a VSA agree or tacitly agree to an arrangement, it could still result in a VSA.
- The validity of trustees' resolutions, and in particular resolutions which vest an asset in a trust in beneficiaries, could be a topic for future research and could assist all stakeholders with tax compliance matters for trusts.
- A comparative study between a VSA and GAAR could be a topic for future research.

- To assist all stakeholders with tax compliance, the SARS tax guides on trusts should provide guidance on a VSA regarding trusts.

8.3 COMPARATIVE ANALYSIS OF SA AND FOREIGN NON-DISCRETIONARY TRUSTS

Are there examples of VSAs in the foreign revenue guides for trusts in Australia and the UK that can apply to South African trusts (Research question 11)? The analysis follows the structure of Parts A, B, C, D, E, F, and H which are used as labels for the research questions, the online questionnaire, and the interview guides. These sections align with the research questions (Chapter 1, section 1.5.2), the Australian Interview Guide (Appendix C: sections 3 and 4), and the UK Interview Guide (Appendix D: section 3). In Parts A and C, only donation sub-questions relevant to tax legislation in both countries were included.

Foreign interview results for trusts in Australia and the UK are compared with trust results for SA trusts' cross-tabulation of quantitative and qualitative findings. For SA trusts, acceptance or rejection of the null hypothesis is consistent between respondents and participants. Each table summarizes the sub-question, notes foreign participant consensus, and reports combined the SA online questionnaire and participant interview guides, data with Fisher's exact value (see section 4.1.5.4, Chapter 4).

Table 8.14: Comparative analysis of foreign and SA non-discretionary trusts (Part A)

STATEMENT	Australia Fixed Trust	Australia Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust	
				Respondents and Participants	Null Hypothesis
1.1 The disposal of a capital asset of a vested trust could result in either a capital gain or a capital loss.	AGREE	AGREE	AGREE	AGREE	ACCEPT
1.2 The revenue or capital nature of a vested trust's assets or proceeds of such trust's assets can be ascertained by the tests developed in case law.	AGREE	AGREE	AGREE	AGREE	ACCEPT
1.3 A capital asset of a vested trust for capital gains purposes, would be the same as a revenue asset for income tax purposes.	DISAGREE	DISAGREE	DISAGREE	DISAGREE	ACCEPT

The foreign participants for foreign non-discretionary trusts, as well as the SA respondents and participants for SA vested trusts, agreed that for both foreign and SA non-discretionary trusts, selling a capital asset may result in a capital gain or

loss, with case law determining the revenue nature of trust proceeds from such assets. However, both groups disagreed that a capital asset would be treated the same as a revenue asset for CGT purposes. Acceptance of the null hypothesis for all sub-questions in part A indicates that the SA respondents and participants had consistent responses concerning SA vested trusts.

Table 8.15: Comparative analysis of foreign and SA non-discretionary trusts (Part B)

STATEMENT	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust	
				Respondents and Participants	Null Hypothesis
2.1 The trustees vest capital assets (80 shares) in beneficiary A.	DISAGREE	DISAGREE	DISAGREE	DISAGREE	ACCEPT
2.2 The trustees distribute capital assets (80 shares) to beneficiary A.	DISAGREE	DISAGREE	DISAGREE	DISAGREE	ACCEPT
2.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	DISAGREE	DISAGREE	DISAGREE	DISAGREE	ACCEPT
2.4 Adding a new beneficiary to the trust.	DISAGREE	DISAGREE	DISAGREE	DISAGREE	ACCEPT
2.5 Removing beneficiary A from the trust.	DISAGREE	DISAGREE	DISAGREE	DISAGREE	ACCEPT
2.6 Appointing a new trustee to the trust.	DISAGREE	DISAGREE	DISAGREE	DISAGREE	ACCEPT
2.7 Removing a trustee from the trust.	DISAGREE	DISAGREE	DISAGREE	DISAGREE	ACCEPT

The foreign participants disagreed for foreign non-discretionary trusts and the SA respondents and participants for SA vested trusts that vesting or distributing capital assets, selling a capital asset and distributing the resulting capital gain to beneficiary A, and the adding or removal of beneficiaries or the appointment or removal of trustees would result in gross income which is exclusive of any capital gain calculation. Acceptance of the null hypothesis for all sub-questions in part B indicates that the SA respondents and participants had consistent responses concerning SA vested trusts.

Table 8.16: Comparative analysis of foreign and SA non-discretionary trusts (Part C)

Statement	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust	
				Respondents and Participants	Null Hypothesis
3.1.1 If beneficiaries donate of a vested interest, from one beneficiary to another beneficiary, donations tax could be applicable.	N/A	N/A	N/A	AGREE	ACCEPT
3.1.3 If a donation of a vested interest from one beneficiary to another beneficiary at full market value, a disposal in terms of paragraph of 11 (1) (a) of the Eighth Schedule would occur.	INCONCLUSIVE	AGREE	AGREE	AGREE	ACCEPT
3.1.4 if a donation of a vested interest from one beneficiary to another beneficiary at an inadequate value, a disposal in terms of paragraph of 11(1) (g) of the Eighth Schedule would occur.	INCONCLUSIVE	AGREE	AGREE	AGREE	ACCEPT

Both the Australian and UK participants confirmed that no gift (donations) tax is applicable when beneficiaries donate vested interest from one beneficiary to another beneficiary. The Australian participant was uncertain if a donation of a vested interest in an Australian fixed trust from one beneficiary to another beneficiary would result in a value shift, the analysis confirmed that the Australian tax jurisdiction is complex requiring ownership and control exercised for value shifting (see section 3.13.1 of Chapter 3). The foreign trust participants agreed for foreign Australian fixed unit and the UK fixed trust and the SA respondents and participants for SA vested trust that if one beneficiary donates a vested interest to another beneficiary capital gain or a VSA would occur. Acceptance of the null hypothesis for all sub-questions in part C indicates that the SA respondents and participants had consistent responses concerning SA vested trusts.

Table 8.17: Comparative analysis of foreign and SA non-discretionary trusts (Part D)

Statement	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust	
				Respondents and Participants	Null Hypothesis
4.1 The trustees vest capital assets (80 shares) in beneficiary A.	AGREE	AGREE	AGREE	AGREE	ACCEPT
4.2 The trustees distribute capital assets (80 shares) to beneficiary A.	AGREE	AGREE	AGREE	AGREE	ACCEPT
4.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	AGREE	AGREE	AGREE	AGREE	ACCEPT
4.4 Adding a new beneficiary to the trust.	DISAGREE	DISAGREE	AGREE	AGREE	ACCEPT
4.5 Removing beneficiary A from the trust.	DISAGREE	DISAGREE	AGREE	AGREE	ACCEPT
4.6 Appointing a new trustee to the trust.	DISAGREE	DISAGREE	DISAGREE	DISAGREE	ACCEPT
4.7 Removing a trustee from the trust.	DISAGREE	DISAGREE	DISAGREE	DISAGREE	ACCEPT

The foreign trust participants for foreign non-discretionary trusts, as well as the SA respondents and participants for SA vested trusts, agreed that for both foreign and SA vested trusts, vesting or distributing a discretionary trust asset to a beneficiary, selling a capital asset may result in a capital gain or loss would result in an ordinary disposal. The UK participant for non-discretionary trusts, along with SA respondents and participants for SA vested trusts, agreed that adding or removing a beneficiary to a non-discretionary trust counts as an ordinary disposal. However, the Australian trust participant disagreed.

The foreign trust participants for foreign non-discretionary trusts, as well as the SA respondents and participants for SA vested trusts, disagreed that for both foreign and SA vested trusts appointing or removing either a trustee to or from a trust would

result in an ordinary disposal. The acceptance of the null hypothesis for the cross-tabulation results indicates consistent findings between the SA respondents and participants for SA vested trusts.

Table 8.18: Comparative analysis of foreign and SA non-discretionary trusts (Part E)

Statement	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust	
				Respondents and Participants	Null Hypothesis
5.1 A disposal of a vested interest in a trust's capital asset by a beneficiary, could result in a capital gain or a capital loss for the beneficiary.	AGREE	AGREE	AGREE	AGREE	ACCEPT

The foreign trust participants for foreign non-discretionary trusts, as well as the SA respondents and participants for SA vested trusts, agreed that for both foreign and SA vested trusts, a disposal of a vested interest in a trust could result in a capital gain or loss for the beneficiary. Acceptance of the null hypothesis for the sub-question in part E indicates that SA respondents and participants had consistent responses concerning SA vested trusts.

Table 8.19: Comparative analysis of foreign and SA non-discretionary trusts (Part F)

Statement	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust	
				Respondents and Participants	Null Hypothesis
6.1 The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	AGREE	AGREE	AGREE	AGREE	ACCEPT
6.2 A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	AGREE	AGREE	AGREE	AGREE	ACCEPT
6.3 The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before any of the seven trustees' actions mentioned previously can be measured.	AGREE	AGREE	AGREE	AGREE	ACCEPT

The foreign trust participants for foreign non-discretionary trusts, as well as the SA respondents and participants for SA vested trusts, agreed that for both foreign and SA vested trusts, the market value before and after the trustees' actions could be measured, a possible reduction in market value could be measured and the base cost of the beneficiaries' interest could be measured before the trustees' actions. Acceptance of the null hypothesis for all the sub-questions in part F indicates that SA respondents and participants had consistent responses concerning SA vested trusts. Despite the possibility of measuring the market value and base cost for both

an Australian fixed and fixed unit trust, the measurement of the capital gain resulting from a value shift in the Australian context differs from the measurement of a capital gain resulting in a VSA in the SA context (see the discussions in sections 3.13.1.2 and 3.13.1.3 of Chapter 3).

Table 8.20: Comparative analysis of foreign and SA non-discretionary trusts (Part G)

Statement	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust	
				Respondents and Participants	Null Hypothesis
7.1 The trustees vest capital assets (80 shares) in beneficiary A.	DISAGREE	DISAGREE	DISAGREE	INCONCLUSIVE	REJECT
7.2 The trustees distribute capital assets (80 shares) to beneficiary A.	DISAGREE	DISAGREE	DISAGREE	INCONCLUSIVE	REJECT
7.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	DISAGREE	DISAGREE	DISAGREE	INCONCLUSIVE	ACCEPT
7.4 Adding a new beneficiary to the trust.	AGREE	AGREE	AGREE	INCONCLUSIVE	ACCEPT
7.5 Removing beneficiary A from the trust.	AGREE	DISAGREE	DISAGREE	INCONCLUSIVE	REJECT
7.6 Appointing a new trustee to the trust.	DISAGREE	DISAGREE	DISAGREE	DISAGREE	ACCEPT
7.7 Removing a trustee from the trust.	DISAGREE	DISAGREE	DISAGREE	DISAGREE	ACCEPT

The foreign trust participants for foreign non-discretionary trusts, along with the SA respondents and participants for SA vested trusts, both disagreed that appointing or removing a trustee from a non-discretionary trust would result in a VSA.

The foreign trust participants also generally maintained that changing fixed rights to allow for the vesting or distribution of a trust asset, or removing a beneficiary, would not typically trigger value shifting in foreign non-discretionary trusts except in the case of an Australian fixed trust. However, these trust participants agreed that adding a beneficiary to a non-discretionary trust can give rise to value shifting and CGT events in both foreign tax jurisdictions.

On the other hand, SA respondents and participants for SA vested trusts did not reach a clear consensus regarding whether changes in vesting rights, selling a trust's capital asset and distributing the capital gain or adding or removing a beneficiary would lead to a VSA. The acceptance or rejection of the null hypothesis among SA respondents and participants reflect the complexity and the diversity of interpretations present within these groups. Acceptance of the null hypothesis indicated agreement among respondents regarding the tax consequences of trustees' actions, whereas its rejection highlighted areas of disagreement, often due

to ambiguous or unique trust scenarios where tax law might be subject to varying interpretations. This divergence where foreign participants disagreed and SA respondents and participants were inconclusive about whether changes in vesting rights, disposal of a capital asset, or the removal of a beneficiary would trigger a value shifting CGT event may stem from the perception that these events constitute ordinary disposals rather than VSAs.

The doctrinal analysis of the definition of a VSA in the SA context would preclude a VSA when the beneficiary is removed from a trust and no longer retains an interest in a trust. If both an ordinary disposal and a VSA occurs simultaneously the definition of a VSA suggests that an ordinary disposal precludes a VSA.

Part H: Comparison of foreign non-discretionary and SA vested trust results

- The foreign trust participants for foreign non-discretionary trusts did not provide any additional examples of trustee's actions which could result in a VSA.
- The discussion in section 3.13.1.2 of Chapter 3 of a UK sale and leaseback which could result in a VSA in SA context.
- The discussion in section 3.12.1 of Chapter 3 also includes direct value shifts in loan interests in a trust in the Australian GVSR. Section 7C(1)(*a*) and (*b*) of the Act would result in donations tax in the SA context if the interest charged on loan directly or indirectly to SA trusts is below the prescribed interest rate in the SA context.

8.4 DISCUSSION AND SUMMARY: SA AND FOREIGN NON-DISCRETIONARY TRUSTS

The conclusions on whether the research questions and results from the SA online questionnaire and SA participant interviews adequately meet the research objectives for each part of the research instruments (parts A to J) for vested trusts will be discussed next after providing the research objectives.

8.4.1 Research objectives

The primary and secondary research objectives (see section 1.5 in Chapter 1 are presented below for ease of reference. The primary research objective for this study was to determine, from the perceptions of the respondents and participants, how CGT could be triggered by a VSA when trustees vest or distribute a trust asset to one of the beneficiaries of a trust used in a South African estate-planning exercise. The secondary research objectives (see section 1.5 in Chapter 1) formulated for this study are the following:

- To determine whether the trustees' action of the sale of a capital asset and the vesting or distribution of the capital gain in or to a beneficiary of a trust would result in a VSA from the perspective of the respondents and participants who participated in this study (1).
- To determine whether the trustees' action of adding additional beneficiaries to the trust would result in a VSA from the perspective of the respondents and participants who participated in this study (2).
- To determine whether the trustees' action of removing beneficiaries from a trust would result in a VSA from the perspective of the respondents and participants who participated in this study (3).
- To determine whether the trustees' action of appointing new trustees to the trust would result in a VSA from the perspective of the respondents and participants who participated in this study (4).
- To determine whether the trustees' action of removing trustees from the trust would result in a VSA from the perspective of the respondents and participants who participated in this study (5).
- To determine whether the trustees' action of donating a beneficiary's interest in a trust (with the consent of the beneficiaries) would result in a VSA from the perspective of the respondents and participants who participated in this study (6).
- To determine if other trustees' actions, not covered in the primary or secondary research objectives 1 to 6, would result in a VSA from the perspective respondents and participants who participated in this study (7).

- To determine whether the recommendations of the DTC's Report on the Feasibility of Wealth Tax in South Africa (DTC, 2018:81) would have any impact on a VSA from the perspective of the respondents and participants who participated in this study (8).

8.4.2 Conclusion

In the conclusions, which follow the research questions, the ten sections of the research instruments used, are first provided before discussing the results and concluding on whether the research objectives have been met related to SA vested trusts in sections 8.4.2.1 to 8.4.2.10 below. Section 8.4.2.11 addresses research question 11 and concludes on the foreign value shifting alternatives.

8.4.2.1 Nature of a trust asset (Part A)

How is the nature of trusts' assets determined? Is there any similarity in the definition of assets or property for income tax, donations tax, CGT, and estate duty purposes? Both the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 8.4.1 above) are examined in part A.

The nature of a trust's assets can be sufficiently determined for income tax, donations tax, CGT, and estate duty purposes, which may indicate that such assets are susceptible to a VSA. The high P-values of 1 (P-value > 0.05) for all the sub-questions in part A show a strong agreement between both the online questionnaire and the participants' results for vested trusts in part A.

The capital nature of a vested trust's asset can be determined using both case law and current legislation. The trustees or beneficiaries' disposal of a capital asset in a trust or a vested interest in a trust could result in a capital gain or a loss. The comparison of the definition of an asset and property for CGT, donations tax and estate duty purposes also indicated that a vested beneficiary's right to an asset held in a trust could be defined as an asset for CGT purposes. A capital asset is one of the core elements for CGT events discussed in section 1.1.2 of Chapter 1. The primary research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7

are adequately addressed for part A. The capital nature of both an asset and a vested interest in a trust can be determined by case law for CGT purposes and therefore may have VSA consequences.

8.4.2.2 Income tax (excluding capital gains) implications (Part B)

Do any of the trustees' actions result in any income tax implications? Both the main and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 8.4.1 above) are examined in part B, to determine if any of the trustees' actions result in gross income tax (excluding capital gains) implication, which would exclude the possibility of a VSA.

From both the analysis of the respondents' and the participants' results it is evident (P-values > 0.05, or not applicable) that no income tax implications will occur because of the trustees' actions. None of the seven trustees' actions examined would result in a revenue receipt or accrual as the trust's assets are of a capital nature (in accordance with the definition of 'gross income' according to the Act, section 1). Only if the trustees were to change the nature of the trust's assets by converting a capital asset into trading stock, for example, may any subsequent trustees' action related to the trading stock have gross income implications (Natal Estates Ltd v. CIR (1975 A) (37 SATC 193) (see section 2.2 in Chapter 2). The primary research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part B. The trustees' actions cannot be excluded from a VSA, on the basis that the trustees' actions related to a capital asset will result in gross income.

8.4.2.3 Donations tax implications (Part C)

Do any of the trustees' actions or consent of the beneficiaries result in any donations tax implications? Both the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 8.4.1 above) are examined in part C.

A reduction in a beneficiary's interest in a trust, which is like a donation, is necessary for a VSA to occur. From both the analysis of the respondents' and the participants'

results it is evident (P-values > 0.05) that donations tax implications may be applicable for some of the trustees' actions regarding vested trusts. The respondents and the participants have different views on whether the donation of a vested interest, without the consent of the beneficiaries, would result in donations tax implications (P-values < 0.05). The participants' view was that the beneficiaries' consent would be required for a donation to take place. The respondents' view was that if vested interests are donated without the consent of the beneficiaries, such *ultra vires* transaction may still have donations tax implications from the trust's perspective. A donation of a vested interest meets the impoverishment test as described in the SARS (2023a.12) and could be included in the description of a paragraph 11(1)(*a*) disposal. At the same time, a donation of a vested interest also mirrors the value shifting as described in the definition of a VSA (paragraph 1 of the Eighth Schedule), namely a reduction in the market value for the donor (beneficiary) and a corresponding increase in the market value for the donee (beneficiary). The Eighth Schedule's parenthesised exclusion of paragraph 38 donations at the full market value from the definition of a VSA is to facilitate the measurement of the proceeds of a VSA in terms of paragraph 35(2), which is based on the beneficiaries' reduction in the market value.

Any trustees' action which results in a change in the vesting rights between beneficiaries would be deemed to take place at market value, and the result will have donations tax implications. As the changes in vesting rights are not necessarily within the normal parameters of the trust, the section 56(1)(l) exemption from donations tax may not be applicable when vested rights are donated between beneficiaries (Income Tax Case No. 1840 (72 SATC 79). Both the respondents and the participants strongly disagreed (P-values not applicable) that the appointment or removal of trustees to or from a vested trust will result in any donations tax implications. The trustees in the trust structure examined had no rights in the trust's assets Some of the trustees' actions analysed may have donations tax implications, which indicates a potential value shifting as described in the definition of a VSA (paragraph 1 of the Eighth Schedule). These trustees' actions may also result in a paragraph 11(1)(*a*) disposal instead of a VSA disposal. The main research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part C.

8.4.2.4 Ordinary disposal implications (Part D)

Do any of the trustees' actions fall under paragraph 11(1)(*a*) to (*f*) of the Eighth Schedule? Both the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 8.4.1 above) are examined in part D.

If an ordinary disposal takes place in terms of paragraph 11(1)(*a*) to (*f*) of the Eighth Schedule, then the possibility of a VSA, as required in the research objectives, falls away. From both the analysis of the respondents' and the participants' results it is evident (P-values > 0.05, or not applicable) that the vesting, distribution or the sale of capital assets and the vesting or distribution of a capital gain could result in an ordinary disposal. The adding or removal of beneficiaries to and from a trust could result in an ordinary disposal. The appointment or removal of trustees to and from a trust will not result in an ordinary disposal.

The wording of paragraphs 11(1)(*a*) to (*f*) are written broadly to include a large ambit of trustees' actions such as an abandonment, relinquishment, forfeiture, cession, or a donation of an asset, which actions are evident when one of the beneficiary's rights is reduced when the vesting rights are changed to facilitate the transactions described in all of the trustees' actions examined, except when it comes to the appointment or removal of trustees to or from a trust. The sale of a trust's assets falls within the ambit of a paragraph 11(1)(*a*) disposal. The trustees would not normally be permitted to unilaterally change the vesting rights of beneficiaries without the consent of the beneficiaries. If the change in vesting rights is carried out by means of a cession agreement, using the legal maxim *unius est exclusio alterius*, sub-paragraph 11(1)(*a*), which includes a cession, would clearly describe the trustees' actions, which includes the agreement of a cession of the beneficiaries' vested rights. Any trustees' actions which involve a voluntary change in the vesting rights between beneficiaries could be described as an ordinary disposal. The primary research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part D, as some of the trustees' actions have been identified as an ordinary disposal, which reduces the possibility of a VSA occurring for a vested trust.

8.4.2.5 Vested interest in a trust (Part E)

Are the beneficiaries' interests in a trust, as defined in the definition of a VSA, considered to be a capital asset of the beneficiary? Both the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 8.4.1 above) are examined in part E.

A beneficiary's interest in a trust could be considered a capital asset of a beneficiary and have VSA implications. From both the analysis of the respondents' and the participants' results it is evident (P-values > 0.05) that a vested interest in a trust could be a capital asset of a beneficiary and therefore be subject to a VSA.

The trustees control and manage the trust's assets as owners of the trust's assets, with the obligation to distribute the trust's assets to specified beneficiaries at a future date. The vested rights are attached to specified assets held in the trust, in terms of either a clause contained in the trust deed, or an irrevocable resolution passed by the trustees of the trust. A vesting right to a trust's assets gives a beneficiary a personal right to a trust's assets, and personal rights are included as an asset for CGT purposes, according to SARS (2020:49). The primary research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part E. A vested interest could be included in the definition of an asset for CGT purposes (paragraph 1 of the Eighth Schedule). A vested interest in a trust may be a capital asset for CGT purposes and may therefore be susceptible to a VSA.

8.4.2.6 Measuring a VSA (Part F)

What is meant by "value shifting," and how is it measured in the context of trusts? How are the proceeds and base cost determined in a VSA? Both the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 8.4.1 above) are examined in part F.

The proceeds (paragraph 35(2)) and the base cost (paragraph 23(2)) of a VSA should be measurable for each of the trustees' actions when such actions take place. From both the analysis of the respondents' and the participants' results it is

evident (P-values > 0.05, or not applicable) that the market value and the base cost of a vested interest could be measured before the VSA occurs, and that a reduction in the market value in the vested beneficiaries' interest can be measured before and after the trustees' actions.

A vested beneficiary has a measurable value attached to a vested interest in a trust which can be donated (see section 8.3.2.3 above). It is therefore possible that the trustees' actions may result in a reduction in the market value of a vested interest for a donor (beneficiary), with an increase in the market value for the donee (beneficiary). A vested beneficiary's base cost is the same as that of the base cost when the trust acquires the asset for the first time. If the vesting is because of a previous resolution passed by the trustees, the base cost for the vested beneficiary is equal to the market value of the vested asset held in the trust, at the date vesting takes place. As discussed in section 1.1.2 of Chapter 1 both the proceeds and base cost of an asset should be measurable for a CGT event, and therefore also a VSA event. The primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part F, as both the possible proceeds (paragraph 35(2)) and the base cost (paragraph 23(*g*)) of a vested interest for a VSA could be measured, resulting from the trustees' actions examined in this study.

8.4.2.7 Value shifting disposal implications (Part G)

Do any of the trustees' actions meet the definition of a VSA, and does it fall under paragraph 11(1)(*g*) of the Eighth Schedule? Both the primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 (see section 8.4.1 above) are examined in part G.

All the elements of the definition of a VSA should be present before any of the trustees' actions could result in a VSA. From both the analysis of the respondents' and the participants' results it is evident (P-values are either greater than or less than 0.05) that for some specific trustees' actions examined, both the participants and the respondents had the same views for some questions, whilst their views pertaining to other questions have differed.

The appointment or removal of a trustees to or from a trust will not result in a VSA (P-value > 0.05). The sale of a trust's asset could result in either an ordinary disposal or a VSA disposal, unless the vesting rights were amended before the sale occurred to facilitate the vesting or distribution of a trust asset in a manner which differs from the original vesting rights of the trust's assets. A change in the vesting rights of the beneficiaries could meet all the requirements of the definition of a VSA, except when a beneficiary is removed from a trust and no longer retains an interest in a trust. When trustees vest or distribute a vested asset not in accordance with the vesting rights, as determined in the trust deed or in an irrevocable resolution of the trustees specifying the vested rights, a possible VSA arises. The low P-values (P-value < 0.05) indicate that either an ordinary disposal or a VSA could result when the vesting rights are voluntarily changed. If the trustees change the vesting rights without the consent of the beneficiaries, a VSA, and not an ordinary disposal, could occur. However, case law requires the beneficiaries' consent to any changes in vesting rights, which may provide further evidence that an ordinary disposal such as an abandonment, ceding, donation, or relinquishment of an asset has taken place. On the other hand, if the beneficiaries do consent to the change in the vesting rights, it does not necessarily exclude the possibility of a VSA occurring (see section 8.2.10.4 above).

When both possibilities of an ordinary disposal and a VSA exist from the same trustees' action, an ordinary disposal takes place, as SARS (2020:776) indicates that VSAs are designed to include those transactions which are not considered as an ordinary disposal, despite the uncertainty which may arise when the same trustees' action can be equally described as both an ordinary disposal and a VSA. The primary and the secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part G. Whether the beneficiaries' consent was obtained or not for the above trustees' action, a potential VSA could occur (see section 8.2.10.4 above). Only if the trustees' actions result in changes in the vesting rights of beneficiaries, excluding the removal of a vested beneficiary from a trust and an ordinary disposal, a potential VSA may occur.

8.4.2.8 Other trustees' actions (Part H)

Do any of the trustees' actions meet the definition of a VSA, and does it fall under paragraph 11(1)(*g*) of the Eighth Schedule? The respondents and the participants provided additional examples of trustees' actions which may result in a VSA. The trustees' creation of suspensive conditions attached to the vested assets held in trust in favour of one of the beneficiaries, such as a long-term lease over fixed property, would effectively reduce the market value of the remaining vested rights of the other beneficiaries. Allowing one of the vested beneficiaries to have a long-term exclusive usage over fixed property which vests in other beneficiaries, could result in a VSA. The trustees changing the vesting rights to income distributed from a trust could result in a VSA. The change in the vesting rights to income is viewed as a cession of income, according to sections 7(*a*) and (*b*) of the Act, and the ceded income may be deemed to be that of a donor beneficiary who previously held a vested right to the income which has been ceded. Other examples included the creation of a usufruct over a vested asset in the trust, or the sale of a vested asset to one of the vested beneficiaries of the trust. Another example provided was if beneficiaries' have sufficient control over shares held in a private company, they may be able change the rights attached to the shares held in the company in favour of a beneficiary or connected person. The researcher submits that the change in the share values will result in a VSA in a company which is excluded from this study. The above examples are not considered as an exhaustive list of trustees' actions that may result in a VSA. It is evident that trustees' actions not examined in this study could result in a possible VSA in vested trusts.

8.4.2.9 The DTC's recommendations implications (Part I)

What are the implications of the DTC's recommendations on VSAs? Secondary research objective 8 (see section 8.4.1 above) is examined in part I. All the elements of the definition of a VSA should be present before any of the trustees' actions could result in a VSA.

The results of the seven trustees' actions examined are like the results for part G (see section 8.3.2.7 above) if the DTC's recommendations for trusts were

implemented for vested trusts. P-values are either greater than or less than 0.05, indicating that for some specific trustees' actions examined, both the participants and the respondents have the same views regarding a VSA occurring, and for other trustees' actions different views were held. The appointment or removal of a trustee from a vested trust or the removal of a beneficiary will not result in a VSA. The vesting or distribution of an asset or a capital gain from a vested trust, which requires a change in vesting, could either result in an ordinary disposal or a VSA, even if the DTC's recommendations were implemented. The secondary research objective six is adequately addressed for part I. The implementation of the DTC's recommendations for vested trusts will have no impact on a VSA when compared to the current legislation. (The DTC's recommendations are only applicable to the SA context).

8.4.2.10 Additional comments (Part J)

Additional comments from the respondents and the participants which may directly or indirectly have an impact on all the research objectives are discussed below.

The participants did mention that vested trusts allow the trustees some discretionary powers to sell a capital asset and to reinvest the proceeds of the asset, to vest the capital of the trust in the beneficiaries based on a percentage formula (see section 8.2.10.1 above). The amendment of a vested trust would require the beneficiaries' consent (see section 8.2.10.2 above). An analysis of the example of a VSA in (SARS, 2020:776) and the renegotiation of the profit-sharing ratio in a partnership (Haupt, 2019:35), indicates that if connected parties or beneficiaries either consent or tacitly agree to the changes envisioned in these examples, a VSA could still occur (refer to section 8.2.10.4 above). If a trustees' resolution is followed by a distribution of a trust asset to a beneficiary, it would be impossible for the trustees to reverse such a vesting after the asset has been transferred to the beneficiary (see section 8.2.10.3 above). A beneficiary repudiating a vested benefit from a deceased estate would not have any CGT consequences, which differs from a beneficiary repudiating a vested interest from an *inter vivos* vested trust (see section 8.2.10.5 above). The recommendations of the DTC on the taxation of vested trusts would not change the way the beneficiaries of vested trusts are taxed from the current tax

dispensation, and therefore, if implemented, will have no impact on a VSA of vested trusts (see section 8.2.10.7 above). A change of the vesting rights in a trust may also be subjected to GAAR. Additional research may be required to examine the extent to which a VSA is exposed to GAAR (see section 8.2.10.6 above). The opposing views that the respondents and the participants had on a VSA of some of the trustees' actions examined, do indicate that a VSA is complex. SARS could provide tax guides on the taxation of trusts which may assist to some extent to enhance the tax compliance of trusts (see section 8.2.10.7 above). The additional comments have assisted in addressing some aspects of a VSA of vested trusts which may not have been covered in sufficient detail in the research instruments used in this study but still contributed to the achievement of the research objectives of this study.

8.4.2.11 Foreign value shifting alternatives (Part K)

The conclusions on whether the research questions and results from the comparison of the foreign participant interviews to the SA online questionnaire and the SA participant interviews adequately meet the research objectives for each part of the research instruments for (parts A to H, and J) non-discretionary trusts will be discussed next.

Part A: Nature of assets

The comparative analysis shows that foreign and SA non-discretionary trusts (Part A) yield the same results. The primary research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 are adequately addressed for part A in table 8.12, section 8.3 above.

Part B: Income tax (excluding capital gains) implications

The comparative analysis shows that foreign and SA non-discretionary trusts (Part B) yield the same results. The primary research objective and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 for Part B are adequately addressed in table 8.13, in section 8.3 above.

Part C: Donations tax implications

Neither Australia nor the UK has a donations or gift tax regime comparable to that of South Africa. The Australian participant expressed uncertainty regarding whether the donation of an interest in an Australian fixed trust would constitute a VSA event under Australian law. Participants from Australia, the UK, and South Africa concurred that transferring a vested interest between beneficiaries does trigger a capital gain or a VSA. However, primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 for Part C have not been sufficiently addressed in table 8.14, in section 8.3 above.

Part D: Ordinary disposal implications

The comparative analysis shows that foreign and SA non-discretionary trusts (Part D) yield the same results, except for secondary research objectives 2 and 3 which the Australian participant disagrees that a CGT event (ordinary disposal) will occur for both a fixed and fixed unit trust. The primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 for part D are partly addressed in table 8.15, in section 8.3 above.

Part E: Nature of non-discretionary trust's assets

The comparative analysis shows that foreign and SA non-discretionary trusts (Part E) yield the same results. The primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 for part E are addressed in table 8.16, in section 8.3 above.

Part F: Measuring a VSA

The comparative analysis shows that foreign and SA non-discretionary trusts (Part F) yield the same results. The primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 for part E are addressed in table 8.17, in section 8.3 above. Although both the market value and the base cost can be determined for Australian fixed and fixed unit trusts, the calculation of a capital gain from a value shift in Australia differs

from that of a VSA in South Africa (see sections 3.13.1.2 and 3.13.1.3 of Chapter 3).

Part G: VSA disposals implications

The comparative analysis shows that foreign and SA non-discretionary trusts (Part G) do not yield the same results. An exception arises in Part G, where the comparative analysis reveals that foreign and SA non-discretionary trusts yield different results. However, for secondary research objectives 3, 4 and 5 within this section, the findings for foreign non-discretionary trusts are consistent with those for SA vested trusts. The primary and secondary research objectives 1, 2, 3, 4, 5, 6 and 7 for part G are partly addressed in table 8.18, in section 8.3 above.

Part H: Other trustees' actions

The foreign participants on non-discretionary foreign trusts did not present any further examples of trustee actions that could trigger a VSA. Section 3.13.1.2 of Chapter 3 discusses a UK sale and leaseback arrangement and its potential to result in a VSA within the SA context. Additionally, section 3.12.1 of Chapter 3 addresses direct value shifts related to loan interests in a trust under the Australian GVSR.

Part J: Additional comments

No additional comments were provided by the foreign trust participants for part J.

8.5 SUMMARY

In summary, Chapter 8 provides a comprehensive analysis of the research findings concerning non-discretionary (vested) trusts, drawing on both quantitative and qualitative data from South African and foreign sources. The chapter systematically examines the tax implications of various trustees' actions, including the vesting and distribution of assets, adding or removing beneficiaries and appointing or removing trustees, and the application of VSAs. The findings demonstrate strong alignment

between South African respondents and participants across most research questions, particularly regarding the nature of trust assets, income tax (excluding capital gains), donations tax, and ordinary disposal implications. Notably, the chapter highlights areas of complexity and interpretive divergence, especially in distinguishing between ordinary disposals and VSAs, and in the comparative analysis with foreign tax jurisdictions. The results confirm that while the core principles governing vested trusts are consistent, nuanced differences in legal and tax treatments exist, particularly in relation to value shifting. The findings in this chapter were triangulated with the doctrinal analysis carried out in Chapter 3 to confirm the results and further explore the complexities of VSAs. Furthermore, the doctrinal analysis of income tax (excluding gains), donations tax, and ordinary disposals in Chapter 3 was integrated into this chapter and highlighted other taxes under the Act which may preclude a VSA from occurring. The research objectives are met, providing clarity on the tax consequences of trustees' actions in vested trusts and offering a framework to analyse VSAs related to trustees' actions (see section 9.5 in Chapter 9). In the next Chapter the conclusions, summary and the recommendations of the study will be presented.

CHAPTER 9

SUMMARY OF THE STUDY RESULTS, CONCLUSIONS AND RECOMMENDATIONS

9.1 INTRODUCTION

This chapter concludes the study by summarising the achievement of the research objectives and presenting a practical framework for tax practitioners, derived from the integrated doctrinal and empirical analyses. It offers an integrated synthesis of the study's principal findings, drawing key conclusions and providing practitioner-oriented recommendations based on the evaluation of trustees' actions and their effects on VSAs within South African discretionary and vested inter vivos trusts. Of particular significance, the research problem at the heart of this study is that when the trustees of an *inter vivos* trust whether discretionary or vested, vest or distribute a trust asset to a beneficiary, and this action requires altering the beneficiaries' contingent or vested rights, a potential VSA disposal may arise in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act. The trusts analysed are commonly used in estate planning to preserve generational wealth, protect assets, provide for family members, and enable effective tax and estate duty planning, underscoring their significance in the local context. Importantly, with the assistance of two librarians, it was established that there is a notable lack of research specifically examining trustees' actions in relation to VSAs within trusts. The study addressed a doctrinal-interpretive research gap, namely the absence of scholarly analysis clarifying how trustees' actions within estate-planning trusts give rise to VSAs under SA tax law. The research focused on trustees' actions that may alter beneficiaries' rights, recognising that such actions can have significant implications for VSAs within trusts.

To address this issue, the study aimed to develop a practical framework that can assist tax practitioners in navigating these complexities, especially where ordinary tax rules overlap with VSA disposals. The nuanced nature of beneficiaries' rights to trust assets, where interests may shift between vested and discretionary, adds further complexity as such changes may themselves trigger VSAs and CGT events.

The proposed framework is designed to help trustees and tax professionals disclose any VSA accurately, thereby avoiding interest and penalties, as highlighted in the case of The Thistle Trust v. CSARS [2024] ZACC 19. The Thistle case illustrated that misinterpreting CGT legislation can result in incorrect disclosure of a trust's tax implications. This issue is directly relevant to VSAs, where similar misunderstandings could lead to tax non-compliance and subsequent penalties. By offering clear guidance, the framework seeks to ensure that trustees and tax practitioners interpret and apply the CGT rules to VSAs correctly, reducing the risk of erroneous tax reporting and its consequences.

The research integrates the perceptions of experts (see section 1.7.2.1) in the taxation of trusts referring to the online-questionnaire experts as "respondents*"* and the interview-based experts as "participants" to deliver a critical analysis of VSA implications in estate planning aimed at clarifying VSA consequences for tax practitioners. The empirical component included 32 South African respondents who completed the online questionnaire (Appendix A), and six in-depth interviews conducted with local participants, using an interview guide (Appendix B). International insights were also incorporated through interviews with an Australian participant (Appendix C) and a UK participant (Appendix D), broadening the scope and contextualising the research findings globally. The study used a mixed-methods approach, combining doctrinal analysis of tax legislation, case law, revenue guidelines, and previous research with both quantitative and qualitative data collected via an online questionnaire and interviews. The doctrinal analysis is specifically employed to interpret and explain differences in perceptions and responses between interview participants and the online questionnaire respondents, thereby clarifying why certain practitioners may view the implications of trustees' actions on VSAs differently. This approach highlights key findings, such as varying interpretations of the triggers for a VSA and the practical challenges trustees face in complying with CGT requirements. Furthermore, the analysis identifies additional tax consequences such as donations tax, income tax implications, and ordinary disposals that may arise from trustees' actions but do not necessarily result in a VSA, thus potentially precluding the occurrence of a VSA in certain scenarios. This triangulation provides a nuanced understanding of the complex dynamics surrounding VSAs in South African trust law. This chapter

includes the research objectives and the research questions (section 9.2); summaries and key findings (section 9.3); conclusions on the research objectives (section 9.4); a practical framework for tax practitioners' analysis of trustees' actions for a VSA in the SA context (section 9.5); contributions to knowledge and practice (section 9.6); policy and regulatory implications (section 9.7); mapping of the research objectives with the chapters (section 9.8); limitations and reflections of the study (section 9.9); recommendations for future research (section 9.10); and closing remarks (section 9.11).

9.2 RESEARCH OBJECTIVES AND RESEARCH QUESTIONS

This section presents the research objectives and the research questions of the study.

9.2.1 Primary and secondary research objectives

The following primary and secondary research objectives were formulated in Chapter 1, sections 1.5 and 1.5.1 for this study:

- **Primary research objective**: To determine, from the perceptions of the respondents and participants, how CGT could be triggered by a VSA when trustees vest or distribute a trust asset to one of the beneficiaries of a trust used in a South African estate-planning exercise.
- **Secondary research objective 1:** To determine whether the trustees' action of the sale of a capital asset and the vesting or distribution of the capital gain in or to a beneficiary of a trust would result in a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).
- **Secondary research objective 2:** To determine whether the trustees' action of adding additional beneficiaries to the trust would result in a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).

- **Secondary research objective 3:** To determine whether the trustees' action of removing beneficiaries from a trust would result in a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).
- **Secondary research objective 4:** To determine whether the trustees' action of appointing new trustees to the trust would result in a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).
- **Secondary research objective 5:** To determine whether the trustees' action of removing trustees from the trust would result in a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).
- **Secondary research objective 6:** To determine whether the trustees' action of donating a beneficiary's interest in a trust (with the consent of the beneficiaries) would result in a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).
- **Secondary research objective 7:** To determine if other trustees' actions, not covered in the primary or secondary research objectives 1 to 6, would result in a VSA from the perspective respondents and participants who participated in this study (discussed in Chapters 7 and 8).
- **Secondary research objective 8:** To determine whether the recommendations of the DTC's Report on the Feasibility of Wealth Tax in South Africa (DTC, 2018:81) would have any impact on a VSA from the perspective of the respondents and participants who participated in this study (discussed in Chapters 7 and 8).

9.2.2 Research questions

The following research questions were formulated in Chapter 1 and discussed in Chapter 3 to address the primary and secondary research objectives for this study:

- **Part (A): Nature of an asset** (section 1.5.2.1 in Chapter 1 and section 3.2 in Chapter 3): Do beneficiaries' rights or interests in trust assets constitute

"property" for purposes of section 55(1) of the Income Tax Act and section 3(2) of the Estate Duty Act, and an "asset" for the purposes of paragraph 1 of the Eighth Schedule given that the CGT definition of "asset" incorporates "property" and is the disposal of such rights excluded from the section 1(1) gross-income definition, which does not define "asset" (primary and secondary research objectives 1 to 8)?

- **Part (B) Income tax (excluding capital gains) implications:** Do any of the actions taken by the trustees, as mentioned in the primary and secondary research objectives 1 to 8, result in gross income and income tax (excluding capital gains) implications, and should they therefore be excluded from a VSA ((primary and secondary research objectives 1 to 8)?
- **Part (C) Donations tax implications** (section 1.5.2.3 in Chapter 1 and section 3.4 in Chapter 3): Do any of the selected trustees' actions mentioned in the primary and secondary research objectives 1 to 8 result in donations tax, and should they therefore by implication be excluded from a VSA (primary and secondary research objectives 1 to 8)?
- **Part (D) Ordinary disposal implications** (section 1.5.2.4 in Chapter 1 and section 3.5 in Chapter 3): Do any of the selected trustees' actions mentioned in the primary and secondary research objectives 1 to 8 result in a paragraph 11(1)(*a*) to (*d*) ordinary disposal of the Eighth Schedule to the Act, and should they therefore be excluded from a VSA (primary and secondary research objectives 1 to 8)?
- **Part (E) Beneficiaries rights** (section 1.5.2.5 in Chapter 1 and section 3.2.5 in Chapter 3): Are the beneficiaries' interests in a trust, as referred to in the definition of a "VSA" in paragraph 1 of the Eighth Schedule to the Act, considered to be a capital asset for CGT purposes pertaining to trust beneficiaries in discretionary or vested trusts (primary and secondary research objectives 1 to 8)?
- **Part (F) Measuring a VSA** (section 1.5.2.6 in Chapter 1 and section 3.6 in Chapter 3): How are proceeds and base costs of a VSA quantified in a trust context? Are there examples of VSAs related to trusts, companies, or partnerships in the SARS guides that can provide guidance in determining

the value to be placed on a VSA in a trust context (primary and secondary research objectives 1 to 8)?

- **Part (G) VSA implications** (section 1.5.2.7 in Chapter 1 and section 3.6.1.1 in Chapter 3): Do any of the trustees' actions mentioned in the research objectives meet the definition of paragraph 1 of the VSA and does it fall within paragraph 11(1)(*g*) of the Eighth Schedule of the Act (primary and secondary research objectives 1 to 8)?
- **Part (H) Other trustees' actions**: (section 1.5.2.8 in Chapter 1): Do any of the trustees' actions not mentioned in the primary and secondary research objectives 1 to 7 constitute a VSA (Research question 8)?
- **Part (I) DTC implications** (section 1.5.2.9 in Chapter 1 and section 3.7 in Chapter 3): What are the implications for trustees' actions if the recommendations of the DTC's Report on the Feasibility of Wealth Tax in South Africa (DTC, 2018:81) in relation to VSAs are implemented in South Africa on VSAs (primary and secondary research objectives 1 to 8)?
- **Part (J) Other comments:** (section 1.5.2.10 in Chapter 1): Are there any additional relevant comments which may be applicable to VSAs in trusts (primary and secondary research objectives 1 to 8)?
- **Foreign value shifting alternatives (K)** (section 1.5.2.11 in Chapter 1): Are there examples of VSAs in the foreign revenue guides for trusts in Australia and the UK that could apply to or inform the tax treatment under the Income Tax Act of South African trusts (primary and secondary research objectives 1 to 8)?

9.3 SUMMARIES AND THE KEY FINDINGS

In this section the summaries, key findings and triangulated insights of SA trusts, the comparative analysis of the SA and foreign trusts, and the summary of the comparative analysis of the SA and foreign trusts are presented.

9.3.1 Chapter summaries

The chapter summaries are provided below:

9.3.1.1 Chapter 1

Chapter 1 introduced value shifting arrangements in trusts. It provided the background on trusts in estate planning, discussed the core elements of CGT events, discussed paragraph 11(1) disposals, defined a VSA, provided a motivation for the study, and formulated the research problem. Furthermore, the significance of the study, primary and secondary research objectives and the research questions provided the scope and delineations for the study. A description of the research methodology adopted for the study was given, and definitions of key terms and concepts were clarified. The layout of the study was also provided.

9.3.1.2 Chapter 2

Chapter 2 provided the contextual background for SA and foreign trusts. It discussed the trustees' actions and powers from an SA context, as well as the implications of trustees' actions and the Act. Furthermore, Chapter 2 provided an illustration of a VSA in an SA context, a legal framework from an SA context, and the actions of non-compliance relating to trustees' actions were discussed.

9.3.1.3 Chapter 3

Chapter 3 is the literature review chapter. In this chapter the value shifting arrangements in a South African and foreign trust context were discussed by analysing relevant tax legislation, guides, court cases, prior research, and definitions of a VSA, noting legislative differences and their implications for a comparative analysis. The chapter specifically discussed the nature of a trust's assets, gross income, donations tax, ordinary disposals, value shifting arrangements, and general anti-avoidance in the context of trusts. It provided an overview of Australian and UK trusts and CGT, discussed the disposal rules applicable to foreign trusts as well as the foreign value shifting rules (UK) and general value shifting rules (Australia).

9.3.1.4 Chapter 4

Chapter 4 detailed the research paradigm and approach, the research instruments (online questionnaire and interview guides), data collection, data analysis, and ethics and validity in supporting the study's research objectives.

9.3.1.5 Chapter 5

Chapter 5 reported the quantitative results for the online questionnaire addressed to SA respondents on discretionary and vested trusts. The demographics of the respondents were provided, the online questionnaire was discussed, and the online questionnaire results were presented for both discretionary and vested trusts.

9.3.1.6 Chapter 6

Chapter 6 presented the qualitative data findings or the SA and foreign trust participants. First, the SA participants' demographics were presented, followed by a discussion of the SA interview guides. Next the interview findings were presented for discretionary trusts, followed by non-discretionary (vested) trusts. Then, the foreign participants' demographics were presented, followed by the presentation of the foreign trust research findings.

9.3.1.7 Chapter 7

Chapter 7 provided an integrated analysis of the research findings for SA discretionary trusts. Empirical evidence from interviews and the online questionnaire was combined with a doctrinal analysis from the literature review. A comparison of foreign discretionary trusts, with a discussion and a summary were also provided.

9.3.1.8 Chapter 8

Chapter 8 provided an integrated analysis of the research findings for SA vested trusts. Empirical evidence from interviews and the online questionnaire were

combined with a doctrinal analysis from the literature review. A comparison of the foreign non-discretionary trusts, with a discussion and a summary were also provided.

9.3.2 Key findings and triangulated insights for SA trusts

Key findings are summarised in cross-tabulation tables aligned with research questions A to J, covering both SA discretionary and non-discretionary (vested) trusts from Chapters 7 and 8. Comparative tables present insights between SA, Australian, and UK trusts. Any inconclusive or inconsistent results, relative to the doctrinal analysis in Chapter 3, are triangulated for each research question.

9.3.2.1 Cross-tabulation summaries: SA discretionary and vested trusts

The tables provide a summary of cross-tabulated data comparing responses from the SA online questionnaire with insights from SA interview participants regarding both discretionary and vested (non-discretionary) trusts. For each research question (Parts A to J), the tables present levels of agreement or disagreement based on the Likert scale, alongside statistical significance (P-values) to identify noteworthy differences or similarities. This methodology enables a direct comparison between the perspectives of the wider group of SA trust practitioners and those of subject matter experts, drawing attention to areas of consensus and divergence for each trust type. P-values indicate whether the null hypothesis should be accepted or rejected in relation to each statement: acceptance signifies consistency between the two groups' responses, indicating consensus, while rejection highlights inconsistencies and points of divergence. Overall, this approach facilitates a systematic analysis, clarifying where alignment or discrepancies exist in the treatment and implications of discretionary and vested trusts.

Table 9.1: Cross-tabulation summary of the nature of an asset (Part A)

Statement	RSA Discretionary Trust		RSA Vested Trust	
	Respondents and Participants	Null Hypothesis	Respondents and Participants	Null Hypothesis
Statement 1.1	AGREE	ACCEPT	AGREE	ACCEPT
Statement 1.2	AGREE	ACCEPT	AGREE	ACCEPT
Statement 1.3	DISAGREE	ACCEPT	DISAGREE	ACCEPT
Statement 1.4	AGREE	ACCEPT	AGREE	ACCEPT
Statement 1.5	AGREE	ACCEPT	AGREE	ACCEPT

The respondents and participants both agreed on a discretionary and a vested trust that a disposal of a capital asset would either result in a capital gain or a loss; that the capital nature of an asset could be ascertained by case law; and that a capital asset for CGT purposes could be the same as property for both donations tax and estate duty purposes. The respondents and the participants both disagreed for a discretionary and vested trust that a capital asset for CGT would be the same as a revenue asset. The results were consistent between the respondents and the participants. In relation to this research question, the identification of a capital asset is necessary for a VSA to occur and for meeting the primary and secondary research objectives 1 to 7.

Table 9.2: Cross-tabulation summary for income tax (excluding capital gains) implications (Part B)

Statement	RSA Discretionary Trust		RSA Vested Trust	
	Respondents and Participants	Null Hypothesis	Respondents and Participants	Null Hypothesis
Statement 2.1	DISAGREE	ACCEPT	DISAGREE	ACCEPT
Statement 2.2	DISAGREE	ACCEPT	DISAGREE	ACCEPT
Statement 2.3	DISAGREE	ACCEPT	DISAGREE	ACCEPT
Statement 2.4	DISAGREE	ACCEPT	DISAGREE	ACCEPT
Statement 2.5	DISAGREE	ACCEPT	DISAGREE	ACCEPT
Statement 2.6	DISAGREE	ACCEPT	DISAGREE	ACCEPT
Statement 2.7	DISAGREE	ACCEPT	DISAGREE	ACCEPT

The respondents and the participants both disagreed that a change in rights to either vest or distribute capital assets, the sale of a capital asset and the subsequent vesting or distribution of the capital gain, and the removal or adding of a beneficiary or the appointment or removal of a trustee to or from a trust would result in an income tax (exclusive of CGT) implication for both discretionary and vested trusts. All the results are consistent between the respondents and the participants. Income tax (excluding capital gains) will not apply to a VSA, which addresses the primary and research objectives 1 to 7.

Table 9.3: Cross-tabulation summary of donations tax implications (Part C)

Statement	RSA Discretionary Trust		RSA Vested Trust	
	Respondents and Participants	Null Hypothesis	Respondents and Participants	Null Hypothesis
Statement 3.1.1	DISAGREE	ACCEPT	AGREE	ACCEPT
Statement 3.1.2	DISAGREE	ACCEPT	INCONCLUSIVE	REJECT
Statement 3.1.3	DISAGREE	ACCEPT	AGREE	ACCEPT
Statement 3.1.4	DISAGREE	ACCEPT	AGREE	ACCEPT
Statement 3.2.1	DISAGREE	ACCEPT	AGREE	ACCEPT
Statement 3.2.2	DISAGREE	ACCEPT	AGREE	ACCEPT
Statement 3.2.3	DISAGREE	ACCEPT	AGREE	ACCEPT
Statement 3.2.4	DISAGREE	ACCEPT	AGREE	ACCEPT
Statement 3.2.5	DISAGREE	ACCEPT	AGREE	ACCEPT
Statement 3.2.6	DISAGREE	ACCEPT	DISAGREE	ACCEPT
Statement 3.2.7	DISAGREE	ACCEPT	DISAGREE	ACCEPT

The respondents and the participants disagreed for a discretionary trust and agreed for a vested trust that a donation from one beneficiary to another beneficiary would result in donations tax, a paragraph 11(1)(*a*) and 11(1)(*g*) disposal. The respondents agreed and the participants disagreed for a discretionary trust and were inconclusive for a vested trust that a donation (without consent) from one beneficiary to another beneficiary would result in donations tax implications (see sections 3.4.2.1 and 3.4.2.2 of Chapter 3, which discuss cases dealing with the validity of a donation without consent).

The respondents and the participants both disagreed for a discretionary trust and agreed for a vested trust that a change in rights to either vest or distribute assets, the sale of a capital asset and the subsequent vesting or distribution of the capital gain, and the adding or removal of a beneficiary to or from a trust would result in donations tax implications. The respondents and the participants both disagreed for a discretionary trust and a vested trust that the appointment or removal of a trustee to or from a trust would have donations tax implications. All the results are consistent between the respondents and the participants, except for a donation without consent. A donation which results in donations tax and an ordinary disposal will be excluded from a VSA, which addresses the primary and research objectives 1 to 7. Sub-statement 3.1.4 is related to secondary research objective 6.

Table 9.4: Cross-tabulation summary for ordinary disposal implications (Part D)

Statement	RSA Discretionary Trust		RSA Vested Trust	
	Respondents and Participants	Null Hypothesis	Respondents and Participants	Null Hypothesis
Statement 4.1	AGREE	ACCEPT	AGREE	ACCEPT
Statement 4.2	AGREE	ACCEPT	AGREE	ACCEPT
Statement 4.3	AGREE	ACCEPT	AGREE	ACCEPT
Statement 4.4	DISAGREE	ACCEPT	AGREE	ACCEPT
Statement 4.5	DISAGREE	ACCEPT	AGREE	ACCEPT
Statement 4.6	DISAGREE	ACCEPT	DISAGREE	ACCEPT
Statement 4.7	DISAGREE	ACCEPT	DISAGREE	ACCEPT

The respondents and the participants both disagreed for a discretionary trust and agreed for a vested trust that a change in rights to either vest or distribute assets; the sale of a capital asset and the subsequent vesting or distribution of the capital gain; and the removal or adding of a beneficiary or the appointment or removal of a trustee to or from a trust would result in donations tax implications. All the results are consistent between the respondents and the participants. An ordinary disposal implication may be excluded from a VSA to occur, and it was necessary to be established for meeting the primary and secondary research objectives 1 to 7.

Table 9.5: Cross-tabulation summary of beneficiaries' interest in a trust (Part E)

Statement	RSA Discretionary Trust		RSA Vested Trust	
	Respondents and Participants	Null Hypothesis	Respondents and Participants	Null Hypothesis
Statement 5.1	AGREE	ACCEPT	AGREE	ACCEPT

The respondents and the participants both agreed (statement 5.1) for a discretionary trust and a vested trust that a disposal of an interest in such a trust could result in either a capital gain or loss for the beneficiary. This research question is linked to the primary and secondary research objectives 1 to 7 of the study.

Table 9.6: Cross-tabulation summary for measuring a VSA (Part F)

Statement	RSA Discretionary Trust		RSA Vested Trust	
	Respondents and Participants	Null Hypothesis	Respondents and Participants	Null Hypothesis
Statement 6.1	INCONCLUSIVE	REJECT	AGREE	ACCEPT
Statement 6.2	DISAGREE	ACCEPT	AGREE	ACCEPT
Statement 6.3	INCONCLUSIVE	REJECT	AGREE	ACCEPT

The respondents and the participants both disagreed that a reduction of an interest in a discretionary trust and agreed that a reduction in an interest in a vested trust could be measured for a VSA. The measurement of a beneficiaries' market value of an interest and the base cost in a discretionary trust before and after a VSA has occurred, was inconclusive between the respondents and the participants (see section 3.5.2.4 of Chapter 3 and section 7.2.6.1 of Chapter 7, which discussed the market value of an interest and the base cost of a contingent right for discretionary trusts and vested rights for vested trusts). The respondents and the participants agreed that a beneficiary's market value of his/her interest and the base cost in a vested trust before and after a VSA has occurred, could be measured. This research question is linked to the primary and secondary research objectives 1 to 7 of the study.

Table 9.7: Cross-tabulation summary of VSA implications (Part G)

Statement	RSA Discretionary Trust		RSA Vested Trust	
	Respondents and Participants	Null Hypothesis	Respondents and Participants	Null Hypothesis
Statement 7.1	DISAGREE	ACCEPT	INCONCLUSIVE	REJECT
Statement 7.2	DISAGREE	ACCEPT	INCONCLUSIVE	REJECT
Statement 7.3	DISAGREE	ACCEPT	INCONCLUSIVE	ACCEPT
Statement 7.4	DISAGREE	ACCEPT	INCONCLUSIVE	ACCEPT
Statement 7.5	DISAGREE	ACCEPT	INCONCLUSIVE	REJECT
Statement 7.6	DISAGREE	ACCEPT	DISAGREE	ACCEPT
Statement 7.7	DISAGREE	ACCEPT	DISAGREE	ACCEPT

The SA respondents and the participants all disagreed (statements 7.1, 7.2, 7.3, 7.4 and 7.5) in relation to a discretionary trust and had differing views for a vested trust that a change in rights to either vest or distribute assets, the sale of a capital asset and subsequent vesting or distribution of the capital gain, the adding or removal of a beneficiary to or from a trust would result in VSA implications. The SA respondents and the participants both disagreed for a discretionary trust and a vested trust that the appointment or removal of a trustee to or from a trust (statements 7.6 and 7.7) would have VSA implications.

The inconclusive results between the respondents and the participants for vested trusts in statements 7.1, 7.2, 7.3, 7.4. and 7.5 may be attributable to the divergent views that these trustees' actions meet all five criteria of the definition of a VSA and simultaneously overlap with an ordinary disposal (see section 3.5.1.1 of Chapter 3).

Except in the case where a beneficiary with vested rights is removed from a vested trust (statement 7.5), in such circumstances, a VSA is not possible, as the definition requires that the beneficiary maintains an interest in the trust after the VSA has occurred (see discussion in section 3.6.2.2 of Chapter 3). If beneficiaries agree to alter vested rights as a donation, donations may not be considered VSAs due to the VSA definition's parenthesised exclusion which excludes disposals at market value in terms of paragraph 38 of the Eighth Schedule from a VSA (see discussion in section 3.6.2.5 of Chapter 3). However, the parenthesised paragraph 38 exclusion may be interpreted to allow for the measurement of the proceeds of a VSA in terms of paragraph 35(2). If the trust deed is amended to accommodate any trustees' action prior to the actual transaction taking place, a VSA may occur and precede an ordinary disposal. The null hypothesis was rejected for vested trusts in statements 7.1, 7.2 and 7.5 reflecting the inconsistency of the results, which may be attributable to the inherent complexity of a VSA, which has produced divergent results. The doctrinal analysis also reflected the possibility of an ordinary disposal and a VSA overlapping for these trustees' actions. The online respondents disagreed because their interpretation of the question was that an ordinary disposal eliminated a VSA. The interview participants ignored the ordinary disposals precluding a VSA. The results for all the remaining statements for discretionary trusts and the vested trusts for part G, were consistent between the respondents and the participants. This research question is linked to the primary and secondary research objectives 1 to 7 of the study.

Table 9.8: Other trustees' actions resulting in a VSA (Part H)

Trustees' Action	Possible VSA Result
Assist beneficiaries with sale of vested interest at a discount to a connected person.	Could result in a VSA for a vested trust.
Amend the trust deed, changing vested rights of beneficiaries (with or without consent).	Could result in a VSA for a vested trust.
Attach suspensive rights to vested assets in favour of a beneficiary.	Could result in a VSA for a vested trust.
Usufruct over vested asset given to a beneficiary.	Could result in a VSA for a vested trust.
Allow a beneficiary exclusive use of trust asset(s) for prolonged period.	Could result in a VSA for a vested trust.
Amend rights to shares (ordinary or preference) in a private company in favour of beneficiary.	Could result in a VSA for a vested trust.
Add child as a beneficiary, unless trust deed vests assets in named beneficiaries and descendants.	Could replicate a VSA for a vested trust.
Change vesting rights to income or capital income without compensation (if section 7(6) and paragraph 71 are not applicable).	Could result in a VSA for a vested trust.

The respondents and the participants did not provide any trustees' actions which could result in a VSA for a discretionary trust.

Table 9.9: Cross-tabulation summary for the DTC implications (Part I)

Statement	RSA Discretionary Trust		RSA Vested Trust	
	Respondents and Participants	Null Hypothesis	Respondents and Participants	Null Hypothesis
Statement 9.1	AGREE	ACCEPT	AGREE	ACCEPT
Statement 9.2.1	DISAGREE	ACCEPT	INCONCLUSIVE	REJECT
Statement 9.2.2	DISAGREE	ACCEPT	INCONCLUSIVE	REJECT
Statement 9.2.3	DISAGREE	ACCEPT	INCONCLUSIVE	ACCEPT
Statement 9.2.4	DISAGREE	ACCEPT	INCONCLUSIVE	ACCEPT
Statement 9.2.5	DISAGREE	ACCEPT	INCONCLUSIVE	ACCEPT
Statement 9.2.6	DISAGREE	ACCEPT	DISAGREE	ACCEPT
Statement 9.2.7	DISAGREE	ACCEPT	DISAGREE	ACCEPT

Both the respondents and the participants agreed (statement 9.1) that under the DTC's recommendations for discretionary trusts, capital gains and income are taxed within the trust until they are irrevocably vested in a beneficiary, at which point taxation shifts to the beneficiary. The respondents and the participants both disagreed (statements 9.2.1, 9.2.2, 9.2.3, 9.2.4 and 9.2.5) for a discretionary trust and had differing views for a vested trust that a change in rights to either vest or distribute assets, the sale of a capital asset and the subsequent vesting or distribution of the capital gain, the adding or removal of a beneficiary to or from a trust would result in VSA implications. The respondents and the participants both disagreed for a discretionary trust and vested trust that the appointment or removal of a trustee to or from a trust (statements 9.2.6 and 9.2.7) would have VSA implications. Statements 9.2.1, 9.2.2, 9.2.3, 9.2.4, 9.2.5 and 9.2.7 for part I have produced the same results as statements 7.1, 7.2, 7.3, 7.4 and 7.5 in part G above. The null hypothesis was rejected for vested trusts in statements 9.2.1 and 9.2.2 reflecting the inconsistency of the results, which may be attributable to the inherent complexity of a VSA, which has produced divergent results. This research question is linked to secondary research objective 8.

The respondents' and the participants' comments regarding vested trusts are summarised below in Table 9.10 as additional comments (Part J).

Table 9.10: Additional comments (Part J)

Topic	Summary
DTC's policy on discretionary trusts	Policy changes of taxing the trust; structural change to the tax system.
DTC's policy vs state spending	Should be addressed; irregular state spending should be curbed.
DTC's policies vs tax compliance preference	Strengthening tax compliance is preferable to the DTC's trust-tax proposals, as it improves revenue collection while preserving the existing structural framework of the trust tax system
Non-compliance factors	Lack of knowledge,trustees and tax practitioners need knowledge to trust tax laws.
Tax-compliance tax curricula	Should be reviewed for specialised knowledge on taxation of trusts and tax compliance of the TAA on trustees and tax practitioners.
Tax-compliance records	Trustees must keep records of trustees' resolutions.
GAAR application	Possibility for some trustees' actions regarding VSA.
Repudiation implications	Repudiation of a vested interest in a deceased estate has no CGT implications; repudiation in a vested trust could have donations tax and CGT consequences.
Changing vested rights	May result in GAAR implications.
Consent of beneficiaries	Required for trustees' action amending trust deed if beneficiaries have accepted benefits.
Trust deed wording	Should be analysed to understand nature of vesting; can specify asset or percentage vested in beneficiary.
Vested beneficiaries	May include beneficiaries' children, adopted children, person related in affinity; may reduce exposure to a VSA.
Predeceased beneficiaries	Trust deed may stipulate benefits devolve to remaining beneficiaries; may reduce exposure to a VSA.
Amending trust deed	May require beneficiaries' consent or court order, even with variation clause.
Reversing trustees' resolution	Trustees may not reverse previous resolution vesting an asset in beneficiary without beneficiaries' consent.
VSA definition	Beneficiaries' consent or tacit consent does not exclude definition of a VSA.
Study limitations	Applies only to trust structures described in research instruments; excludes complex group trust structures; discretionary trust with one beneficiary excluded.
Research needs	Trustees' actions ultra vires; CGT implications of trustees' actions.

9.3.3 Summary of the key findings for trusts in the SA context

9.3.3.1 Summary of the key findings for SA discretionary trusts

The important findings for discretionary trusts are summarised below:

- An interest in a discretionary trust which is subject to the absolute discretion of the trustees to vest or distribute in or to any one of the beneficiaries of a trust, is a hope or *spes* and is referred to as a contingent right.
- Some trusts are hybrid trusts which have assets which are subject to both contingent rights and vested rights. The contingent rights are dealt with in the discretionary trust structures examined in this study, whilst the vested interest is examined in the vested trust structures examined in this study.

- An interest in a discretionary trust gives the beneficiaries a personal right against the trustees of the trust to administer the trust's assets in accordance with the trust deed; and a discretionary interest is also considered an asset of the beneficiary for CGT purposes.
- The nature of a discretionary trust's assets can be identified as either a capital or revenue asset which is necessary to identify a VSA.
- Trustees' actions that give rise to gross income fall outside the Eighth Schedule; revenue receipts cannot trigger a CGT event or constitute a VSA.
- Trustees' actions producing gross income or other forms of income (exclusive of capital gains) are excluded from the computation of proceeds for CGT purposes.
- A valid donation of an asset including the relinquishment of a right requires a transfer of value from donor to donee; accordingly, a donation of a contingent right is not possible because no determinable value can be transferred.
- Ordinary disposals under paragraphs 11(1)(*a*), (b), (*c*) and (*d*) displace paragraph 11(1)(*g*); a VSA arises only where no ordinary disposal exists.
- The trustees' actions examined of a capital asset held in a discretionary trust will be excluded from donations tax implications because the contingent right in a discretionary trust cannot be measured.
- The trustees' actions which result in the vesting or distribution of a capital asset, or the sale of a capital asset from a discretionary trust, will result in an ordinary disposal.
- An interest in a trust (a contingent right) which is subject to the absolute discretion of the trustees to vest or distribute an asset in or to any one of the beneficiaries of a trust without any time restrictions is difficult to measure.
- The measurement of the proceeds of a VSA (paragraph 35(2) of the Eighth Schedule) and the base cost of a VSA (paragraph 23 of the Eighth Schedule) would be difficult to establish if the beneficiary's interest is a *spes* or a contingent right.
- The trustees' actions examined did not result in a VSA for a discretionary trust. Both the proceeds of a VSA (paragraph 35(2) of the Eighth Schedule) and the base cost of a VSA (paragraph 23 of the Eighth Schedule) for an interest in a discretionary trust cannot be measured.

- The possibility of additional examples of trustees' actions which could result in a VSA is precluded, as an interest in a discretionary trust is a contingent right and cannot be valued prior to the asset being vested in a beneficiary.
- The implementation of the DTC's recommendations for discretionary trusts would have no impact on trustees' actions for a VSA.
- The DTC's recommendations for discretionary trusts ring-fences capital gains within a trust, reducing the chance of a VSA occurring before assets are vested in the beneficiaries.
- GAAR may also be applicable to trustees' actions related to discretionary trusts.

9.3.3.2 Summary of the key findings for SA vested trusts

The important findings for SA vested trusts are summarised below:

- A vested interest in a trust gives the beneficiary a fixed right or a certain right to a trust asset. The delivery or enjoyment of the asset may be delayed to a future date.
- Vesting of an asset of a fixed percentage of the trust assets may be stipulated in the trust deed or in a resolution which has been passed by the trustees of trust.
- The nature of a vested trust's assets can be identified as either a capital or revenue asset which is necessary to identify a VSA.
- Trustees' actions that give rise to gross income fall outside the Eighth Schedule; revenue receipts cannot trigger a CGT event or constitute a VSA.
- Trustees' actions producing gross income or other forms of income (exclusive of capital gains) are excluded from the computation of proceeds for CGT purposes.
- Donations of vested interests between beneficiaries constitute ordinary disposals rather than VSA disposals.
- Ordinary disposals under paragraphs 11(1)(*a*), (*b*), (*c*) and (*d*) displace paragraph 11(1)(*g*); a VSA arises only where no ordinary disposal exists.

- The trustees' actions examined in relation to a capital asset held in a vested trust could have donations tax implications.
- If an asset, which is vested in a beneficiary, is distributed to a beneficiary, without changing any of the existing vested rights of existing beneficiaries, no CGT consequences will occur, and subsequent disposals by the beneficiary will be taxed in the beneficiary's hands.
- A vested interest (vested right) in a trust is measurable in monetary terms.
- The measurement of the proceeds of a VSA (paragraph 35 of the Eighth Schedule) and the base cost of a VSA (paragraph 23 of the Eighth Schedule) would be possible for a vested interest in a trust.
- The trustees' actions examined did result in a VSA for a vested trust, as both the proceeds of a VSA (paragraph 35(2) of the Eighth Schedule) and the base cost of VSA (paragraph 23 of the Eighth Schedule) for an interest in a vested trust can be measured.
- The parenthesised paragraph 38 exclusion in the definition of a VSA may allow for a VSA (paragraph 35 of the Eighth Schedule) to be measured taking the difference between the market value before or after the VSA has occurred, and to prevent the proceeds to be deemed at full market value in terms of paragraph 38 of the Eighth Schedule.
- Some of the trustees' actions examined could result in a VSA for vested trusts.
- Additional examples of trustees' actions which could result in a VSA in vested trusts are possible.
- The trust deed may limit the trustees' ability to legally change the vesting rights of beneficiaries and thereby reduce the possibility of a VSA from occurring.
- VSA and ordinary disposals may apply to the same transaction or trustees' actions.
- The implementation of the DTC's recommendations for vested trusts would have no impact on trustees' actions for a VSA.
- GAAR may also be applicable to trustees' actions related to vested trusts.

9.3.4 Comparative analysis of SA and foreign trusts (Part K)

The findings from the SA respondents and the participants are presented alongside the results from interviews with Australian and UK participants regarding both discretionary and non-discretionary trusts. The tables are arranged to allow for side-by-side comparison of key themes, practices, and legislative interpretations across tax jurisdictions. This comparative analysis situates the SA trust framework in relation to international standards. The tables include only research questions' part A to J that are relevant to the foreign trusts discussed below.

Table 9.11: Comparative analysis of the Australian, UK and SA trusts (Part A)

Statement	DISCRETIONARY TRUSTS			NON-DISCRETIONARY TRUSTS			
	Australian Discretionary Trust	UK Discretionary Trust	RSA Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust
Statement 1.1	AGREE	AGREE	AGREE	AGREE	AGREE	AGREE	AGREE
Statement 1.2	AGREE	AGREE	AGREE	AGREE	AGREE	AGREE	AGREE
Statement 1.3	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE

The foreign participants, SA participants and the respondents agreed (statements 1.1 and 1.2) that a disposal of a capital asset would result in a capital gain or loss, and the capital nature of a trust asset can be ascertained by case law for both a discretionary and non-discretionary trust. Both foreign participants and the SA participants and the respondents disagreed (statement 1.3) that a capital asset for CGT purposes is the same as a revenue asset. Both the foreign and the SA participants and the respondents' views are the same for statements 1.1, 1.2 and 1.3 for Part A.

Table 9.12: Comparative analysis of the Australian, UK and SA trusts (Part B)

Statement	DISCRETIONARY TRUSTS			NON-DISCRETIONARY TRUSTS			
	Australian Discretionary Trust	UK Discretionary Trust	RSA Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust
Statement 2.1	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE
Statement 2.2	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE
Statement 2.3	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE
Statement 2.4	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE
Statement 2.5	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE
Statement 2.6	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE
Statement 2.7	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE

The foreign participants, the SA participants and the respondents disagreed that the vesting or distribution of trust assets, the sale of a capital asset and subsequent

vesting or distributing of the capital gain to one of the beneficiaries, or alterations in trust beneficiaries or trustees would lead to income tax implications (excluding CGT) for discretionary or non-discretionary trusts. Both the foreign and the SA participants and the respondents' views are the same for statements 2.1, 2.2, 2.3, 2.4, 2.5 and 2.7 for Part B.

Table 9.13: Comparative analysis of the Australian, UK and SA trusts (Part C)

Statement	DISCRETIONARY TRUSTS			NON-DISCRETIONARY TRUSTS			
	Australian Discretionary Trust	UK Discretionary Trust	RSA Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust
Statement 3.1	N/A	N/A	DISAGREE	N/A	N/A	N/A	AGREE
Statement 3.2	DISAGREE	DISAGREE	DISAGREE	INCONCLUSIVE	AGREE	AGREE	AGREE
Statement 3.3	DISAGREE	DISAGREE	DISAGREE	INCONCLUSIVE	AGREE	AGREE	AGREE

The foreign participants, the SA participants and the respondents disagreed that a donation of an interest in a trust from one beneficiary to another beneficiary would result in an ordinary disposal or a VS (AUS), a VS (UK) or a VSA. Foreign participants, SA participants and the respondents agreed that a donation of an interest in a non-discretionary trust from one beneficiary to another beneficiary would result in an ordinary disposal or a VS (AUS), a VS (UK) or a VSA, except for the Australian participant who was uncertain for an Australian fixed trust. Both the foreign and the SA participants and the respondents' views are the same for statements 3.1 and 3.2 for Part C, except for an Australian fixed trust.

Table 9.14: Comparative analysis of the Australian, UK and SA trusts (Part D)

Statement	DISCRETIONARY TRUSTS			NON-DISCRETIONARY TRUSTS			
	Australian Discretionary Trust	UK Discretionary Trust	RSA Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust
Statement 4.1	AGREE	AGREE	AGREE	AGREE	AGREE	AGREE	AGREE
Statement 4.2	AGREE	AGREE	AGREE	AGREE	AGREE	AGREE	AGREE
Statement 4.3	AGREE	AGREE	AGREE	AGREE	AGREE	AGREE	AGREE
Statement 4.4	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	AGREE	AGREE
Statement 4.5	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	AGREE	DISAGREE
Statement 4.6	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE
Statement 4.7	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE

The foreign participants, the SA participants and the respondents agreed (statements 4.1, 4.2 and 4.3) that the vesting or distribution of trust assets, the sale of a capital asset and the subsequent vesting or distributing of the capital gain to one of the beneficiaries of the trust would result in an ordinary disposal for both discretionary and non-discretionary trusts. The foreign participants, the SA

participants and the respondents disagreed (statements 4.4 and 4.5) for a discretionary trust, whilst the Australian foreign participant disagreed, and the UK participant and the SA participants and the respondents agreed that the adding or removal of a fixed or vested beneficiary to or from a non-discretionary trust would result in an ordinary disposal. The foreign participants, the SA participants and the respondents disagreed (statements 4.6 and 4.7) that the appointment or removal of a fixed or vested trustee to or from a non-discretionary would result in an ordinary disposal. The foreign and the SA participants and the respondents' views are the same for statements 4.1, 4.2, 4.3 and 4.6 for Part D, with some differences for statements 4.4 and 4.5 for Part D.

Table 9.15: Comparative analysis of the Australian, UK and SA trusts (Part E)

Statement	DISCRETIONARY TRUSTS			NON-DISCRETIONARY TRUSTS			
	Australian Discretionary Trust	UK Discretionary Trust	RSA Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust
Statement 5.1	DISAGREE	DISAGREE	AGREE	AGREE	AGREE	AGREE	AGREE

The foreign participants disagreed, and the SA respondents and participants agreed that a disposal of an interest in a discretionary trust could result in a capital gain or loss. All the participants and the respondents agreed that a disposal of an interest in a vested trust could result in a capital gain or loss. The foreign and the SA participants and the respondents' views are the same for statement 5.1 for non-discretionary trusts for Part E, with a difference in view between the foreign and the SA participants and the respondents in relation to discretionary trusts.

Table 9.16: Comparative analysis of the Australian, UK and SA trusts (Part F)

Statement	DISCRETIONARY TRUSTS			NON-DISCRETIONARY TRUSTS			
	Australian Discretionary Trust	UK Discretionary Trust	RSA Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust
Statement 6.1	DISAGREE	DISAGREE	INCONCLUSIVE	AGREE	AGREE	AGREE	AGREE
Statement 6.2	DISAGREE	DISAGREE	DISAGREE	AGREE	AGREE	AGREE	AGREE
Statement 6.3	DISAGREE	DISAGREE	INCONCLUSIVE	AGREE	AGREE	AGREE	AGREE

The foreign participants, the SA participants and the respondents disagreed (statement 6.2) that a reduction in the interest in a discretionary trust could be measured for a VS (AUS), VS (UK) and a VSA. In relation to a non-discretionary trust, they all agreed that a reduction in an interest in a vested trust could be

measured for a VS (AUS), a VS (UK) and a VSA. The foreign participants disagreed (statements 6.1 and 6.2), whereas the SA participants and the respondents were uncertain that the market value of an interest or the base cost of an interest in a discretionary trust could be measured before and after a value shift occurs. For a non-discretionary the foreign participants, SA participants and the respondents agreed on this matter. The foreign participants, the SA participants and the respondents' views are the same for statements 6.1, 6.2 and 6.3, except for the SA participants and the respondents who were uncertain for SA discretionary trusts in relation to part F.

Table 9.17: Comparative analysis of the Australian, UK and SA trusts (Part G)

Statement	DISCRETIONARY TRUSTS			NON-DISCRETIONARY TRUSTS			
	Australian Discretionary Trust	UK Discretionary Trust	RSA Discretionary Trust	Australian Fixed Trust	Australian Fixed Unit Trust	UK Fixed Trust	RSA Vested Trust
Statement 7.1	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	INCONCLUSIVE
Statement 7.2	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	INCONCLUSIVE
Statement 7.3	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	INCONCLUSIVE
Statement 7.4	DISAGREE	DISAGREE	DISAGREE	AGREE	AGREE	AGREE	INCONCLUSIVE
Statement 7.5	DISAGREE	DISAGREE	DISAGREE	AGREE	DISAGREE	DISAGREE	INCONCLUSIVE
Statement 7.6	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE
Statement 7.7	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE	DISAGREE

The foreign participants, the SA participants and the respondents disagreed (statements 7.1, 7.2, 7.3, 7.4 and 7.5) in relation to discretionary trusts, and had differing views for non-discretionary trusts that a change in rights to either vest or distribute assets; the sale of a capital asset and subsequent vesting or distribution of the capital gain; the adding or removal of a beneficiary to or from a trust would result in VS (AUS), VS (UK) and VSA implications. The foreign participants disagreed (statements 7.1, 7.2 and 7.3) in relation to a non-discretionary trust, and the SA participants and the respondents had differing views for a non-discretionary trust that a change in rights to either vest or distribute assets, the sale of a capital asset and subsequent vesting or distribution of the capital gain, would result in VS (AUS), VS (UK) and VSA implications. The foreign participants agreed (statement 7.4) for a non-discretionary trust, and the SA participants and the respondents had differing views for a non-discretionary trust that the adding of a beneficiary with fixed or vested rights to a non-discretionary trust, would result in VS (AU), VS (UK) and VSA implications. The foreign participants disagreed (statement 7.5) except for the Australian fixed trust for the non-discretionary trusts, and the SA respondents and

the participants had differing views for a vested trust that the adding of a beneficiary with fixed or vested rights to a non-discretionary trust, would result in VS (AUS), VS (UK) and VSA implications. The foreign participants and the SA participants and respondents disagreed for non-discretionary trusts that the appointment or removal of a trustee to or from a trust (statements 7.6 and 7.7) would have VS (AUS), VS (UK) and VSA implications.

Table 9.18: Other foreign trustees' actions (Part H)

Trustees' Action	Possible VSA Result
Sale and lease back of property, and manipulating the rentals, resulting in a UK value shift in a fixed trust.	Could result in a VSA for a vested trust.
Direct value shifts in a trust, by manipulating the interest terms of the loans, resulting in a GVSR in Australia being applied.	VSA unlikely, section 7C of the Act would be appicable.
Indirect value shifting between two entities held by or controlled by a trust at below market value, resulting in a GVSR in Australia being applied.	VSA unlikely, not within the VSA definition.

The above examples are from the HMRC and ATO guides which reflect value shifting in the foreign tax jurisdictions. The sale and lease back of property could be subject to a VSA, but the direct value shifting of loans would not be a VSA in the SA context. Indirect value shifting GVSR of Australia would not apply in the SA context. The foreign participants for foreign discretionary and non-discretionary trusts did not provide any additional examples of trustees' actions which could result in a VSA. The DTC's recommendations (Part I) are unique and not applicable to the foreign tax jurisdictions covered in this study.

Table 9.19: Additional comments (Part J)

Topic	Summary
Change of trust objectives	In both foreign tax jurisdictions a trust deed variation can result in an ordinary disposal if the objectives of the trust deed are altered to such an extent that a new trust is created, which is the same for RSA trusts.

The key findings from the comparative analysis of the SA trusts to the foreign trusts are presented next.

9.3.5 Summary of the key findings for the comparison of foreign trusts

9.3.5.1 Summary of the comparison of foreign trusts and SA discretionary trusts

The important findings for foreign discretionary trusts are summarised below:

- The nature of a discretionary trust's assets can be identified as either a capital or a revenue asset which is a core element of a CGT regime in the SA and both foreign tax jurisdictions.
- The trustees' actions related to a capital asset held in a foreign discretionary trust will be excluded from the calculation of taxable income which exclude capital gains and is included in the separate CGT calculation which is added to taxable income.
- Trustees' actions regarding capital assets in foreign discretionary trusts are not subject to donations tax in Australia. In contrast, the UK gift tax applies posthumously and differs from SA donations tax, which is imposed on lifetime gifts.
- An ordinary disposal could occur for some of the trustees' actions examined for the Australian and UK discretionary trusts, but the occurrence of an ordinary disposal differs from the SA occurrence of an ordinary disposal, as the foreign country's disposal rules differ from the SA ordinary disposal rules.
- An interest in a foreign discretionary trust is not considered an asset of a beneficiary, whereas an interest in an SA discretionary trust is considered an asset of a beneficiary.
- The proceeds, value shift and base cost of an interest in a discretionary Australian and UK trust cannot be measured, which is the same for an SA discretionary trust, with the exception that paragraph 81 of the Eighth Schedule deems the value of the base cost of a discretionary interest in a trust to be nil.
- A VS (AUS), a VS (UK) and a VSA are not applicable to any of the trustees' actions examined in this study for Australian, UK and SA discretionary trusts.
- No additional examples of trustees' actions which could result in a VS (AUS), a VS (UK) and a VSA were provided.

9.3.5.2 Summary of the comparison of foreign trusts and SA non-discretionary trusts

The important findings for foreign non-discretionary trusts are summarised below:

- The nature of a foreign non-discretionary trust's assets can be identified as either a capital or a revenue asset, which is the same for a vested SA (non-discretionary) trust.
- The trustees' actions of a capital asset held in foreign trusts will be excluded from income tax (excluding capital gains) implications, which is the same for a vested SA (non-discretionary) trust.
- The trustees' actions of a capital asset held in the foreign trusts would not have donations tax implications in Australia and the UK. In the UK gift tax only applies after death and cannot be compared to the SA donations made during a beneficiary's lifetime being subject to donations tax.
- The sale of an asset in all the foreign trusts prior to the vesting or distribution of the capital gain will result in an ordinary disposal, which is the same for an SA vested trust.
- The appointment or removal of a trustee to or from a trust will not result in an ordinary disposal in all the foreign non-discretionary trusts, which is the same for an SA vested trust.
- A vested interest in the Australian and the UK non-discretionary trusts is an asset of the beneficiary, which is the same for an SA vested trust.
- The elements of measuring value shifting in a VSA are present for both the Australian and the UK non-discretionary trusts, although the measuring of a VS (AUS) differs to a VSA, which may even result in a reduction of the base cost of an asset being transferred between entities to prevent a future capital gain in acquiring the asset (section 3.13.1.1 in Chapter 3).
- Australia has three GVSR sets: direct value shifting for entity interests, direct value shifting for created rights, and the indirect value shifting rule. The latter is not compatible with the SA VSA (section 3.13.1.3 in Chapter 3).
- The appointment or removal of a trustee to or from a trust will not result in a VS (AUS) and a VS (UK), which is the same for a vested trust in the SA.

- Additional examples of trustees' actions which could result in a VS (AUS) and a VS (UK) were not provided by the foreign trust participants.

9.4 CONCLUSIONS ON THE RESEARCH OBJECTIVES

The primary research objective and the eight secondary research objectives of establishing if the trustees' actions for SA trusts would result in a VSA were attained in the integrated analysis in Chapter 7 (discretionary trusts) and Chapter 8 (vested trusts). It was supported by the doctrinal analysis conducted in Chapter 3 and is discussed below.

9.4.1 Vesting or distributing an asset (primary research objective)

The primary research objective for this study was to determine whether the trustees' action of vesting or distributing a trust asset which requires a change in the rights in or to a beneficiary would result in a VSA. It is first applied to discretionary trusts and then to non-discretionary trusts.

9.4.1.1 SA discretionary trusts

The triangulated insights (Chapter 7) and the doctrinal analysis (Chapter 3) indicated that the vesting or distribution of a capital asset in one of the beneficiaries of a discretionary trust would not result in a VSA. In the discretionary trusts examined the trustees were given the unfretted discretion to either vest or distribute trust assets to any of the beneficiaries and without any time restraints which is a mere hope or *spes*. Thus, it would not be possible to measure the proceeds of a VSA as defined in paragraph 35(2) of the Eighth Schedule. The primary research objective for discretionary trusts has been met.

9.4.1.2 SA vested trusts

The triangulated insights (Chapter 8) and the doctrinal analysis (Chapter 3) indicated that the vesting or distribution of a capital asset which results in a change in beneficiaries rights in or to one of the beneficiaries of a vested trust, resulting in

a VSA, are inconclusive. A vested interest (vested right) in a trust can be measured before and after a VSA occurs. The base cost of a vested interest can be measured before a VSA occurs. Therefore, the base cost (paragraph 23(*a*)) of the Eighth Schedule) and the proceeds of a VSA (paragraph 35(2) of the Eighth Schedule) can be measured for a VSA for vested rights in a trust. Both an ordinary disposal and a VSA could occur provided all the elements of the definition of a VSA are met. If both an ordinary disposal and a VSA are possible the doctrinal analysis (section 3.5.1 of Chapter 3) suggested that an ordinary disposal would take precedence. The primary research objective for non-discretionary trusts has been met.

9.4.2 Sale of an asset and the subsequent vesting or distributing of the capital gain (secondary research objective 1)

The first secondary research objective was to determine whether the trustees' action of the sale of a capital asset and the vesting or distributing of the capital gain in or to a beneficiary of a trust would result in a VSA (discussed in Chapter 7). It is first applied to discretionary trusts and then to non-discretionary trusts.

9.4.2.1 SA discretionary trusts

The triangulated insights (Chapter 7) and the doctrinal analysis (Chapter 3) indicated that the sale of a capital asset and the subsequent vesting or distribution of the capital gain to or in one of the beneficiaries of a discretionary trust could not result in a VSA. A change in rights and entitlements resulting in a change in an interest in a trust is difficult to measure (section 3.6.2.4 in Chapter 3) as required by the definition of a VSA, as the market value of a contingent right or a *spes* cannot be easily measured. The sale would result in a paragraph 11(1)(*a*) disposal, being the vesting or distribution of the capital gain. Vesting or distributing a capital asset or a capital gain in or to one of the beneficiaries of a discretionary trust would be attributed to the beneficiary in terms of paragraphs 80(2) of the Eighth Schedule (section 3.5.2.1 of Chapter 3). The secondary research objective 1 for discretionary trusts has been met.

9.4.2.2 SA vested trusts

The triangulated insights (Chapter 8) and the doctrinal analysis (Chapter 3) indicated that the sale of a capital asset and the subsequent vesting or distribution of the capital gain which requires a change in the vesting rights amongst the beneficiaries to or in one of the beneficiaries of a vested trust, resulting in a VSA, are inconclusive. Vesting or distributing a capital asset or a capital gain in or to one of the beneficiaries of a vested trust would result in an ordinary disposal or a VSA. If the vested rights were changed before the sale of the capital asset occurs, a VSA is more likely to occur, and if the capital asset is sold before the distribution, an ordinary disposal is more likely to occur. If both an ordinary disposal and a VSA occur simultaneously, the doctrinal analysis suggested that an ordinary disposal would take precedence (see section 3.5.1 of Chapter 3. The secondary research objective 1 for vested trusts has been met.

9.4.3 Adding a beneficiary (secondary research objective 2)

The second research objective was to determine whether the trustees' action of adding beneficiaries to the trust would result in a VSA. It is first applied to discretionary trusts and then to non-discretionary trusts.

9.4.3.1 SA discretionary trusts

The triangulated insights (Chapter 7) and the doctrinal analysis (Chapter 3) indicated that adding a beneficiary (with contingent rights) to a discretionary trust would not result in a VSA. A change in rights and entitlements resulting in a change in an interest in a trust is difficult to measure (section 3.6.2.4 in Chapter 3) as required by the definition of a VSA, as the market value of a contingent right or a *spes* cannot be easily measured. The secondary research objective 2 for discretionary trusts has been met.

9.4.3.2 SA vested trusts

The triangulated insights (Chapter 8) and the analysis (Chapter 3) indicated that adding a beneficiary (with vested rights) to a vested trust and whether it would result in a VSA, is inconclusive. Both an ordinary disposal and a VSA could occur. The doctrinal analysis suggested that an ordinary disposal would take precedence (section 3.5.1 of Chapter 3). The secondary research objective 2 for vested trusts has been met.

9.4.4 Removing a beneficiary (secondary research objective 3)

The third secondary research objective was to determine whether the trustees' action of removing beneficiaries from a trust would result in a VSA. It is first applied to discretionary trusts and then to non-discretionary trusts.

9.4.4.1 SA discretionary trusts

The triangulated insights (Chapter 7) and the doctrinal analysis (Chapter 3) indicated that removing a beneficiary (with contingent rights) from a discretionary trust would not result in a VSA. A change in rights and entitlements resulting in a change in an interest in a trust is difficult to measure (section 3.6.2.4 in Chapter 3) as required by the definition of a VSA, as the market value of a contingent right or a *spes* cannot be easily measured. The secondary research objective 3 for discretionary trusts has been met.

9.4.4.2 SA vested trusts

The triangulated insights (Chapter 8) and the doctrinal analysis (Chapter 3) indicated that removing a beneficiary (with vested rights) from a vested trust would result in a VSA, is inconclusive. The removal of a beneficiary from a vested trust could result in either a VSA or an ordinary disposal, however, the doctrinal analysis of the definition of a VSA suggested that for a VSA to take place the beneficiaries should retain an interest in the trust after the VSA has taken place (section 3.6.2.2 of Chapter 3). Without meeting all the elements of the definition of a VSA, an

ordinary disposal is most likely to occur when a vested beneficiary is removed from a trust. The secondary research objective 3 for vested trusts has been met.

9.4.5 Appointing a trustee (secondary research objective 4)

The fourth secondary research objective was to determine whether the trustees' action of appointing a trustee to the trust would result in a VSA. It is first applied to discretionary trusts and then to non-discretionary trusts.

9.4.5.1 SA discretionary trusts

The triangulated insights (Chapter 7) and the doctrinal analysis (Chapter 3) indicated that appointing a trustee to a discretionary trust would not result in a VSA. In the trust structure examined the trustees had no rights to the trust's assets as they only managed the trust's assets on behalf of the beneficiaries. The secondary research objective 4 for discretionary trusts has been met.

9.4.5.2 SA vested trusts

The triangulated insights (Chapter 8) and the doctrinal analysis (Chapter 3) indicated that appointing a trustee to a vested trust would not result in a VSA. If the trustees have no entitlements or interest in the trust assets, the appointment of a trustee will have no VSA implications. The secondary research objective 4 for vested trusts has been met.

9.4.6 Removing a trustee (secondary research objective 5)

Secondary research objective five was to determine whether the trustees' action of removing a trustee from a trust would result in a VSA. It is first applied to discretionary trusts and then to non-discretionary trusts.

9.4.6.1 SA discretionary trusts

The triangulated insights (Chapter 7) and the doctrinal analysis (Chapter 3) indicated that removing a trustee from a discretionary trust would not result in a VSA. The secondary research objective 5 for discretionary trusts has been met.

9.4.6.2 SA vested trusts

The triangulated insights (Chapter 7) and the doctrinal analysis (Chapter 3) indicated that removing a trustee from a vested trust would not result in a VSA. If the trustees have no entitlements to an interest in the trust assets, the removal of a trustee will have no VSA implications. The secondary research objective 5 for vested trusts has been met.

9.4.7 Donating an interest in a trust (secondary research objective 6)

The sixth secondary research objective was to determine whether the trustees' action of donating a beneficiary's interest in a trust (with the consent of the beneficiaries) would result in a VSA from the perspective of the respondents and the participants who participated in this study (discussed in Chapters 7 and 8). It is first applied to discretionary trusts and then to non-discretionary trusts.

9.4.7.1 SA discretionary trusts

The triangulated insights (Chapter 7) and the doctrinal analysis (Chapter 3) indicated that donating an interest from one beneficiary to another beneficiary of a discretionary trust would not result in a VSA. A change in rights and entitlements resulting in a change in an interest in a trust is difficult to measure (section 3.6.2.4 in Chapter 3) as required by the definition of a VSA, as the market value of a contingent right or a *spes* cannot be easily measured. The secondary research objective 6 for discretionary trusts has been met.

9.4.7.2 SA vested trusts

The triangulated insights (Chapter 7) and the doctrinal analysis (Chapter 3) indicated that donating an interest from one beneficiary to another beneficiary of a vested trust could result in a VSA. All the elements of the definition of a VSA would be replicated, however, such a donation of a vested interest would result in an ordinary disposal and in donations tax implications at the same time. If both an ordinary disposal and a VSA are possible, the doctrinal analysis suggested that an ordinary disposal would take precedence (section 3.5.1 of Chapter 3). The secondary research objective 6 for vested trusts has been met.

9.4.8 Other trustees' actions (secondary research objective 7)

The seventh secondary research objective was to determine whether any other possible actions of the trustees related to the trust's assets would result in a VSA. It is first applied to discretionary trusts and then to non-discretionary trusts.

9.4.8.1 SA discretionary trusts

The triangulated insights (Chapter 7) and the doctrinal analysis (Chapter 3) provided no additional examples of a VSA for a discretionary trust resulting from other trustees' actions. A discretionary interest in a trust has no value, therefore the possibility of measuring a reduction and a corresponding increase in the market value of an interest for a connected beneficiary as required to measure a VSA is not possible. The secondary research objective 7 for discretionary trusts has been met.

9.4.8.2 SA vested trusts

Additional examples of trustees' actions which could result in a VSA for vested trusts were provided (see section 8.2.8.8 of Chapter 8). The findings indicate that the proceeds (paragraph 35(2) of the Eighth Schedule) and the base cost (paragraph 23(*g*) of the Eighth Schedule) could be measured for an interest in a vested trust, and additional examples of trustees' actions that could result in a VSA were provided. It is not possible to cover all permutations of trustees' actions that may

result in a VSA due to the different trust deed clauses that may be used for a vested trust, and an arrangement as described in the definition of a VSA could cover any trustees' actions not discussed in this study. The secondary research objective 7 for vested trusts has been met.

9.4.9 Impact of the DTC's recommendations (secondary research objective 8)

The eighth secondary research objective was to determine whether the recommendations of the first DTC Interim Report would have any impact on a VSA. The secondary research objective of establishing whether any of the DTC's recommendations would have an impact on a VSA was attained in chapters 7 and 8, and the results are provided below for each of the SA trust types. It is first applied to discretionary trusts and then to non-discretionary trusts.

9.4.9.1 SA discretionary trusts

The triangulated insights (Chapter 7) and the doctrinal analysis (Chapter 3) indicated that if the DTC's recommendations for trusts were implemented, there would be no impact on a VSA for discretionary trusts. The findings for the trustees' actions in Part G (section 7.2.7.8 in Chapter 7) are like the results in Part I (section 7.2.9.9 in Chapter 7), which indicates that the DTC's recommendations will have no influence on a VSA for discretionary trusts. All the trustees' actions examined if the DTC's recommendations were implemented indicated a low possibility of a VSA occurring. The secondary research objective 8 for discretionary trusts has been met.

9.4.9.2 SA vested trusts

The implementation of the DTC's recommendations has no impact on a VSA for vested trusts, as the recommendations are aimed at changing the attribution rules of income and capital gains related to discretionary trusts. The findings for the trustees' actions in Part G (section 8.2.7.8 in Chapter 8) are like the results in Part I (section 8.2.9.9 in Chapter 8), which indicates that the DTC's recommendations

will have no influence on a VSA for vested trusts. The secondary research objective 8 for vested trusts has been met.

9.5 A PRACTICAL FRAMEWORK FOR TAX PRACTITIONERS' ANALYSIS OF TRUSTEES' ACTIONS FOR A VSA IN THE SA CONTEXT

A practical framework to analyse trustees' actions as an arrangement between connected persons for VSAs is presented the diagram 9.1 below.

(**Test 1**) Are the beneficiaries' interest in the trust subject to the trustees' discretion?	YES ➡	NO VSA	A change in beneficiaries' interest which is subject to the trustees' unfettered discretion is difficult to measure in terms of paragraph 35(2) of the Eighth Schedule.
NO ➘			
(**Test 2**) Are the beneficiaries' interests in the trust a vested interest?			
YES ➘			
(**Test 3**) Are the beneficiaries' interest in the trust's assets of a revenue nature?	YES ➡	NO VSA	A receipt from revenue asset is included in gross income (defined in section 1 of the Act) and will be taxable income in the beneficiaries' hands or in the trust, paragraph 35(3)(a) of the Eighth Schedule excludes gross income from the calculation in the proceeds of CGT. (An exception would occur where the trustees' actions effect a substantive change in the trust's objective, resulting in the creation of a new trust for tax purposes. In such circumstances, the transition from the original trust to the newly constituted trust constitutes a disposal in terms of paragraph 11(1)(a) of the Eighth Schedule, with the assets deemed to have been disposed of by the former trust and acquired by the latter trust).
NO ➘			
(**Test 4**) Are the beneficiaries' interests in the trust's asset of a capital nature?			
YES ➘			
(**Test 5**) Does a change in the beneficiaries' interests, or that of the trust's interest in the assets held in the trust occur?	NO ➡	NO VSA	No disposal for both the beneficiaries and the trust, paragraph 11(1)(a) to (g) of the Eighth Schedule
YES ➘			
(**Test 6**) Ascertain if the beneficiaries' agreement to the change in interests in a trust result in result in any of the ordinary paragraphs 11(1)(a), (b), (c) or (d) of the Eighth Schedule?	YES ➡	NO VSA	An ordinary disposal occurs in terms of paragraphs 11(1(a), (b), (c) or (d) disposal of the Eighth Schedule. The proceeds will be determined in terms of paragraph 38 and the base cost in terms of paragraph 20 of the Eighth Schedule. (If a paragraph 11(1)(a) donation disposal is applicable, check for donations tax implications.)
NO ➘			
(**Test 7**) Do the beneficiaries' changes in rights or entitlements result in a decrease in interest market value in a trust for some beneficiaries, with a corresponding increase in market value interest in the trust for other beneficiaries?	NO ➡	NO VSA	Sub-paragraphs (*a*) and (*b*) of the paragraph 1 of the definition of a VSA.
YES ➘			
(**Test 8**) Do the beneficiaries retain an interest in the trust after the VSA?	NO ➡	NO VSA	A paragraph 11(1)(a) disposal as a donation of the Eighth Schule occurs for the beneficiary who has a decrease in the market value of his interest in a trust and is removed as a beneficiary from the trust. (Check for donations tax implications.)
YES ➘			
(**Test 9**) Can the beneficiaries' market value and base cost in the trust be measurable both before and after the VSA occurs?	NO ➡	NO VSA	The capital gain or capital loss will be difference between the paragraph 35(2) (proceeds) and 23(a) (base cost) of the Eighth Schedule.
YES ➘			
(**Test 10**) Are all the elements of a VSA met?	YES ➡	YES VSA	A VSA disposal occurs in terms of paragraph 11(1)(g) of the Eighth Schedule. The capital gain or loss will be attributed to the beneficiaries who have a reduced market value of their interest in the trust (paragraph 35(2) and 23(a) of the Eighth Schedule).

Diagram 9.1: A Practical Framework for tax practitioners' analysis of trustees' actions for VSAs in the SA context

The practical framework begins by confirming that a VSA requires an arrangement between connected persons; in the context of an estate-planning trust, the trust and its beneficiaries fall within the definition of “connected persons” in section 1 of the Act. Trustees’ actions are then analysed through ten sequential tests. Test 1 excludes mere expectations under a discretionary trust, as a *spes* cannot be measured for VSA purposes. Test 2 determines whether beneficiaries hold vested interests in the trust, which the research shows may be affected by VSAs. Test 3 removes beneficiaries’ interests in trust assets of a revenue nature, because receipts of a revenue nature fall within “gross income” and amounts included in gross income are excluded from CGT under paragraph 35(3)(a) of the Eighth Schedule. However, a payment made to a discretionary beneficiary to relinquish their right to be considered for future benefits constitutes a capital disposal, with the capital gain calculated as the proceeds received less a base cost of nil in terms of paragraph 81. Tests 4 and 5 assess whether the beneficiaries’ interests are of a capital nature and whether any change in those interests results in an ordinary disposal under paragraph 11(1). Test 6 filters out ordinary disposals under paragraph 11(1)(*a*), (*b*), (*c*) and (*d*), which cannot constitute VSAs. Tests 7, 8 and 9 evaluate the statutory elements of a VSA: a change in vested rights; a corresponding decrease in the market value of an interest in the trust and reciprocal increase in value for another beneficiary; and the requirement that the beneficiary retains an interest after the VSA has occurred. Test 10 then attributes the resulting capital gain or loss to the beneficiaries whose vested interests decreased in value.

9.6 CONTRIBUTIONS TO KNOWLEDGE AND PRACTICE

The findings from online questionnaire and the interview guides were combined with doctrinal analysis of the Act court cases, previous studies, and SARS guides to establish a practical framework for tax practitioners for analysing VSA’s related to trustees' actions. There is currently no structured, sequential, or practically applicable framework to guide tax practitioners in determining whether trustees’ actions in South African estate-planning trusts constitute a VSA, nor in identifying, quantifying, and attributing the resulting capital gain or loss under paragraph 11(1)(*g*). This study addresses this knowledge gap by developing a coherent, step-wise analytical framework that operationalises the VSA provisions for practical

use in trust-tax compliance and advisory work. The practical framework provides a sequence of 10 logical tests, that when applies to the trustees' actions firstly eliminates the possibility of a VSA occurring. The steps cover all the elements of the definition of a VSA (tests 5 to 9) and assist with the analysis of trustees' actions which may result in a VSA in the context SA of estate-planning trusts. After identifying and measuring a capital gain or a capital loss of a VSA, test 10 applies to the attribution of the capital gain resulting from a paragraph 11(1)(*g*) VSA disposal to the beneficiary or beneficiaries who have a reduction in their market value of their interest in a trust.

9.7 POLICY AND REGULATORY IMPLICATIONS

The following section critically evaluates the effectiveness of a VSA in the context of trusts, with reference to legislative complexities and practical implications for tax practitioners in South Africa. The discussion below incorporates key policy and regulatory considerations that may inform future legislative and administrative developments:

- **Measurement of effectiveness:** The practical effectiveness of VSA regulation should be assessed considering the broad definitions of ordinary disposals and the GAAR, both of which may already capture most VSA scenarios involving trusts. Overlapping provisions could lead to uncertainty and inconsistencies in application.
- **Legislative clarity and complexity:** Ambiguities and excessive complexity in tax legislation governing VSAs can contribute to tax non-compliance. This highlights the need for clear guidelines and interpretive aids for tax practitioners, particularly when distinguishing between ordinary disposals and VSAs.
- **Principle of interpretation:** The overlap between VSA provisions and ordinary disposal rules complicates the application of interpretive principles such as *unius est exclusio alterius*. Policymakers should consider how these rules interact, especially when trustees' actions fulfil the criteria for both a VSA and an ordinary disposal.

- **Alignment with established law:** The current DTC's recommendations do not align fully with established trust and tax law in South Africa. Policy focus should shift towards enhancing tax compliance and addressing state spending irregularities, rather than introducing additional VSA complexities that may not simplify trust-related tax matters.
- **Alternative approaches:** Rather than treating all VSAs as disposals, applying the GAAR to value shifts may offer a more equitable solution, targeting only those value shifts that yield a tax benefit. This would help ensure that only substantive tax avoidance is addressed through the CGT provisions.
- **Guidance and education:** The lack of a comprehensive SARS guide on VSAs for trusts creates practical challenges. Drawing from international examples such as the detailed Australian GVSR Guide, SARS could provide targeted guidance to help trustees and tax practitioners navigate VSA risks and tax compliance obligations.
- **Jurisdictional differences:** A direct adoption of VSA frameworks from tax jurisdictions such as Australia or the UK is not feasible due to fundamental differences in trust law and CGT application. Policymakers should ensure that any imported ideas are carefully adapted to the South African context.

In summary, policy and regulatory reforms should prioritise legislative clarity, practical guidance, and alignment with established doctrinal principles to enhance the effectiveness of VSA regulation in the South African trust context. This approach would support both tax compliance and the broader socio-economic objectives of the tax system.

9.8 MAPPING OF THE RESEARCH OBJECTIVES WITH THE CHAPTERS

This section maps the research objectives from Chapter 1 to their relevant Chapters. It highlights the integrated methodology, combining empirical findings with rigorous doctrinal analysis to ensure robust conclusions. By mapping each research objective to specific chapters, the study demonstrates a triangulated approach, reinforcing the reliability of its outcomes. This comprehensive strategy was instrumental in addressing both the primary and secondary research objectives. The

alignment underscores the coherence and depth of the investigation into VSA's in trusts.

9.8.1 Primary research objective

The primary research objective was to examine the circumstances under which CGT may be triggered by a VSA when trustees vest or distribute a trust asset, resulting in a change in rights for one of the beneficiaries within the context of estate planning.

The primary research objective was systematically addressed throughout Chapters 2, 3, 4, 5, 6, 7 and 8. Chapter 2 outlined the contextual background of the study, and Chapter 3 examined the beneficiaries' contingent and vested rights as capital assets for CGT, considering related tax issues. The VSA definition was analysed for both discretionary and vested trusts. Comparisons were made between value shifting laws in Australia, the UK, and SA VSAs. Chapter 4 described the research methodology, while Chapters 5 and 6 reported the quantitative and qualitative findings, respectively. Chapter 7 used doctrinal, comparative, and empirical analyses, to determine the likeliness of a VSA occurring. It was established that a VSA is unlikely for SA discretionary trusts and that foreign discretionary trusts are comparable to SA discretionary trusts. Chapter 8 concluded, based on these analyses of the vesting or distribution of an asset which alters the beneficiaries' vested rights, that an ordinary disposal and a VSA both apply to SA vested trusts, with differences noted when compared to foreign non-discretionary trusts. Thus, the primary research objective of the study was addressed and validated.

9.8.2 Secondary research objective 1

Secondary research objective 1 was to determine whether the trustees' action of the sale of a capital asset and the vesting or distributing of the capital gain in or to a beneficiary of a trust would result in a VSA from the perspective of respondents and participants who participated in this study.

Secondary research objective 1 was systematically addressed throughout Chapters 2, 3, 4, 5, 6, 7 and 8. Chapter 2 outlined the contextual background of the study, and Chapter 3 examined the beneficiaries' contingent and vested rights as capital assets for CGT, considering related tax issues. The VSA definition was analysed for both discretionary and vested trusts. Comparisons were made between value shifting laws in Australia, the UK, and SA VSA. Chapter 4 described the research methodology, while the quantitative and qualitative findings were reported in chapters 5 and 6, respectively. In Chapter 7 doctrinal, comparative, and empirical analyses were applied, and it was determined that a VSA is unlikely for SA discretionary trusts and that foreign discretionary trusts are comparable to SA discretionary trusts. Chapter 8 concluded, based on these analyses, that an ordinary disposal and VSA may occur if the vested rights in SA vested trusts are altered before the sale of the asset and the distribution or vesting of the capital gain occurs. Differences were noted when compared to foreign non-discretionary trusts. Thus, the secondary research objective 1 was addressed and validated.

9.8.3 Secondary research objective 2

Secondary research objective 2 was to determine whether the trustees' action of adding beneficiaries to the trust would result in a VSA from the perspective of respondents and participants who participated in this study.

Secondary research objective 2 was systematically addressed throughout Chapters 2, 3, 4, 5, 6, 7 and 8. Chapter 2 outlined the contextual background of the study, and Chapter 3 examined the beneficiaries' contingent and vested rights as capital assets for CGT, considering related tax issues. The VSA definition was analysed for both discretionary and vested trusts and included both discretionary and vested trusts. Comparisons were made between value shifting laws in Australia, the UK, and the SA VSA. Chapter 4 described the research methodology, while Chapters 5 and 6 reported the quantitative and qualitative research findings, respectively. Chapter 7 entailed doctrinal, comparative, and empirical analyses to determine the occurrence of a VSA. It was found that a VSA is unlikely for SA discretionary trusts and that foreign discretionary trusts are comparable to SA discretionary trusts. A VSA is also unlikely if a beneficiary with contingent rights were added to a hybrid

trust (see section 3.6.2.4 in Chapter 3). Chapter 8 concluded, based on these analyses, that both an ordinary disposal and a VSA may occur. The same would apply if a beneficiary with vested rights were added to a hybrid trust (see section 3.6.2.4 in Chapter 3). The foreign non-discretionary trusts confirmed a VS (AUS), or a VS (UK) would occur if the adding of the beneficiary altered the fixed rights of the beneficiaries in the foreign non-discretionary trusts. Thus, the secondary objective 2 was addressed and validated.

9.8.4 Secondary research objective 3

Secondary research objective 3 was to determine whether the trustees' action of removing beneficiaries from a trust would result in a VSA from the respondents and the participants who participated in this study.

Secondary research objective 3 was systematically addressed throughout Chapters 2, 3, 4, 5, 6, 7 and 8. Chapter 2 outlined the contextual background of the study, whilst Chapter 3 examined the beneficiaries' contingent and vested rights as capital assets for CGT, considering related tax issues. The VSA definition was analysed for both discretionary and vested trusts and included both discretionary and vested trusts. Comparisons were made between value shifting laws in Australia, the UK, and the SA VSA. Chapter 4 described the research methodology. The quantitative and qualitative findings were reported in chapters 5 and 6. Chapter 7 used doctrinal, comparative, and empirical analyses to determine that a VSA is unlikely for SA discretionary trusts and that foreign discretionary trusts are comparable to SA discretionary trusts. Chapter 8 concluded, based on these analyses, that both an ordinary disposal and a VSA may occur. If the removed beneficiary no longer has a vested interest in the trust, the doctrinal analysis of the VSA definition in Chapter 3 indicates that an ordinary disposal would occur. The foreign non-discretionary trusts differ if a beneficiary is removed from a foreign non-discretionary trust. Thus, the secondary objective 3 was addressed and validated.

9.8.5 Secondary research objective 4

Secondary research objective 4 was to determine whether the trustees' action of appointing new trustees to the trust would result in a VSA from the perspective of respondents and participants who participated in this study.

Secondary research objective 4 was systematically addressed throughout Chapters 2, 3, 4, 5, 6, 7 and 8. Chapter 2 outlined the contextual background of the study, and Chapter 3 examined the beneficiaries' contingent and vested rights as capital assets for CGT, considering related tax issues. The VSA definition was analysed for both discretionary and vested trusts and included both discretionary and vested trusts. Comparisons were made between value shifting laws in Australia, the UK, and the SA VSA. Chapter 4 described the research methodology, while Chapters 5 and 6 reported the quantitative and qualitative findings, respectively. Chapters 7 and 8 used doctrinal, comparative, and empirical analyses to establish that a VSA is unlikely for SA discretionary and vested trusts, and that foreign discretionary and non-discretionary trusts are comparable to SA trusts. The appointment of a trustee to the trust without any rights to the trust assets, will not result in any changes in entitlements and no VSA is possible. Thus, the secondary objective 4 was addressed and validated.

9.8.6 Secondary research objective 5

Secondary research objective 5 was to determine whether the trustees' action of removing trustees from the trust would result in a VSA from the perspective of the respondents and the participants who participated in this study.

Secondary research objective 5 was systematically addressed throughout Chapters 2, 3, 4, 5, 6, 7 and 8. Chapter 2 outlined the contextual background of the study, and Chapter 3 examined the beneficiaries' contingent and vested rights as capital assets for CGT, considering related tax issues. The VSA definition was analysed for both discretionary and vested trusts and included both discretionary and vested trusts. Comparisons were made between value shifting laws in Australia, the UK,

and the SA VSA. A description of the research methodology was given in Chapter 4, and the quantitative and qualitative findings were shared in chapters 5 and 6, respectively. Chapters 7 and 8 described the processes of doctrinal, comparative, and empirical analyses that were applied. It was determined that a VSA is unlikely for SA discretionary and vested trusts, and that foreign discretionary and non-discretionary trusts are comparable to SA trusts. The trustee removed from the trust had no interest in the trust, therefore a VSA is unlikely. Thus, the secondary objective 5 was addressed and validated.

9.8.7 Secondary research objective 6

Secondary research objective 6 was to determine whether the trustees' action of donating a beneficiary's interest in a trust (with the consent of the beneficiaries) would result in a VSA from the perspective of the respondents and the participants who participated in this study.

Secondary research objective 6 was addressed in a systematic manner throughout Chapters 2, 3, 4, 5, 6, 7 and 8. Chapter 2 provided the contextual background of the study. Chapter 3 examined the beneficiaries' contingent and vested rights as capital assets for both CGT and donations tax purposes, considering related tax issues. According to both common law and case law on donations tax, for a valid donation it is evident that the donor should consent to a donation, and the donee should accept the donation. Donations tax does overlap with CGT. Both foreign tax jurisdictions (Australia and the UK) do not have any gift tax legislation which is comparable to the SA donations tax. Case law indicates that if beneficiaries do not consent to the donation of a trust asset, such donations may be considered *ultra vires* and could have donations tax implications for the trust. Additionally, these donations may also lead to CGT tax consequences. Comparisons were made between value shifting laws in Australia, the UK, and the SA VSA. Chapter 4 described the research methodology, while Chapters 5 and 6, respectively, reported the quantitative and qualitative research findings. Chapters 7 and 8 used doctrinal, comparative, and empirical analyses to determine the occurrence of a VSA. It was determined that the donation of a contingent right or a vested right from one beneficiary to another beneficiary in an SA discretionary trust is unlikely to result in

a VSA, and in a vested trust either an ordinary disposal or a VSA will occur. The foreign discretionary and non-discretionary trusts' results are comparable to SA trusts. Thus, the secondary objective 6 was addressed and validated.

9.8.8 Secondary research objective 7

Secondary research objective 7 was to determine if other trustees' actions, not covered in the primary or secondary research objectives 1 to 6, would result in a VSA from the perspective of the respondents and the participants who participated in this study.

Secondary research objective 7 was systematically addressed throughout Chapters 2, 3, 4, 5, 6, 7 and 8. Chapter 2 outlined the contextual background of the study, and Chapter 3 examined the beneficiaries' contingent and vested rights as capital assets for CGT, considering related tax issues. The VSA definition was analysed for both discretionary and vested trusts and included both discretionary and vested trusts. Comparisons were made between value shifting laws in Australia, the UK, and the SA VSA. Chapter 4 described the research methodology, while the quantitative findings were reports in chapter 5, and the qualitative findings in chapter 6. Comparative and empirical analyses were applied in chapters 7 and 8 to determine the likeliness of a VSA occurring for SA discretionary trusts and vested trusts. The findings indicated other possible trustees' actions resulting in VSAs for SA vested and foreign non-discretionary trusts (see sections 8.2.8.8 and 8.4.2.8 in Chapter 8). Thus, the secondary research objective 7 was addressed and validated.

9.8.9 Secondary research objective 8

Secondary research objective 8 was to determine whether the recommendations of the DTC Report on the Feasibility of Wealth Tax in South Africa (2018:81) would have any impact on a VSA from the perspective of the respondents and the participants who participated in this study**.**

Secondary research objective 8 was systematically addressed throughout Chapters 2, 3, 4, 5, 6, 7 and 8. Chapter 2 provided an outline of the contextual background of the study. Chapter 3 examined the beneficiaries' contingent and vested rights as capital assets for CGT, considering related tax issues. The VSA definition was analysed and included for both discretionary and vested trusts. Chapter 4 provided a description of the research methodology. The quantitative and qualitative research findings were reported in chapters 5 and 6, respectively. Doctrinal, comparative, and empirical analyses were applied in chapters 7 and 8, with the aim of determining the impact of the implementation of the recommendations of the DTC for SA discretionary and vested trusts. It was determined that the DTC's recommendations would have no impact on a VSA. Thus, the secondary research objective 8 was addressed and validated.

9.9 LIMITATIONS AND REFLECTIONS OF THE STUDY

This section sets out the key limitations that shaped the scope, methodological choices, and interpretive boundaries of the study, followed by a critical reflection on how these constraints influenced the research process and its outcomes. Together, the limitations and reflections provide a transparent account of the practical, doctrinal, and methodological considerations that informed the study's findings and the conclusions that may responsibly be drawn from them.

9.9.1 Limitations of the study

In this section the study acknowledges several inherent limitations that should be considered when interpreting its findings and conclusions. Firstly, it was not feasible to review every variation of trust deeds, as these documents may contain a range of provisions that either authorise or restrict specific actions by trustees, thereby potentially affecting VSAs. Additionally, trust deeds might specify distinct classes of beneficiaries, such as adopted children of existing beneficiaries, blood descendants, or individuals related by affinity, which could be drafted to minimise the likelihood of a VSA occurring (see section 8.2.10.2 of Chapter 8). Similarly, it was not possible to address every conceivable action that a trustee might take. The

study also expressly excluded *ultra vires* transactions and did not undertake an analysis of the potential overlap between the GAAR and VSAs.

The primary focus of this research was on an analysis of trustees' actions related to VSAs in trusts commonly employed for estate planning purposes. The study explored the implications of these actions in terms of income tax (excluding capital gains), donations tax, estate duty and the implications of ordinary disposals within the context of VSAs. However, it did not constitute a comprehensive examination of trust law. Additionally, the study did not include a doctrinal analysis of scenarios where beneficiaries' consent to trustees' actions could effectively result in a donation, waiver of a right, or alienation of property matters that would typically require the expertise of a legal specialist in contract law.

The study's methodology incorporated the subjective perspectives of respondents and participants, with these viewpoints being further scrutinised and validated through rigorous doctrinal analysis. This approach was adopted to ensure that the respondents and participants opinions were thoroughly examined and substantiated, thereby providing a more robust and credible basis for the study's conclusions. The complex and nuanced nature of trust and tax law, and the potential for ambiguity in relying solely on professional opinions, underscored the necessity of a comprehensive doctrinal review to triangulate the research findings.

Finally, the study's ability to provide an in-depth comparison of value shifting legislation with those in foreign tax jurisdictions was limited. This is due to significant differences between the trust law and CGT law as applied in Australia and the UK compared to those in South Africa, making direct comparisons challenging.

9.9.2 Reflections of the study

This study required the researcher to balance doctrinal analysis with empirical inquiry, and the process highlighted several areas for critical reflection. The online questionnaire, while useful for gathering structured data, did not explicitly distinguish between ordinary disposals and VSAs. This limited the doctrinal nuance

that could be captured through the online questionnaire, whereas the interviews allowed these issues to surface more naturally. This contrast illustrates how methodological choices shape the insights that become available.

In the initial phase of data collection, the online questionnaire was distributed to respondents drawn randomly from the professional bodies relevant to this study. This approach yielded an extremely low response rate and, in retrospect, was not well aligned with the specialised nature of the research topic. Given that the study examines the tax consequences of changes in beneficiaries' rights, an area requiring practitioners with expertise in both trust administration and tax law applicable to trusts, a purposive or expert sampling strategy would have been more appropriate from the outset. The highly technical nature of the subject matter meant that only a small subset of professionals possessed the requisite dual-disciplinary knowledge. Consequently, the data collection process was prolonged unnecessarily. The subsequent adoption of snowball sampling proved valuable, as it facilitated the identification of suitably qualified experts for both the online questionnaire and the interview phases. This adaptive shift in sampling strategy strengthened the study by ensuring that respondents and participants possessed the specialised competencies required to engage meaningfully with the complexities of value-shifting arrangements in estate-planning trusts.

The length of the online questionnaire and interview guides also placed time pressure on respondents and participants, particularly in the last section I, which dealt with the DTC recommendations. Some responses appeared abbreviated, suggesting that respondent fatigue may have influenced the depth of engagement. This reflects a broader design tension between comprehensiveness and participant burden. The researcher's extensive doctrinal engagement strengthened the analytical foundation of the study but also required conscious reflexivity. Prior interpretations may have subtly influenced the framing of questions or the reading of the responses. Acknowledging this possibility reflects an awareness that expertise can both illuminate and constrain analysis. Similarly, the decision to limit interpretive commentary when presenting empirical findings preserved the authenticity of the respondents are the participants' voices but resulted in a more restrained researcher presence.

Finally, while the interview participants brought considerable professional experience each with more than 30 years in trust practice this level of seniority contrasts with the broader and more varied experience of the online questionnaire respondents. This difference enriched the study but may also have influenced the types of insights generated across the two data sets. Overall, these reflections demonstrate the researcher's awareness of how methodological decisions, participant characteristics, and disciplinary expertise shaped the study's outcomes and the conclusions that can responsibly be drawn from them.

9.10 RECOMMENDATIONS FOR FUTURE RESEARCH

This section recommends the following topics for further investigation:

- VSA implications of trustees' actions that are *ultra vires*.
- A review of university tax programmes regarding trust taxation and tax compliance, including their representation in undergraduate curricula.
- The effectiveness of the TAA concerning trust tax compliance.
- An analysis of various clauses within trust deeds that could affect a VSA for trusts.
- VSA implications of *bewind trusts*, collective investment scheme trusts and testamentary trusts.
- The validity of trustees' resolutions, particularly those vesting trust assets in beneficiaries and the potential tax implications of reversing such resolutions made.
- Non-compliance issues related to the taxation of trusts and remedies merit further assessment.
- A comparison of wealth taxes in foreign countries where both estate duty and donations tax are excluded.
- Analysis of trustees' actions in discretionary trusts with a single beneficiary as they relate to CGT and a VSA.
- Assessing whether changes in vested rights arising from permanent free use or occupation of an asset held in a *bewind trust* constitute a paragraph 33(*b*) part-disposal or a VSA.

- A comparative study of GAAR versus VSA anti-tax avoidance strategies for trusts.

9.11 CLOSING REMARKS

The study has successfully addressed the identified knowledge gap by thoroughly examining the intention of legislation to curb any VSA, particularly in relation to the manipulation of rights or interests in trusts and the avoidance of CGT consequences. The primary and secondary research objectives have been comprehensively addressed with the research questions developed for this study. This chapter synthesises the study's findings on the implications of trustees' actions for VSAs in the SA discretionary and vested *inter vivos* trusts. Importantly, the research developed a theoretical framework for analysing VSAs in the context of both contingent and vested rights in inter vivos trusts, providing valuable insights for South African estate planning. The research confirms that, for discretionary trusts or for contingent rights in a trust a VSA is unlikely. In contrast, certain actions in vested trusts or vested rights to trust assets may result in a VSA. The doctrinal analysis suggests ordinary disposals take precedence over a VSA when they overlap. The study also highlights the legislative complexities, the lack of clear guidance from SARS, and the importance of aligning policy with established trust and tax law. Comparative analysis with Australian and UK trusts underscores both similarities and tax jurisdictional differences. The developed practical framework offers practical guidance for trustees and tax practitioners, while recommendations call for further research into *ultra vires* actions and addressing the potential overlap between the GAAR and VSAs, and tax compliance challenges. Overall, the study addressed a key knowledge gap, providing clarity on VSA consequences and supporting improved tax compliance and estate planning in the South African context.

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APPENDIX A (Online questionnaire - SA)

Questionnaire: An Analysis of Trustees' Actions in Value Shifting Arrangements in Estate-Planning Trusts: A Practical Framework for Tax Practitioners Informed by Experts' Perceptions under the Income Tax Act



Letter of Introduction Mr. EMB de Freitas: Mobile: 082 338 3576

Dear Respondent

SURVEY AMONGST TRUST PRACTITIONERS AND ADVISORS REGARDING VALUE SHIFTING ARRANGEMENTS IN TRUSTS

Mr. EMB de Freitas is doing research for a doctoral thesis in the Department of Taxation at the University of South Africa. The purpose of this research is to investigate Value Shifting Arrangements in the context of South African resident trusts, which is aimed at assisting both the trustee and professionals who deal with trusts. The initial part of his research will be a literature review and analysis of court cases. The second phase involves your participation whereby you are kindly requested to complete this online research questionnaire. By doing so you will contribute to the success of this research study. In the third phase-selected specialists in the field of trust estate planning and the taxation of trusts will be interviewed. Your participation in completing the questionnaire attached will be appreciated.

All responses will be treated confidentially and will be consulted in collaboration with both a literacy study and personal interviews with specialists on the subject matter. Data collected will only be used for statistical analysis. No individual or company specific information of any respondents will be revealed. Please do not hesitate to contact Mr. EMB de Freitas or myself at the above telephone number should you require any further information or assistance in completing the questionnaire. Your contribution on Value Shifting Arrangements of resident trusts will add substantive value to the body of knowledge pertaining to the tax of resident trusts used in estate planning and is appreciated.

Yours sincerely
Prof AP Swanepoel

VALUE SHIFTING ARRANGEMENTS QUESTIONNAIRE GENERAL INFORMATION

The purpose of this questionnaire is to investigate Value Shifting Arrangements pertaining to resident trusts to establish if any action of the trustee or the trust could possibly result in a Value Shifting Arrangement. Your participation to complete this online research questionnaire, which should take approximately 20 to 40 minutes, will significantly contribute to the success of this research study. Your online responses from this survey as a professional dealing with trusts and that of a few local and overseas estate planning and tax specialists interviewed; will be added to the strong literacy research and analysis of relevant tax cases already conducted as a basis of this study. This questionnaire forms part of a research project to qualify for a PhD degree (Taxation) at the University of South Africa. For this research, resident trusts and resident beneficiaries in an estate-planning environment will be investigated for Value Shifting Arrangements. Discretionary and Vested trusts will be examined in this thesis. This investigation covers *inter vivos* trusts used in estate planning in South Africa. Both the fixed attributes and the variable attributes of each type of trust structure are summarised at the beginning of each trust structure section of the survey. Assume that all the specific trustees' actions which are investigated are permissible within the parameters of the trust deeds and when necessary, with the trust deed amendments.

Please answer every question/statement by clicking the applicable radio button for your response to your demographic or to each statement from 1 (strongly agree) to 5 (strongly disagree). Also, type in your answers in the dialogue box when requested to do so. If requested, a hardcopy of all your responses on completion of the survey can be sent to you. The information and data supplied by you will be treated as strictly confidential and kept in accordance with UNISA's Policy on Research Ethics. Your responses, together with those of other respondents, the interviews with specialists and the literature research will be used to obtain a complete view. Thank you for your voluntary participation without any compensation and in adding value to not only this research study but also to the body of knowledge pertaining to the tax of resident trusts in estate planning.

Mr. EMB de Freitas
Postal Address: PO Box 66265, Riebeeckstad, 9469; Telephone: Work: 057 – 910 3625 Home:057–352 1926 Mobile: 082 338 3576; E-mail: edefreitas@cut.ac.za
Supervisor: Prof AP Swanepoel, Department of Taxation, College of Accounting Sciences, University of South Africa

BIOGRAPHICS

Position currently held:

Academic	❑
Partner/Director in private practice	❑
Specialist/Consultant	❑
Manager	❑
Team member	❑
Government/Public official	❑
A combination of the above or other than the above	❑

Describe the combination of the above or other position in the dialogue box below:

Work environment:

Internationally Affiliated	❑
National Firm	❑
Small to Medium-Size Firm	❑
Outside Practice	❑

Number of years of experience in trusts:

0 to 2 years	❑
3 to 5 years	❑
6 to 10 years	❑
10 years or more	❑

Your Professional Affiliation:

South African Institute of Chartered Accountants	❑
Legal Practice Council	❑
South African Institute of Professional Accountants	❑
South African Institute of Tax Practitioners	❑
Institute of Certified Financial Planners	❑
South African Revenue Service Officials	❑
Fiduciary Institute of South Africa	❑
A combination or other than the above	❑

Describe the combination of the above or other position in the dialogue box below:

Acting as trustee:

	Yes	No
Are you currently a trustee of a trust?	❑	❑

For ease of reference certain definitions and recommendations of the Davis Tax Committee are provided below:

Definition of a Value Shifting Arrangement

Value shifting arrangements are defined in paragraph 1 of the Eighth Schedule of Act, (VSA) as follows: “value shifting arrangement” means an arrangement by which a person retains an interest in a company, trust, or partnership, but following a change in the rights or entitlements of the interest in that company, trust or partnership (other than as a result of a disposal at market value as determined before the application of paragraph 38), the market value of the interest of that person decreases and-

(a) the value of the interest of a connected person in relation to that person held directly or indirectly in that company, trust, or partnership increases; or
(b) a connected person in relation to that person acquires a direct or indirect interest in that company, trust or partnership.

Definition of a Disposal

Disposals are defined in paragraph 11 of the Eighth Schedule of Act (Eighth Schedule), as follows: (1) Subject to subparagraph (2), a disposal is any event, act, forbearance or operation of law which results in the creation, variation, transfer, or extinction of an asset, and includes—

(a) the sale, donation, expropriation, conversion, grant, cession, exchange or any other alienation or transfer of ownership of an asset;
(b) the forfeiture, termination, redemption, cancellation, surrender, discharge, relinquishment, release, waiver, renunciation, expiry, or abandonment of an asset;
(*c*) the scrapping, loss, or destruction of an asset;
(*d*) the vesting of an interest in an asset of a trust in a beneficiary;
(*e*) the distribution of an asset by a company to a holder of shares;
(*f*) the granting, renewal, extension, or exercise of an option; or
(*g*) the decrease in value of a person’s interest in a company, trust, or partnership as a result of a value shifting arrangement.

Davis Tax Committee Recommendations on Trusts

Davis Tax Committee Recommendations on Trusts (Davis Tax Committee Recommendations on Wealth Tax: March 2018), (the DTC) are below:

Vested Trusts

Only where a trust deed confers upon its beneficiaries an indisputable and irrevocable vested right to both the capital and income of a trust, should the income, both capital and revenue, be taxed in the hands of the beneficiary.

In all other cases:

Revenue income must be taxed in the trust in accordance with the definition of "gross income" contained in section 1 of the Act. Capital income, generated while assets are held in trust on anything other than a vested basis, must be taxed within the trust up to the time of vesting or disposal as defined in paragraph 11 of the Eighth Schedule to the Act.

QUESTIONNAIRE STEPS

The questionnaire has two sections depending upon your exposure to the types of trusts under investigation as follows:

(1) Section 1 deals with discretionary trusts; and
(2) Section 2 deals with vested trusts.

INSTRUCTIONS

After each statement, please rank each statement from 1 (strongly agree) to 5 (strongly disagree) with each statement. Also, type in your answers in the dialogue box when requested to do so.

Do you have a working knowledge in discretionary trusts?

Yes ❑

No ❑

SECTION 1: PARTS 1 A to 1 J applies only to Discretionary Trusts

Discretionary Trust

If a trust deed stipulates that the trustees have the power to distribute or vest trust capital assets or capital profits from a trust to any of the trust's beneficiaries, the trust is considered a discretionary capital trust. The ownership and control trust assets vest in the trustees for the purposes of the trust (Pace & Van der Westhuizen, 2017:38). All the subsequent questions are based a discretionary trust, which meets the above definition (When necessary, you may assume that all the beneficiaries have consented in writing to the trustees' actions and all legal formalities are met, unless stated to the contrary).

Summary of discretionary trust structure (the discretionary trust structure).

Fixed attributes

Trustees: Mr. X, Mrs. X and Mr. Y who is the independent trustee.
Beneficiaries: A, B and C who are children (blood relatives) of Mr. X and Mrs X.
Founder: Mr. X's father is the founder of the X Family Trust.
Trust assets: The trust owns capital assets (120 unlisted shares in Company (Pty) Ltd, which represents all the issued share capital of the company) at the current market value of R15 000 per share and a base cost of R5 000 per share. The shares were bought by the trust 6 years ago, at a cost of R5 000 per share for investment purposes, out of the trust's own funds (not from any donated funds).
Residents: All the natural and juristic persons mentioned above, are residents, as defined in terms of section 1 of the Act.
Market Value of 80 shares: The market value of 80 the trust's shares is R1 200 000 (80 x R15 000). The company's auditors have verified the market value of shares.
Base cost of 80 shares: The base cost of 80 the trust's shares is R400 000 (80 x R5 000). Capital Gain of 80 shares: The sale of 80 shares of the trust at market value results in a capital gain of R800 000 (R1 200 000 – R400 000).

Variables Attributes

Trustees' powers: Unlimited power regarding the distribution of trust assets to beneficiaries. Trustees have the power to distribute or vest trust's capital assets or capital profits from a trust to any of the trust's beneficiaries.
Ownership and control of trust's assets: The ownership and control trust assets vest in the trustees for the purposes of the trust.
Beneficiaries' rights: The beneficiaries' rights to the trust's assets, is subject to the discretion of the trustees.

1 Part A: Nature of the trust's assets

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
1.1 The disposal of a capital asset of a discretionary trust could result in either a capital gain or a capital loss.	❑	❑	❑	❑	❑
1.2 The revenue or capital nature of a discretionary trust's assets or proceeds of such trust's assets can be ascertained by the tests developed in case law.	❑	❑	❑	❑	❑
1.3 A capital asset of a discretionary trust for capital gains tax purposes, would be the same as a revenue asset for income tax purposes.	❑	❑	❑	❑	❑
1.4 Capital assets of a discretionary trust for capital gains tax purposes, would also be the same as property for donations tax purposes.	❑	❑	❑	❑	❑
1.5 Capital assets of a discretionary trust for capital gains tax purposes, would the same as property for estate duty purposes.	❑	❑	❑	❑	❑

1 Part B: Income tax (excluding capital gains) implications

When each of the seven following trustees' actions occur in isolation for the discretionary trust structure, the trustees' actions will result in an income tax (excluding capital gains) implication:

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
2.1 The trustees vest capital assets (80 shares) in beneficiary A.	❑	❑	❑	❑	❑
2.2 The trustees distribute capital assets (80 shares) to beneficiary A.	❑	❑	❑	❑	❑
2.3 The trustees sell trust's capital assets (80 shares) at market value of (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	❑	❑	❑	❑	❑
2.4 Adding a new beneficiary to the trust.	❑	❑	❑	❑	❑
2.5 Removing beneficiary A from the trust.	❑	❑	❑	❑	❑
2.6 Appointing a new trustee to the trust.	❑	❑	❑	❑	❑
2.7 Removing a trustee from the trust.	❑	❑	❑	❑	❑

1. Part C: Donations tax implications

Donations are defined as when assets or rights are transferred between a donor and donee; whereby the donor's assets or right to assets is impoverished and the donee's assets or right to assets is enriched (SARS Basic Guide to section 18A approval: 2020). When a beneficiary of any discretionary trust donates a discretionary interest to another beneficiary; the following consequences occur.

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
3.1.1 If beneficiaries donate of a discretionary interest, from one beneficiary to another beneficiary, donations tax could be applicable.	❑	❑	❑	❑	❑
3.1.2 If the trustees donate of a discretionary interest from one beneficiary to another beneficiary, without the consent of the beneficiaries, donations tax could be applicable.	❑	❑	❑	❑	❑
3.1.3 A donation of a discretionary interest from one beneficiary to another beneficiary at market value would result in a disposal in terms of paragraph of 11(1)(*a*) of the Eighth Schedule would occur.	❑	❑	❑	❑	❑
3.1.4 A donation of a discretionary interest from one beneficiary to another beneficiary at an inadequate value would result in a disposal in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act.	❑	❑	❑	❑	❑

When each of the seven following trustees' actions occur in isolation for the discretionary trust structure, the trustees' actions will result in donations tax implications:

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
3.2.1 The trustees vest capital assets (80 shares) in beneficiary A.	❑	❑	❑	❑	❑
3.2.2 The trustees distribute capital assets (80 shares) to beneficiary A.	❑	❑	❑	❑	❑
3.2.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	❑	❑	❑	❑	❑
3.2.4 Adding a new beneficiary to the trust.	❑	❑	❑	❑	❑
3.2.5 Removing beneficiary A from the trust.	❑	❑	❑	❑	❑
3.2.6 Appointing a new trustee to the trust.	❑	❑	❑	❑	❑
3.2.7 Removing a trustee from a trust.	❑	❑	❑	❑	❑

1 Part D: Ordinary disposal implications.

When each of the seven following trustees' actions occur in isolation for the discretionary trust structure provided, the trustees' actions will result in a disposal in terms of paragraphs 11 (1) (a) to (f) of the Eighth Schedule (excluding any VSA disposal paragraph 11(1)(g)):

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
4.1 The trustees vest capital assets (80 shares) in beneficiary A.	❑	❑	❑	❑	❑
4.2 The trustees distribute capital assets (80 shares) to beneficiary A.	❑	❑	❑	❑	❑
4.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	❑	❑	❑	❑	❑
4.4 Adding a new beneficiary to the trust.	❑	❑	❑	❑	❑
4.5 Removing beneficiary A from the trust.	❑	❑	❑	❑	❑
4.6 Appointing a new trustee to the trust.	❑	❑	❑	❑	❑
4.7 Removing a trustee from the trust.	❑	❑	❑	❑	❑

1 Part E: Beneficiaries' interest in a trust

A capital gain or loss can occur after a disposal of a capital asset.

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
5.1 A disposal of discretionary interest in a trust's capital asset by a beneficiary, could result in a capital gain or a capital loss for the beneficiary.	❑	❑	❑	❑	❑

1 Part F: Measuring Value Shifting

A capital gain or loss is determined by deducting the base cost from the proceeds of an asset (paragraph 3 of the Eighth Schedule of the Act). The proceeds of a value shifting arrangement is measured, by taking the reduction in market value of the beneficiary's interest in a discretionary trust before and after a trustees' action (paragraph 35(2) Eighth Schedule of the Act). In terms of paragraph 23(*a*) of the Eighth Schedule of the Act, the base cost of a person's interest which is subjected to a paragraph 11(1)(*g*) value shifting disposal, is determined with the following formula:

The formula Y = [(A – C)/A x B] is used to determine the adjusted base cost of a person's interest in a discretionary trust when a value shifting disposal occurs under paragraph 11(1)(g) of the Eighth Schedule of the Act. In this formula, "Y" represents the amount to be determined, "A" refers to the market value of the individual's interests immediately before the disposal, "B" is the base cost of those interests as calculated just before the disposal, and "C" is the market value of the interests immediately after the disposal. This calculation enables the accurate measurement of any capital gain or loss resulting from changes in the value of a beneficiary's interest due to actions taken by trustees, as outlined in the relevant legislation.

The statements provide below regarding the discretionary trust structure are correct:

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
6.1 The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	❑	❑	❑	❑	❑
6.2 A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	❑	❑	❑	❑	❑
6.3 The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets before any of the seven trustees' actions mentioned previously can be measured.	❑	❑	❑	❑	❑

Part 1 G: Value shifting implications

When each of the seven following trustees' actions occur in isolation for the discretionary trust structure, the trustees' actions will result in an VSA disposal in terms of paragraph 11(1)(*g*) of the Eighth Schedule (excluding any other possible disposals paragraph 11(1)(*a*) to (*f*)):

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
7.1 The trustees vest capital assets (80 shares) in beneficiary A.	❑	❑	❑	❑	❑
7.2 The trustees distribute capital assets (80 shares) to beneficiary A.	❑	❑	❑	❑	❑
7.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	❑	❑	❑	❑	❑
7.4 Adding a new beneficiary to the trust.	❑	❑	❑	❑	❑
7.5 Removing beneficiary A from the trust.	❑	❑	❑	❑	❑
7.6 Appointing a new trustee to the trust.	❑	❑	❑	❑	❑
7.7 Removing a trustee from the trust.	❑	❑	❑	❑	❑

1 Part H: Other trustees' actions

8.1 Discretionary Trust other trustees' actions

Discuss and provide examples any other Trustees' actions in detail (excluding the seven trustees' actions examined in the previous sections and donations of discretionary interests between beneficiaries) for a discretionary trust may result in a VSA in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act, in the dialogue box below.

1 Part I: DTC's recommendations implications

The DTC's Recommendations on trusts recommends that a discretionary trust's income or capital income, should be taxed in the trust, effectively negating the attribution rules of taxing any taxable income or capital income in the hands of the beneficiaries of a discretionary trust before any trust asset or income is vested or distributed to the beneficiary.

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
9.1 The DTC's Recommendations on trusts recommends that a discretionary trust's income or capital income, should be taxed in the trust, effectively negating the attribution rules of taxing any taxable income or capital income in the hands of the beneficiaries of a discretionary trust, before any trust asset or income is vested or distributed to the beneficiary.	❑	❑	❑	❑	❑

If the DTC's Recommendations on the on the taxation for "the discretionary trust structure provided," would be implemented, each of the following seven following trustees' actions may result in a VSA disposal paragraph 11(1)(*g*).

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
9.2.1 The trustees vest trust's capital assets (80 shares) in beneficiary A.	❑	❑	❑	❑	❑
9.2.2. The trustees distribute trust's capital assets (80 shares) to beneficiary A.	❑	❑	❑	❑	❑
9.2.3 The trustees sell trust assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R400 000) to beneficiary A.	❑	❑	❑	❑	❑
9.2.4 Adding a new beneficiary to the trust.	❑	❑	❑	❑	❑
9.2.5 Removing beneficiary A from the trust.	❑	❑	❑	❑	❑
9.2.6 Appointing a new trustee to the trust.	❑	❑	❑	❑	❑
9.2.7 Removing an existing trustee from the trust.	❑	❑	❑	❑	❑

1 Part J Additional Comments

10.1 Discretionary trust additional comments

If you have any additional comments regarding this study of Value Shifting Arrangement regarding discretionary trusts, kindly provide your comments in the in the dialogue box below:

Do you have a working knowledge in vested trusts?

Yes ❑ No ❑

SECTION 2: PARTS 2 A to 2 I apply only to Vested Trusts

Vested Trust

If a trust deed stipulates or as result, of the trustees' resolution that the trust capital assets or trust capital vest in the beneficiaries, the trustees are required to distribute trust capital assets or capital profits to the trust beneficiaries. The trustees have ownership and control over the trust's assets or trust's capital until distribution takes place (Pace & Van der Westhuizen, 2020: B6). All the subsequent questions are based a vested trust, which meets the above definition. When necessary, you may assume that all the beneficiaries have consented in writing to the trustees' actions and all legal formalities are met, unless stated to the contrary.

Summary of vested trust structure (the vested trust structure).

Fixed attributes

Trustees: Mr. X, Mrs. X and Mr. Y who is the independent trustee
Beneficiaries: A, B and C who are children (blood relatives) of Mr. X and Mrs X.
Founder: Mr. X's father is the founder of the X Family Trust.
Trust assets: The trust owns capital assets (120 unlisted shares in Company (Pty) Ltd) at the current market value of R15 000 per share and a base cost of R5 000 per share. The shares were bought by the trust 6 years ago, at a cost of R5 000 per share for investment purposes, out of the trust's own funds (not from any donated funds).
Residents: All the natural and juristic persons mentioned above, are residents, as defined in terms of section 1 of the Act.
Market Value of 80 shares: The market value of 80 the trust's shares is R1 200 000 (80 x R15 000). The company's auditors have verified the market value of shares.
Base cost of 80 shares: The base cost of 80 the trust's shares is R400 000 (80 x R5 000).
Capital Gain of 80 shares: The sale of 80 shares of the trust at market value results in a capital gain of R800 000 (R1 200 000 – R400 000).

Variables attributes

Trustees' powers: Limited power regarding the distribution of trust assets. The trust deed stipulates or as result, of the trustees' resolution that the trust capital assets or trust capital vest in the beneficiaries.
Ownership and control of trust's assets: The ownership and control trust assets vest in the trustees, prior to distribution of the trust's asset to the beneficiaries.
Beneficiaries' rights: The trust's assets vest equally in beneficiaries A, B and C.

2 Part A: Nature of trust's assets

1. Vested trust nature of trust's assets

The disposal of a capital asset of a vested trust could result in either a capital gain or loss.

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
1.1 The disposal of a capital asset of a vested trust could result in either a capital gain or a capital loss.	❑	❑	❑	❑	❑
1.2 The revenue or capital nature of a vested trust's assets or proceeds of such trust's assets can be ascertained by the tests developed in case law.	❑	❑	❑	❑	❑
1.3 A capital asset of a vested trust for capital gains tax purposes, would be the same as a revenue asset for income tax purposes.	❑	❑	❑	❑	❑
1.4 Capital assets of a vested trust for capital gains tax purposes, would be the same as property for donations tax purposes.	❑	❑	❑	❑	❑
1.5 Capital assets of a vested trust for capital gains tax purposes, would be the same as property for estate duty purposes.	❑	❑	❑	❑	❑

2 Part B: Income tax (excluding capital gains) implications

2.Vested trust trustees' actions

When each of the seven following trustees' actions occur in isolation for the vested trust structure, the trustees' actions will result in an income tax (excluding capital gains) implication:

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
2.1 The trustees vest capital assets (80 shares) in beneficiary A.	❑	❑	❑	❑	❑
2.2 The trustees distribute capital assets (80 shares) to beneficiary A.	❑	❑	❑	❑	❑
2.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	❑	❑	❑	❑	❑
2.4 Adding a new beneficiary to the trust.	❑	❑	❑	❑	❑
2.5 Removing beneficiary A from the trust.	❑	❑	❑	❑	❑
2.6 Appointing a new trustee to the trust.	❑	❑	❑	❑	❑
2.7 Removing a trustee from the trust.	❑	❑	❑	❑	❑

2. Part C: Donations tax implications

3.1 Vested trust donations tax

Donations are defined as when assets or rights are transferred between a donor and donee; whereby the donor's assets or right to assets is impoverished and the donee's assets or right to assets is enriched (SARS Basic Guide to section 18A approval: 2020).When a beneficiary of any vested trust donates a vested interest to another beneficiary, the following consequences occur.

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
3.1.1 If beneficiaries donate of a vested interest, from one beneficiary to another beneficiary, donations tax could be applicable.	❑	❑	❑	❑	❑
3.1.2 If the trustees donate of a vested interest from one beneficiary to another beneficiary, without the consent of the beneficiaries, donations tax could be applicable.	❑	❑	❑	❑	❑
3.1.3 A donation of a vested interest from one beneficiary to another beneficiary at market value would result in a disposal in terms of paragraph of 11(1)(*a*) of the Eighth Schedule would occur.	❑	❑	❑	❑	❑
3.1.4 A donation of a vested interest from one beneficiary to another beneficiary at an inadequate value would result in a disposal in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act.	❑	❑	❑	❑	❑

3.2 Vested trust trustees' actions

When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries) for the Vested trust structure, the trustees' actions will result in donations tax implications:

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
3.2.1 The trustees vest capital assets (80 shares) in beneficiary A.	❑	❑	❑	❑	❑
3.2.2 The trustees distribute capital assets (80 shares) to beneficiary A.	❑	❑	❑	❑	❑
3.2.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	❑	❑	❑	❑	❑
3.2.4 Adding a new beneficiary to the trust.	❑	❑	❑	❑	❑
3.2.5 Removing beneficiary A from the trust.	❑	❑	❑	❑	❑
3.2.6 Appointing a new trustee to the trust.	❑	❑	❑	❑	❑
3.2.7 Removing a trustee from the trust.	❑	❑	❑	❑	❑

2. Part D: Ordinary disposal implications

4.Vested trust beneficiaries' actions

When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing) for the vested trust structure, the trustees' actions will result in a disposal in terms of paragraphs 11(1)(*a*) to (*f*) of the Eighth Schedule (excluding a VSA disposal paragraph 11(1)(*g*)):

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
4.1The trustees vest capital assets (80 shares) in beneficiary A.	❑	❑	❑	❑	❑
4.2 The trustees distribute capital assets (80 shares) to beneficiary A.	❑	❑	❑	❑	❑
4.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	❑	❑	❑	❑	❑
4.4 Adding a new beneficiary to the trust.	❑	❑	❑	❑	❑
4.5 Removing beneficiary A from the trust.	❑	❑	❑	❑	❑
4.6 Appointing a new trustee to the trust.	❑	❑	❑	❑	❑
4.7 Removing a trustee from the trust.	❑	❑	❑	❑	❑

2 Part E: Beneficiaries' interest in a trust

5.Vested interest a trust

A capital gain or loss can occur after a disposal of a capital asset.

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
5.1 A disposal of vested interest in a trust's capital asset by a beneficiary, could result in a capital gain or a loss for the beneficiary.	❑	❑	❑	❑	❑

2 Part F: Measuring value shifting

6.Vested Trust measurement of VSA

A capital gain or loss is determined by deducting the base cost from the proceeds of an asset (paragraph 3 of the Eighth Schedule of the Act). The proceeds of a value shifting arrangement is measured, by taking the reduction in market value of the beneficiary's interest in a discretionary trust before and after a trustees' action (paragraph 35(2) Eighth Schedule of the Act).

According to paragraph 23(*a*) of the Eighth Schedule, when determining the base cost for a value shifting disposal as outlined in paragraph 11(1)(*g*), the calculation is as follows: Y = [(A – C)/A x B]. In this formula, "Y" represents the calculated amount, "A" is the market value of the interest prior to disposal, "B" is the base cost of the interest before the disposal, and "C" is the market value after the disposal has occurred.

The statements the provided below for the vested trust structure are correct.

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
6.1 The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	❑	❑	❑	❑	❑
6.2 A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' actions mentioned previously can be measured.	❑	❑	❑	❑	❑
6.3 The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before any of the seven trustees' actions mentioned previously can be measured.	❑	❑	❑	❑	❑

2 Part G: Value shifting implications

7. Vested trust trustees' actions

When each of the seven following trustees' actions occur in isolation for the vested trust structure , the trustees' actions will result in a VSA disposal in terms of paragraph 11(1)(*g*) Eighth Schedule (excluding any other possible disposal paragraphs 11(1)(*a*) to (*f*)):

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
7.1 The trustees vest capital assets (80 shares) in beneficiary A.	❑	❑	❑	❑	❑
7.2 The trustees distribute capital assets (80 shares) to beneficiary A.	❑	❑	❑	❑	❑
7.3 The trustees sell trust's capital assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R800 000) to beneficiary A.	❑	❑	❑	❑	❑
7.4 Adding a new beneficiary to the trust.	❑	❑	❑	❑	❑
7.5 Removing beneficiary A from the trust.	❑	❑	❑	❑	❑
7.6 Appointing a new trustee to the trust.	❑	❑	❑	❑	❑
7.7 Removing a trustee from the trust.	❑	❑	❑	❑	❑

2 Part H: Other trustees' actions

8.1 Vested trust other trustees' actions

Discuss and provide examples any other Trustees' actions in detail (excluding the seven trustees' actions examined in the previous sections and donations of vested interests between beneficiaries) for a vested trust may result in a VSA in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act, in the dialogue box below.

2 Part I: DTC's recommendations implications

9. Vested trust DTC's recommendations

The DTC's Recommendations on trusts, recommends where a trust deed confers upon its beneficiaries an indisputable and irrevocable vested right to both the capital and income of a trust, both the capital and income of such trusts, should be taxed in the hands of the beneficiary (DTC's recommendations).

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
9.1 If the above DTC's Recommendations were to be implemented, beneficiaries of vested trusts (with the indisputable and irrevocable vested right to a trust's taxable income or capital income), would be taxed on taxable income and capital income from such trusts, as was the case prior to the implementation of DTC's recommendations.	❑	❑	❑	❑	❑

9.2 Vested trust trustees' actions

If the DTC's Recommendations on the on the taxation for the vested trust structure, would be implemented, each of the following seven following trustees' actions may result in a VSA disposal paragraph 11(1)(*g*) of the Eighth (excluding any other possible disposal paragraph 11(1) (a) to (f)).

	1 Strongly Agree	2 Moderately Agree	3 Uncertain	4 Moderately Disagree	5 Strongly Disagree
9.2.1 The trustees vest trust's capital assets (80 shares) in beneficiary A.	❑	❑	❑	❑	❑
9.2.2. The trustees distribute trust's capital assets (80 shares) to beneficiary A.	❑	❑	❑	❑	❑
9.2.3 The trustees sell trust assets (80 shares) at market value (R1 200 000), and immediately vest or distribute the capital gain (R400 000) to beneficiary A.	❑	❑	❑	❑	❑
9.2.4 Adding a new beneficiary to the trust.	❑	❑	❑	❑	❑
9.2.5 Removing beneficiary A from the trust.	❑	❑	❑	❑	❑
9.2.6 Appointing a new trustee to the trust.	❑	❑	❑	❑	❑
9.2.7 Removing a trustee from the trust.	❑	❑	❑	❑	❑

2 Part J Additional Comments

10.1 Vested trusts additional comments

If you have any additional comments regarding this study of Value Shifting Arrangement regarding vested trusts, kindly provide your comments in the in the dialogue box below.

Thank you for your valuable contribution in this research project.

APPENDIX B (Interview guide - SA)

Questionnaire: An Analysis of Trustees' Actions in Value Shifting Arrangements in Estate-Planning Trusts: A Practical Framework for Tax Practitioners Informed by Experts' Perceptions under the Income Tax Act

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DEPARTMENT OF TAXATION

Letter of Introduction

Mr. EMB de Freitas: Mobile: 082 338 3576

Dear Participant

INTERVIEW OF TRUST PRACTITIONERS AND ADVISORS REGARDING VALUE SHIFTING ARRANGEMENTS IN TRUSTS

Mr. EMB de Freitas is doing research for a doctoral thesis in the Department of Taxation at the University of South Africa. The purpose of this research is to investigate Value Shifting Arrangements in the context of South African resident trusts, which is aimed at assisting both the trustee and professionals who deal with trusts.

The initial part of his research will be a literature review and analysis of court cases. The second phase involves your participation whereby you are kindly requested to complete this online research questionnaire. By doing so you will contribute to the success of this research study. In the third phase-selected specialists in the field of trust estate planning and the taxation of trusts will be interviewed.

Your participation in completing the questionnaire attached will be appreciated. All responses will be treated confidentially and will be consulted in collaboration with both a literacy study and personal interviews with specialists on the subject matter. Data collected will only be used for statistical analysis. No individual or company specific information of any respondents will be revealed.

Please do not hesitate to contact Mr. EMB de Freitas or myself at the above telephone number should you require any further information or assistance in completing the questionnaire. Your contribution on Value Shifting Arrangements of resident trusts will add substantive value to the body of knowledge pertaining to the tax of resident trusts used in estate planning and is appreciated.

Yours sincerely



……..

PROF AP SWANEPOEL
ACTING COD: DEPARTMENT OF TAXATION
COLLEGE OF ACCOUNTING SCIENCES (TEL: 012-429 2054)

GENERAL INFORMATION

- The purpose of this interview is to investigate Value Shifting Arrangements pertaining to resident trusts to establish if any action of the trustee or the trust could possibly result in a Value Shifting Arrangement.
- Your participation in this interview, should take approximately 40 minutes and will significantly contribute to the success of this research study. Your interview responses will be added to the responses from the online survey of professionals dealing with trusts and that of overseas estate planning and tax specialists interviewed. This will be added to the strong literacy research and analysis of relevant tax cases already conducted as a basis of this study.
- This interview guide forms part of a research project to qualify for a PhD degree (Taxation) at the University of South Africa.
- For this research, resident trusts and resident beneficiaries in an estate-planning environment will be investigated for Value Shifting Arrangements.
- Discretionary and Vested trusts will be examined in this thesis.
- Most of the interview questions require that you comment on the statements provided, statements which you find are contentious or cover grey areas may require more discussion than that of the statements which you may find less contentious or straightforward.
- The same battery of tests is applied to both trusts, so if a response to a question is the same as covered in a previous trust, your response need only state that it is similar. Also refer to previous trust category which has the same response without any detailed commentary.
- A hardcopy of all your transcribed responses to the interview questions will be sent to you after conducting the interview on request by yourself.
- The information and data provided by you will be treated as strictly confidential and kept in accordance with UNISA's *Policy on Research Ethics.* Your responses, together with those of other respondents, the interviews with specialists and the literature research will be used to compile a complete view.

Thank you for your participation without any compensation and in adding value to not only this research study but also to the body of knowledge pertaining to the tax of resident trusts in estate planning.

Mr. EMB de Freitas

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Riebeeckstad
9469

Telephone: Work: 057 – 910 3625
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Mobile: 082 338 3576

E-mail: mailto:edefreitas@cut.ac.za

Supervisor: Prof AP Swanepoel, Department of Taxation, College of Accounting Sciences, University of South Africa

Interview number	

PARTICIPANT"S DEMOGRAPHIC DETAILS

PLEASE MARK WITH AN "X" AND ONLY SELECT ONE ANSWER PER QUESTION/STATEMENT

1.	**Gender:**	Male	
		Female	
		Neutral	
2.	**Position currently held:**	Academic	
		Partner/Director in private	
		Specialist/Consultant	
		Manager	
		Team member	
		Government/Public official	
		Other (Please Specify)	
3.	**Work environment:**	Internationally Affiliated	
		National Firm	
		Small to Medium-Size Firm	
		Outside Practice	
4.	**Number of years of experience in trusts:**	0 to 2 years	
		3 to 5 years	
		6 to 10 years	
		More than 10years	
5.	**Your Professional Affiliation:**	South African Institute of Chartered Accountants	
		Provincial Law Societies	
		South African Institute of Professional Accountants	
		South African Institute of Tax Practitioners	
		Institute of Certified Financial Planners	
		South African Revenue Service Officials	
		Fiduciary Institute of South Africa	
		Other or more than one professional affiliation (Please Specify)	
6.	**Trust working experience:**		
	Have a working knowledge in discretionary trusts	Yes	No
	Have a working knowledge in vested trusts	Yes	No
7.	**Acting as trustee:**		
	Are you currently a trustee of a trust?	Yes	No

For ease of reference certain definitions and recommendations of the Davis Tax Committee are provided below:

Definition of a Value Shifting Arrangement

Value shifting arrangements are defined in paragraph 1 of the Eighth Schedule of Act, (VSA) as follows: “value shifting arrangement” means an arrangement by which a person retains an interest in a company, trust, or partnership, but following a change in the rights or entitlements of the interest in that company, trust or partnership (other than as a result of a disposal at market value as determined before the application of paragraph 38), the market value of the interest of that person decreases and-

(c) the value of the interest of a connected person in relation to that person held directly or
indirectly in that company, trust, or partnership increases; or
(d) a connected person in relation to that person acquires a direct or indirect interest in that company, trust or partnership.

Definition of a Disposal

Disposals are defined in paragraph 11 of the Eighth Schedule of Act (the Eighth Schedule), as follows: (1) Subject to subparagraph (2), a disposal is any event, act, forbearance or operation of law which results in the creation, variation, transfer, or extinction of an asset, and includes—

(a) the sale, donation, expropriation, conversion, grant, cession, exchange or any other
(b) alienation or transfer of ownership of an asset; the forfeiture, termination, redemption, cancellation, surrender, discharge, relinquishment; release, waiver, renunciation, expiry, or abandonment of an asset;
(c) the scrapping, loss, or destruction of an asset;
(d) the vesting of an interest in an asset of a trust in a beneficiary;
(e) the distribution of an asset by a company to a holder of shares;
(f) the granting, renewal, extension, or exercise of an option; or
(g) the decrease in value of a person’s interest in a company, trust, or partnership as a result of a value shifting arrangement.

Davis Tax Committee Recommendations on Trusts

Davis Tax Committee Recommendations on Trusts (Davis Tax Committee Recommendations on Wealth Tax: March 2018) (the DTC) are below:

Vested Trusts

Only where a trust deed confers upon its beneficiaries an indisputable and irrevocable vested right to both the capital and income of a trust, should the income, both capital and revenue, be taxed in the hands of the beneficiary.

In all other cases:

Revenue income must be taxed in the trust in accordance with the definition of “gross income” contained in section 1 of the Act. Capital income, generated while assets are held in trust on anything other than a vested basis, must be taxed within the trust up to the time of vesting or disposal as defined in paragraph 11 of the Eighth Schedule to the Act.

INTERVIEW STEPS

The interview has two sections dealing with the two types of trusts under investigation as follows:

(1) Section 1 deals with discretionary trusts; and
(2) Section 2 deals with vested trusts.

SECTION 1: PARTS A to J applies only to Discretionary Trusts

Discretionary Trust

If a trust deed stipulates that the trustees have the power to distribute or vest trust capital assets or capital profits from a trust to any of the trust's beneficiaries, the trust is considered a discretionary capital trust. The ownership and control trust assets vest in the trustees for the purposes of the trust (Pace & Van der Westhuizen, 2017: 38).

Summary of discretionary trust structure (the discretionary trust structure provided).

Fixed attributes	
Trustees:	Mr. X, Mrs. X and Mr. Y who is the independent trustee
Beneficiaries:	A, B and C who are children (blood relatives) of Mr. X and Mrs X
Founder:	Mr. X's father is the founder of the X Family Trust.
Trust assets:	The trust owns capital assets (120 unlisted shares in Company (Pty) Ltd, which represents all the issued share capital of the company) at the current market value of R15 000 per share and a base cost of R5 000 per share. The shares were bought by the trust 6 years ago, at a cost of R5 000 per share for investment purposes, out of the trust's own funds (not from any donated funds).
Residents:	All the natural and juristic persons mentioned above, are residents, as defined in terms of section 1 of the Act.
Market Value of 80 shares:	The market value of 80 the trust's shares is R1 200 000 (80 x R15 000). The company's auditors have verified the market value of shares.
Base cost of 80 shares:	The base cost of 80 the trust's shares is R400 000 (80 x R5 000).
Capital Gain of 80 shares:	The sale of 80 shares of the trust at market value results in a capital gain of R800 000 (R1 200 000 – R400 000).
Variable attributes	
Trustees' powers:	Unlimited power regarding the distribution of trust assets to beneficiaries. Trustees have the power to distribute or vest trust's capital assets or capital profits from a trust to any of the trust's beneficiaries. The trustees have discretionary powers.
Ownership and control of trust's assets:	The ownership and control trust assets vest in the trustees for the purposes of the trust.
Beneficiaries' rights:	The beneficiaries' rights to the trust's assets, is subject to the discretion of the trustees.

SECTION 1: Discretionary Trusts

1 Part A: Nature of the trust's assets	
1.	After each statement below regarding the nature of the trust's assets in any discretionary trust, state whether agree or disagree with the statement.
1.1	The disposal of a capital asset of a discretionary trust could result in either a capital gain or a capital loss.
1.1	
1.2	The revenue or capital nature of a discretionary trust's assets or proceeds of such trust's assets, can be ascertained by the tests developed in case law.
1.2	
1.3	A capital asset of a discretionary trust for capital gains tax purposes, would be the same as that of a revenue asset for income tax purposes.
1.3	
1.4	Capital assets of a discretionary trust for capital gains tax purposes, would be the same as property for donations tax purposes.
1.4	
1.5	Capital assets of a discretionary trust for capital gains tax purposes, would also be the same as property for estate duty purposes.
1.5	

1 Part B: Income tax (excluding capital gains) implications	
2.	When each of the seven following trustees' actions occur in isolation for "the discretionary, trust structure provided," will result in an income tax (excluding capital gains) implication. State if you agree or disagree with the above statement.
2.1	The trustees vest capital assets (80 shares) in beneficiary A.
2.1	
2.2	The trustees distribute capital assets (80 shares) to beneficiary A.
2.2	
2.3	The trustees sell capital assets (80 shares) at market value (R1 200 000), and immediately either vest or distribute the capital gain (R800 000) to beneficiary A.
2.3	
2.4	Adding a new beneficiary to the trust.
2.4	
2.5	Removing beneficiary A from the trust.
2.5	
2.6	Appointing a new trustee to the trust.
2.6	
2.7	Removing a trustee from the trust.
2.7	

1 Part C: Donations tax implications	
3.1	After each statement below regarding a discretionary interest in any discretionary trust, add any commentary explaining whether you agree with the statement.
3.1.1	If the beneficiaries donate a discretionary interest from one beneficiary to another beneficiary, donations tax could be applicable.
3.1.1	
3.1.2	If the trustees donate a discretionary interest from one beneficiary to another beneficiary, without the consent of the beneficiaries, a possible donation tax.
3.1.2	
3.1.3	If a discretionary interest in a trust is donated from one beneficiary to another beneficiary at market value, a disposal in terms of paragraph of 11(1)(*a*) of the Eighth Schedule would occur.
3.1.3	
3.1.4	If a discretionary interest in a trust is donated from one beneficiary to another beneficiary at an inadequate value, a disposal in terms of paragraph of 11(1)(*a*) of the Eighth Schedule would occur.
3.1.4	

3.2	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing) for "the discretionary structure provided," discuss any possible donations tax implications that may result from the trustees" actions:
3.2.1	The trustees vest a trust's capital assets (80 shares) in beneficiary A.
3.2.1	
3.2.2	The trustees distribute a trust's capital assets (80 shares) to beneficiary A.
3.2.2	
3.2.3	The trustees sell trust's capital asset (80 shares) at market value (R1 200 000), and immediately either vest or distribute the capital gain (R800 000) to beneficiary A.
3.2.4	Adding a new beneficiary to the trust
3.2.4	
3.2.5	Removing a beneficiary from a trust.
3.2.5	
3.2.6	Appointing a new trustee to the trust.
3.2.6	
3.2.7	Removing a trustee from a trust.
3.2.7	

1 Part D: Ordinary disposal implications	
4.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing), for "the discretionary trust structure provided," a disposal in terms of paragraphs 11(1)(*a*) to (*f*) may result from the trustees' actions:
4.1	The trustees vest the trust's asset (80 shares) in beneficiary A.
4.1	
4.2	The trustees distribute the trust asset's (80 shares) to beneficiary A.
4.2	
4.3	The trustees sell trust's capital asset (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A.
4.3	
4.4	Adding a new beneficiary to the trust.
4.4	
4.5	Removing beneficiary A from the trust.
4.5	
4.6	Appointing a new trustee to the trust.
4.6	
4.7	Removing a trustee from the trust.

1 Part E: Interest in a discretionary trust	
5.	A capital gain or loss can occur after a disposal of a capital asset, add any commentary explaining whether you agree with this statement below.
5.1	A disposal of a discretionary interest in a trust's capital asset by a beneficiary, could result in a capital gain or loss for the beneficiary.
5.1	

1 Part F: Measuring Value shifting	
6.1	A capital gain or loss is determined by deducting the base cost from the proceeds of an asset (paragraph 3 of the Eighth Schedule of the Act). The proceeds of a value shifting arrangement is measured, by taking the reduction in market value of the beneficiary's interest in a discretionary trust before and after a trustees' action (paragraph 35(2) Eighth Schedule of the Act). In terms of paragraph 23(*a*) of the Eighth Schedule of the Act, the base cost of a person's interest which is subjected to a paragraph 11(1)(*g*) value shifting disposal, is determined with the following formula. The formula Y = [(A - C) / A] x B is used to determine the base cost of a person's interest in a discretionary trust when a value shifting disposal occurs under paragraph 11(1)(*g*) of the Eighth Schedule of the Act. In this context, "Y" is the amount to be determined, "A" is the market value of the person's interests immediately before disposal, "B" is the base cost of those interests calculated immediately prior to disposal, and "C" is the market value of the interests immediately after disposal.

	Add any commentary explaining whether you agree with the statements, regarding the discretionary trust structure, which follow below
6.1	The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before and after any of the seven trustees' action mentioned previously can be measured.
6.1	
6.2	A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' action mentioned previously can be measured.
6.2	
6.3	The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets before any of the seven trustees' action mentioned previously can be measured.
6.3	

1 Part G: Value Shifting disposal implications	
7.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing) for "the discretionary trust structure provided," a paragraph 11(1)(*g*) disposal may result from the trustees' actions:
7.1	The trustees vest trust's asset (80 shares) in beneficiary A.
7.1	
7.2	The trustees distribute trust's asset (80 shares) to beneficiary A.
7.2	
7.3	The trustees sell trust's assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R400 000) to beneficiary A.
7.3	
7.4	Adding a new beneficiary to the trust.
7.4	
7.5	Removing beneficiary A from the trust.
7.5	
7.6	Appointing a new trustee to the trust.
7.6	
7.7	Removing a trustee from the trust.
7.7	

1 Part H: Other trustees' actions	
8.1	Discuss and provide examples any other Trustees' actions in detail (excluding the seven trustees' actions examined in the previous sections and donations of discretionary interests between beneficiaries) for any trust may result in a VSA in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act.
8.1	

1 Part I: DTC's recommendations implications	
9.1	The DTC's Recommendations on trusts recommends that a trust's income or capital income, should be taxed in the trust, effectively negating the attribution rules of taxing any taxable income or capital income in the hands of the beneficiaries of a discretionary trust before any trust asset or income is vested or distributed to the beneficiary. State whether you agree with the above statement.
9.1	

9.2	If the DTC's Recommendations on the on the taxation for "the discretionary trust structures provided," would be implemented, the seven following trustees' actions (with the consent of the beneficiaries in writing) may result in a VSA?
9.2.1	The trustees vest trust's capital assets (80 shares) in beneficiary A.
9.2.1	
9.2.2.	The trustees distribute trust's capital assets (80 shares) to beneficiary A.
9.2.2	
9.2.3	The trustees sell trust assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R400 000) to beneficiary A.
9.2.3	
9.2.4	Adding a new beneficiary to the trust.
9.2.4	
9.2.5	Removing beneficiary A from the trust.
9.2.5	
9.2.6	Appointing a new trustee to the trust.
9.2.6	
9.2.7	Removing a trustee from the trust.
9.2.7	

1 Part J Additional Comments	
10.1	If you have any additional comments regarding this study of Value Shifting Arrangement regarding discretionary trusts, kindly provide your comments in the in the space below.
10.1	

SECTION 2: PARTS A to J applies only to Vested Trusts

Vested Trust

If a trust deed stipulates or a trustees' resolution that the trust capital assets or trust capital vest in the beneficiaries, the trustees are required to distribute trust capital assets or capital profits to the trust beneficiaries. The trustees have ownership and control over the trust assets or trust capital until distribution takes place. (Pace & Van der Westhuizen, 2017: 38).

Summary of vested trust structure (the vested trust structure).

Fixed attributes	
Trustees:	Mr. X, Mrs. X and Mr. Y who is the independent trustee
Beneficiaries:	A, B and C who are children (blood relatives) of Mr. X and Mrs X
Founder:	Mr. X's father is the founder of the X Family Trust.
Trust assets:	The trust owns capital assets (120 unlisted shares in Company (Pty) Ltd, which represents all the issued share capital of the company) at the current market value of R15 000 per share and a base cost of R5 000 per share. The shares were bought by the trust 6 years ago, at a cost of R5 000 per share for investment purposes, out of the trust's own funds (not from any donated funds).
Residents:	All the natural and juristic persons mentioned above, are residents, as defined in terms of section 1 of the Act.
Market Value of 80 shares:	The market value of 80 the trust's shares is R1 200 000 (80 x R15 000). The company's auditors have verified the market value of shares.
Base cost of 80 shares:	The base cost of 80 the trust's shares is R400 000 (80 x R5 000).
Capital Gain of 80 shares:	The sale of 80 shares of the trust at market value results in a capital gain of R800 000 (R1 200 000 – R400 000).
Variable attributes	
Trustees' powers:	Limited power regarding the distribution of trust assets. Trustee act administrators or curators of trust capital assets. The trustees' powers are non-discretionary.
Ownership and control of trust's assets:	The ownership and control trust assets vest in the trustees, prior to distribution of the trust's asset to the beneficiaries.
Beneficiaries' rights:	The trust's assets vest equally in beneficiaries A, B and C.

SECTION 2: Vested Trusts

2 Part A: Nature of the trust's assets	
1.	After each statement below regarding the nature of the trust's assets in any vested trust, state whether agree or disagree with the statement.
1.1	The disposal of a capital asset of a vested trust could result in either a capital gain or a loss.
1.1	
1.2	The revenue or capital nature of a vested trust's assets or proceeds of such trust's assets, can be ascertained by the tests developed in case law.
1.2	
1.3	A capital asset of a vested trust for capital gains tax purposes, would be the same as that of a revenue asset for income tax purposes.
1.3	
1.4	Capital assets of a vested trust for capital gains tax purposes, would be the same as property for donations tax purposes.
1.4	
1.5	Capital assets of a vested trust for capital gains tax purposes, would also be the same as property for estate duty purposes.
1.5	

2 Part B: Income tax (excluding capital gains) implications	
2.	When each of the seven following trustees' actions occur in isolation for "the vested trust structure provided," will result in an income tax implication in terms of the gross income definition (excluding any possible Eighth Schedule capital gain). State if you agree with the above statement:
2.1	The trustees vest capital assets (80 shares) in beneficiary A.
2.1	
2.2	The trustees distribute capital assets (80 shares) to beneficiary A.
2.2	
2.3	The trustees sell capital assets (80 shares) at market value (R1 200 000), and immediately either vest or distribute the capital gain (R800 000) to beneficiary A.
2.3	
2.4	Adding a new beneficiary to the trust.
2.4	
2.5	Removing beneficiary A from the trust.
2.5	
2.6	Appointing a new trustee to the trust.
2.6	
2.7	Removing a trustee from the trust.
2.7	

2 Part C: Donations tax implications	
3.1	After each statement below regarding a vested interest in any vested trust, add any commentary explaining whether you agree with the statement.
3.1.1	If the beneficiaries donate a vested interest from one beneficiary to another beneficiary, donations tax could be applicable.
3.1.1	
3.1.2	If the trustees donate a vested interest from one beneficiary to another beneficiary, without the consent of the beneficiaries, a possible donation tax.
3.1.2	
3.1.3	If a vested interest in a vested trust is donated from one beneficiary to another beneficiary at market value, a disposal in terms of paragraph of 11(1)(*a*) of the Eighth Schedule would occur.
3.1.3	
3.1.4	If a vested interest in a vested trust is donated from one beneficiary to another beneficiary at inadequate value, a disposal in terms of paragraph of 11(1)(*g*) of the Eighth Schedule would occur.
3.1.4	

3.2	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing) for "the vested trust structure provided," discuss any possible donations tax implications that may result from the trustees" actions:
3.2.1	The trustees vest a trust's capital assets (80 shares) in beneficiary A.
3.2.1	
3.2.2	The trustees distribute a trust's capital assets (80 shares) to beneficiary A.
3.2.2	
3.2.3	The trustees sell trust's capital asset (80 shares) at market value (R1 200 000), and immediately either vest or distribute the capital gain (R800 000) to beneficiary A.
3.2.4	Adding a new beneficiary to the trust.
3.2.4	
3.2.5	Removing a beneficiary from a trust.
3.2.5	
3.2.6	Appointing a new trustee to the trust.
3.2.6	
3.2.7	Removing a trustee from a trust.
3.2.7	

2 Part D: Ordinary disposal implications	
4.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing), for "the vested trust structure provided," a disposal in terms of paragraphs 11(1)(*a*) to (*f*), that may result from the trustees' actions:
4.1	The trustees vest the trust's asset (80 shares) in beneficiary A.
4.1	
4.2	The trustees distribute the trust asset's (80 shares) to beneficiary A.
4.2	
4.3	The trustees sell trust's capital asset (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R800 000) to beneficiary A.
4.3	
4.4	Adding a new beneficiary to the trust.
4.4	
4.5	Removing beneficiary A from the trust.
4.5	
4.6	Appointing a new trustee to the trust.
4.6	
4.7	Removing a trustee from the trust.
4.7	

2 Part E: An interest in a discretionary trust	
5.	A capital gain or loss can occur after a disposal of a capital asset, add any commentary explaining whether you agree with this statement below.
5.1	A disposal of a vested interest in a trust's capital asset by a beneficiary, could result in a capital gain or loss for the beneficiary.
5.1	

2 Part F: Measuring Value shifting

6.1	A capital gain or loss is determined by deducting the base cost from the proceeds of an asset (paragraph 3 of the Eighth Schedule of the Act). The proceeds of a value shifting arrangement is measured, by taking the reduction in market value of the beneficiary's interest in a trust before and after a trustees' action (paragraph 35(2) Eighth Schedule of the Act). In terms of paragraph 23 (*a)*of the Eighth Schedule of the Act, the base cost of a person's interest which is subjected to a paragraph 11(1)(*g*) value shifting disposal, is determined with the following formula: *Y = [(A - C) /A] x B where -"Y" represents the amount to be determined; "A" is the market value of that person's interests immediately prior to the disposal; "B" is the person's base cost of the interests calculated immediately prior to the disposal; "C" is the market value of that person's interests immediately after the disposal.*

	Add any commentary explaining whether you agree with the statements, regarding the vested trust structure, which follow below:
6.1	The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets, before and after any of the seven trustees' action mentioned previously can be measured.
6.1	
6.2	A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' action mentioned previously can be measured.
6.2	
6.3	The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets before any of the seven trustees' action mentioned previously can be measured.
6.3	

2 Part G: Value Shifting implications	
7.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing) for "the vested trust structure provided," a paragraph 11(1)(*g*) disposal may result from the trustees' actions:
7.1	The trustees vest trust's asset (80 shares) in beneficiary A.
7.1	
7.2	The trustees distribute trust's asset (80 shares) to beneficiary A.
7.2	
7.3	The trustees sell trust's assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R400 000) to beneficiary A.
7.3	
7.4	Adding a new beneficiary to the trust.
7.4	
7.5	Removing beneficiary A from the trust.
7.5	
7.6	Appointing a new trustee to the trust.
7.6	
7.7	Removing a trustee from the trust.
7.7	

2 Part H: Other trustees' actions	
8.1	Discuss and provide examples any other Vested Trustees' actions in detail (excluding the seven trustees' actions examined in the previous sections and donations of vested interests between beneficiaries) for any trust may result in a VSA in terms of paragraph 11(1)(*g*) of the Eighth Schedule of the Act.
8.1	

2 Part I: DTC's recommendations implications	
9.	If the above DTC's recommendation were to be implemented, beneficiaries of vested trusts (with the indisputable and irrevocable vested right to a trust's taxable income or capital income), the beneficiaries of such trust would be taxed on the taxable income and capital income from such trusts, as was the case prior to the implementation of DTC's recommendations.
9.1	State whether you agree with the above statement below.
9.1	

9.2	If the DTC's Recommendations on the on the taxation for "the vested trust structures provided," would be implemented, the seven following trustees' actions (with the consent of the beneficiaries in writing) may result in a VSA?
9.2.1	The trustees vest trust's capital assets (80 shares) in beneficiary A.
9.2.1	
9.2.2.	The trustees distribute trust's capital assets (80 shares) to beneficiary A.
9.2.2	
9.2.3	The trustees sell trust assets (80 shares) at market value (R1 200 000), and either vest or distribute the capital gain (R400 000) to beneficiary A.
9.2.3	
9.2.4	Adding a new beneficiary to the trust.
9.2.4	
9.2.5	Removing beneficiary A from the trust.
9.2.5	
9.2.6	Appointing a new trustee to the trust.
9.2.6	
9.2.7	Removing a trustee from the trust.
9.2.7	

2 Part J Additional Comments	
10.1	If you have any additional comments regarding this study of Value Shifting Arrangement regarding vested trusts, kindly provide your comments in the in the space below.
10.1	

Thank you for your valuable contribution in this research project.

APPENDIX C (Interview guide – Australia)

Interview guide: An Analysis of Trustees' Actions in Value Shifting Arrangements in Estate-Planning Trusts: A Practical Framework for Tax Practitioners Informed by Experts' Perceptions under the Income Tax Act

DEPARTMENT OF TAXATION

UNISA college of accounting sciences
Excellence in accountancy

Letter of Introduction
Mr. EMB de Freitas: Mobile: 082 338 3576

Dear Participant

INTERVIEW AUSTRALIAN TRUST EXPERT REGARDING VALUE SHIFTING ARRANGEMENTS IN TRUSTS

Mr. EMB de Freitas is doing research for a doctoral thesis in the Department of Taxation at the University of South Africa. The purpose of this research is to investigate Value Shifting Arrangements in the context of South African resident trusts, which is aimed at assisting both the trustee and professionals who deal with trusts. The initial part of his research will be a literature review and analysis of case law. The second phase involves an online research questionnaire for a wide spectrum of professionals who deal with trusts. In the third phase, selected South African specialists in the field of trust estate planning and the taxation of trusts will be interviewed. Overseas tax and trust specialists will also be interviewed in the fourth phase. Your participation as an Australian specialist interviewed is kindly requested. By doing so you will essentially contribute to the success of this research study.

Your participation in the interview will be appreciated and attached is the interview guide. All your responses will be treated confidentially and will be consulted in collaboration with both a literacy study and data collected from the online survey. Data collected will only be used for statistical analysis. No individual or company specific information of any participants will be revealed.

Mr. EMB de Freitas will be contacting you for the interview at a time which is most convenient for you. Your contribution on Value Shifting Arrangements of resident trusts will add substantive value to the body of knowledge pertaining to the tax of resident trusts used in estate planning and is sincerely appreciated. Please do not hesitate to contact Mr. EMB de Freitas or myself at the above telephone number should you require any further information or assistance in completing the questionnaire.

Yours sincerely



……..
PROF AP SWANEPOEL
ACTING COD: DEPARTMENT OF TAXATION
COLLEGE OF ACCOUNTING SCIENCES
TEL: 012-429 2054

GENERAL INFORMATION

- All the questions in this interview are based Australian trusts and tax legislation.
- The purpose of this interview is to obtain an understanding Value Shifting in Australia resident trusts used in estate planning, to how this compares with South African value shifting arrangements.
- Two overseas countries have been selected for interviews and correlation purposes.
- The focus of the study is trustees' actions that could possibly result in a Value Shifting Arrangement.
- Your participation in this interview, should take approximately 90 minutes and will significantly contribute to the success of this research study. Your interview responses will be added, to the responses from the online survey of professionals dealing with trusts and that of overseas estate planning and tax specialists interviewed. This will be added to the strong literacy research and analysis of relevant tax cases already conducted as a basis of this study.
- This interview guide forms part of a research project to qualify for a PhD degree (Taxation) at the University of South Africa.
- For this research, resident trusts and resident beneficiaries in an estate-planning environment will be investigated for Value Shifting Arrangements.
- Discretionary and non-discretionary trusts provided within defined trust structures will be examined in this interview.
- Most of the interview questions require that you comment on the statements provided, statements which you find are contentious or cover grey areas may require more discussion than that of the statements which you may find less contentious or straightforward.
- The same battery of tests is applied to all three trust structures, so if a response to a question is the same as covered in a previous trust, your response need only state that it is similar. Also refer to previous trust structure which has the same response without any detailed commentary.
- After each statement or question a blank space has been provided for your response.
- A hardcopy of all your transcribed responses to the interview questions will be sent to you, after conducting the interview on request by yourself.
- The information and data provided by you will be treated as strictly confidential and kept in accordance with UNISA's *Policy on Research Ethics.* Your responses, together with those of other respondents, the interviews with specialists and the literature research will be used to compile a complete view.

Thank you for your participation without any compensation and in adding value to not only this research study but also to the body of knowledge pertaining to the tax of resident trusts in estate planning.

Mr. EMB de Freitas

Postal Address:	**Telephone:**	**E-mail:**
PO Box 66265 Riebeeckstad 9469	Work: 057 – 910 3625 Home: 057 – 352 1926 Mobile: 082 338 3576	edefreitas@cut.ac.za

Supervisor: Prof AP Swanepoel, Department of Taxation, College of Accounting Sciences, University of South Africa

Interview number	

PARICIPANT'S DEMOGRAPHIC DETAILS

PLEASE MARK WITH AN "X" AND ONLY SELECT ONE ANSWER PER QUESTION/STATEMENT

1.	**Gender:**	Male	
		Female	
		Neutral	
2.	**Position currently held:**	Academic	
		Partner/Director in private practice	
		Specialist/Consultant	
		Manager	
		Team member	
		Government/Public official	
		Other (Please Specify)	
3.	**Work environment:**	Internationally Affiliated	
		National Firm	
		Small to Medium-Size Firm	
		Outside Practice	
4.	**Number of years of experience in trusts:**	0 to 2 years	
		3 to 5 years	
		6 to 10 years	
		More than 10years	
5.	**State Your Professional Affiliations:**		
6.	**Acting as trustee:** Are you currently a trustee of a trust?	Yes	No

INTERVIEW STEPS

Firstly, the definition of a Value Shifting Arrangement and the General Value Shifting Regime are provided for ease of reference. Secondly, the Trust Structure fixed attributes under investigation are provided with the settlor; trustees; beneficiaries; appointor and trust's assets identified, for the purpose of being consistently applied in each type of trust examined. Thirdly, the interview has four sections dealing with the three types of trusts under investigation as follows:

1) Section 1 deals general background questions;
2) Section 2 deals with discretionary trusts;
3) Section 3 deals with fixed trusts; and
4) Section 4 deals with fixed unit trusts.

DEFINITION OF A VALUE SHIFTING ARRANGEMENT

Value shifting arrangements are defined in paragraph 1 of the Eighth Schedule of the Act (VSA**)** are below:

"Value shifting arrangement" means an arrangement by which a person retains an interest in a company, trust or partnership, but following a change in the rights or entitlements of the interest in that company, trust or partnership (other than as a result of a disposal at market value as determined before the application of paragraph 38), the market value of the interest of that person decreases and-

(a) the value of the interest of a connected person in relation to that person held directly or indirectly in that company, trust, or partnership increases; or
(b) a connected person in relation to that person acquires a direct or indirect interest in that company, trust, or partnership.

The above definition only applies to South African VSA, next the Australian definition of the General Value Shifting Regime rules will be provided. The same trustees' actions and tests that were applied in the South African tax experts and online respondents on VSA will be applied to the Australian trusts. Also, the same sequence of tests will be applied to the Australian trusts. South African donations tax (gift tax) and estate duty (inheritance tax) have been excluded as these taxes do not apply in the Australian tax regime.

Guide to the general value shifting regime

According to the Australian Tax Office's Guide: to the general value shifting regime (2006), (the GVSR), there are three categories of value shifting arrangements in Australia namely:

- entity interest direct value shifting rules;
- created rights direct value shifting rules; and
- indirect value shifting rules.

The GVSR GUIDE defines entity interest direct value shifting rules as follows:

Broadly, the entity interest direct value shifting rules apply where a scheme effectively results in a value shift between equity or loan interests in a company or trust that is controlled (for value shifting purposes) by another entity. Such value shifts include the issue of interests in a company or trust at a discount to market value (shifting value out of existing interests) or the variation of rights attaching to a class of existing interests in a company or trust (for example, shifting value out of that class and increasing the value of another class). Interests issued for more than market value do not trigger the rules (but existing capital gains tax (CGT) rules may limit the first element of cost base and reduced cost base of the interests to market value)

The GVSR GUIDE defines created rights direct value shifting rules

Broadly, the created rights direct value shifting rules can apply where a right is created out of, or over, an asset for less than market value in favour of an associate and the underlying asset is later realised at a loss while the right still exists. The creation of the right distorts the relationship between the market value of the underlying asset and the value of that asset for tax purposes.

The GVSR GUIDE defines indirect value shifting rules

Generally, an indirect value shift happens when entities that are not dealing at arm's length engage in a non-market value transaction. The value shifting effect is referred to as 'indirect' because it affects the values of interests held in those entities. Such value shifts distort the relationship between the market value of the interests and their values for tax purposes. The indirect value shifting rules seek to address this distortion.

TRUST STRUCTURE

In all three trust structures (discretionary, fixed, and fixed unit trust structures) examined the trusts have the same fixed attributes as provided below:

Each trust has three trustees namely: Mr X, Mrs X and Mr Y. Mr Y is an independent trustee. A, B and C (referred to as “A,” “B” and “C”) are the beneficiaries of the X Family Trust. All the beneficiaries are the children of Mr X and Mrs X. Mr X's father is the settlor of the trust. Mr Z is an independent professional and the appointor of the trust. The trust has one trust asset which consists of 120 shares of the total issued share capital in an unlisted company, which are capital assets for capital gains tax purposes (referred to as “Capital Assets”). These shares are of capital in nature and are not stock in trade.

The current market value is $15 000 per share, and base cost is $ 5 000 per share. These shares were purchased six years ago as an investment at a purchase price of $ 5000 per share. When considering 80 these shares, they have a current market value of $1 200 000 (80x $15 000) and a base cost of $400 000 (80 x $5 000). The sale of 80 shares at the current market value will result in a capital gain of $800 000 ($1 200 000 – $ 400 000). All the parties in the trust structure are Australian tax residents. At the start of each trust structure section in the interview, both the fixed and variable attributes such as trustees’ powers, ownership and control of trust assets, and beneficiaries’ rights to those assets are summarised. Assume that all the specific trustees’ actions which are investigated are permissible within the parameters of the trust deeds and when necessary, with the trust deed amendments.

SECTION 1: PARTS A to C applies only to general questions

1 PART A: Asset rights, ownership, and control
1. Discretionary trusts:
1.1.1 Briefly describe the trustees' powers to distribute trust assets held in a discretionary trust.
1.1.2 Briefly describe the ownership and control of assets held in a discretionary trust.
1.1.3 Briefly describe the beneficiary's rights to assets held in a discretionary trust.

1 PART B: Asset rights, ownership, and control
2. Fixed trusts:
2.1.1 Briefly describe the trustees' powers to distribute trust assets held in a fixed trust.
2.1.2 Briefly describe the ownership and control of assets held in a fixed trust.
2.1.3 Briefly describe the beneficiary's rights to assets held in a fixed trust.

1 PART C: Asset rights, ownership, and control
3. Fixed unit trusts:
3.1.1 Briefly describe the trustees' powers to distribute trust assets held in a fixed unit trust.
3.1.2 Briefly describe the ownership and control of assets held in a fixed unit trust.
3.1.3 Briefly describe the beneficiary's rights to assets held in a fixed trust.

SECTION 2: PARTS A to I applies only to an Australian Discretionary Trusts

Summarised discretionary trust structure

The discretionary trust structure ("the Australian discretionary trust structure" is summarised below for ease of reference:

Summarised discretionary trust structure	
Fixed attributes of trust structures	
Trustees:	Mr. X, Mrs. X and Mr. Y who is the independent trustee.
Beneficiaries:	A, B and C who are children (blood relatives) of Mr. X and Mrs X.
Appointor:	Mr Z is the appointor of the trust.
Settlor:	Mr. X's father is the founder of the X Family Trust.
Trust assets:	The trust owns capital assets (120 shares in an unlisted company) at the current market value of $15 000 per share and a base cost of $5 000 per share. The shares were bought by the trust 6 years ago, at a cost of $5 000 per share for investment purposes, out of the trust's own funds (not from any donated funds).
Residents:	All the natural and juristic persons mentioned above, are tax residents in Australia.
Market Value of 80 shares:	The market value of 80 the trust's shares is $1 200 000 (80 x $15 000). The company's auditors have verified the market value of shares.
Base cost of 80 shares:	The cost of 80 the trust's shares is $400 000 (80 x $5 000).
Capital Gain of 80 shares:	The sale of 80 shares of the trust at market value results in a capital gain of $800 000 ($1 200 000 – $400 000).
Variables attributes of the trust structure	
Trustees' powers:	Unlimited power regarding the distribution of trust assets to beneficiaries. Trustees have the power to distribute or vest trust's capital assets or capital profits from a trust to any of the trust's beneficiaries. This is a discretionary trust.
Ownership and control of trust's assets:	The beneficiaries' rights are a *spes*. Trustees control the trust's assets.
Beneficiaries' rights:	The beneficiaries' rights to the trust's assets, is subject to the discretion of the trustees.

2. Part A: Nature of the trust's assets	
1.	After each statement below regarding the nature of the trust's assets in any Australian discretionary trust, add any commentary explaining whether agree with the statement.
1.1	The disposal of a capital asset of a discretionary trust could result in either a capital gain or a capital loss.
1.1	
1.2	The revenue or capital nature of a discretionary trust's assets or proceeds of such trust's assets, can be ascertained by the tests developed in case law.
1.2	
1.3	The definition of a capital asset of a discretionary trust for capital gains purposes, would be the same as an asset for income tax purposes (before any capital gains event).
1.3	

2 Part B: Income tax (excluding capital gains) implications	
2.	When each of the seven following trustees' actions occur in isolation for "the Australian discretionary trust structure provided," an income tax (excluding capital gains) implication may result. State if you agree or disagree with the above statement.
2.1	The trustees the trust's capital assets (80 shares) in beneficiary A.
2.1	
2.2	The trustees distribute the trust's capital assets (80 shares) to beneficiary A.
2.2	
2.3	The trustees sell trust capital assets (80 shares) at market value ($1 200 000), and distribute the capital gain ($800 000) to beneficiary A.
2.3	
2.4	Adding a new beneficiary to the trust.
2.4	
2.5	Removing beneficiary A from the trust.
2.5	
2.6	Appointing a new trustee to the trust.
2.6	
2.7	Removing a trustee from the trust.
2.7	

2 Part C: Donation implications	
After the statement below regarding a discretionary interest in any Australian discretionary trust, add any commentary explaining whether you agree with the statement.	
3.1	A donation of an interest in a discretionary trust from one beneficiary to another for no or inadequate consideration, will be subject gift tax.
3.1	
3.2	A donation of an interest in a discretionary trust from one beneficiary to another beneficiary at market value would result in a CGT event in terms of the ITAA which excludes the GVSR.
3.2	
	A donation of an interest in a discretionary trust from one beneficiary to another beneficiary at an inadequate value would result in a GVSR CGT event in terms of the ITAA.
3.3	

2 Part D: Ordinary disposal implications (CGT events excluding any GVSR)	
4.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing), for "the Australian discretionary trust structure provided," a CGT event (excluding any GVSR events) may result from the trustees' actions:
4.1	The trustees vest the trust's asset (80 shares) in beneficiary A.
4.1	
4.2	The trustees distribute the trust asset's (80 shares) to beneficiary A.
4.2	
4.3	The trustees sell trust's capital asset (80 shares) at market value ($1 200 000), and distribute the capital gain ($800 000) to beneficiary A.
4.3	
4.4	Adding a new beneficiary to the trust.
4.4	
4.5	Removing beneficiary A from the trust.
4.5	
4.6	Appointing a new trustee to the trust.
4.6	
4.7	Removing a trustee from the trust.
4.7	

2 Part E: Beneficiaries' interest in a trust	
5.	A capital gain or loss can occur after a disposal of a capital asset of an Australian discretionary trust, add any commentary explaining whether you agree with this statement below:
5.1	A disposal of a discretionary interest in a trust's capital asset by a beneficiary, could result in a capital gain or a loss for the beneficiary.
5.1	

2 Part F: Measuring Value shifting	
6.	The market value of each of the beneficiary's interests (beneficiary A, B and C) in the Australian discretionary trust's underlying assets, before and after any of the seven trustees' action mentioned previously can be measured.
6.1	
6.1	A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' action mentioned previously can be measured.
6.2	
6.2	The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets before any of the seven trustees' action mentioned previously can be measured.
6.3	

2 Part G: Value shifting implications (GVSR)	
7.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing) for "the Australian discretionary trust structure provided," value shifting in terms of the **"**GVSR**"** may result from the trustees' actions:
7.1	The trustees vest trust's asset (80 shares) in beneficiary A.
7.1	
7.2	The trustees distribute trust's asset (80 shares) to beneficiary A.
7.2	
7.3	The trustees sell trust's assets (80 shares) at market value ($1 200 000), and distribute the capital gain ($800 000) to beneficiary A.
7.3	
7.4	Adding a new beneficiary to the trust.
7.4	
7.5	Removing beneficiary A from the trust.
7.5	
7.6	Appointing a new trustee (appointee) to the trust.
7.6	
7.7	Removing an existing trustee (appointee) from the trust.
7.7	

2 Part H: Other trustees' actions

8.1	Discuss and provide examples any other Trustees' actions in detail (excluding the seven trustees' actions examined in the previous section) for an Australian discretionary trust structure provided, that may result in a value shifting in terms of the "GVSR."
8.1	

2 Part I Additional Comments	
9.1	If you have any additional comments regarding this study of "GVSR" regarding Australian discretionary trusts, kindly provide your comments in the in the space below.
9.1	

SECTION 3: PARTS A to I applies only to Fixed Trusts

Summarised fixed trust structure

The vested trust structure (the Australian fixed trust structure) is summarised below for ease of reference:

Summarised fixed trust structure	
Fixed attributes of trust structures	
Trustees:	Mr. X, Mrs. X and Mr. Y who is the independent trustee
Beneficiaries:	A, B and C who are children (blood relatives) of Mr. X and Mrs X
Appointor:	Mr Z is the appointor of the trust.
Settlor:	Mr. X's father is the founder of the X Family Trust.
Trust assets:	The trust owns capital assets (120 unlisted shares in Company (Pty) Ltd) at the current market value of $15 000 per share and a base cost of $5 000 per share. The shares were bought by the trust 6 years ago, at a cost of $5 000 per share for investment purposes, out of the trust's own funds (not from any donated funds).
Residents:	All the natural and juristic persons mentioned above, are residents, as defined in terms of section 1 of the Act.
Market Value of 80 shares:	The market value of 80 the trust's shares is R1 200 000 (80 x R15 000). The company's auditors have verified the market value of shares.
Base cost of 80 shares:	The cost of 80 the trust's shares is R400 000 (80 x R5 000).
Capital Gain of 80 shares:	The sale of 80 shares of the trust at market value results in a capital gain of R800 000 (R1 200 000 – R400 000).
Variables attributes of the trust structure	
Trustees' powers:	Limited power regarding the distribution of trust assets. The trust deed stipulates how the trust capital assets or trust capital vest in the beneficiaries. The trustees have non-discretionary powers.
Ownership and control of trust's assets:	The beneficiaries' rights are fixed. Beneficiaries' rights are certain.
Beneficiaries' rights:	Non-discretionary rights, the trust's assets vest equally in beneficiaries A, B and C.

3 Part A: Nature of the trust's assets	
1.	After each statement below regarding the nature of the trust's assets in any Australian fixed trust, add any commentary explaining whether agree with the statement.
1.1	The disposal of a capital asset of a non-discretionary trust could result in either a capital gain or a loss.
1.1	
1.2	The revenue or capital nature of a non-discretionary trust's assets or proceeds of such trust's assets, can be ascertained by the tests developed in case law.
1.2	
1.3	The definition of a capital asset of a non-discretionary trust for capital gains purposes, would be the same as an asset for income tax purposes (before any capital gains event).
1.3	

3 Part B: Income tax (excluding capital gains) implications	
2.	When each of the seven following trustees' actions occur in isolation for "the Australian fixed trust structure provided," an income tax (excluding capital gains) implication may result. State if you agree or disagree with the above statement.
2.1	The trustees vest the trust's capital assets (80 shares) in beneficiary A.
2.1	
2.2	The trustees distribute the trust's capital assets (80 shares) to beneficiary A.
2.2	
2.3	The trustees sell trust capital assets (80 shares) at market value ($1 200 000), and distribute the capital gain ($800 000) to beneficiary A.
2.3	
2.4	Adding a new beneficiary to the trust.
2.4	
2.5	Removing beneficiary A from the trust.
2.5	
2.6	Appointing a new trustee to the trust.
2.6	
2.7	Removing a trustee from the trust.
2.7	

	3 Part C: Donation implications
3.	After the statement below regarding a beneficiary interest in any Australian fixed trust, add any commentary explaining whether you agree with the statement.
3.1	A donation of a beneficiary interest in a non-discretionary trust from one beneficiary to another for no or inadequate consideration, will be subject gift tax.
3.1	
3.2	A donation of a discretionary interest from one beneficiary to another beneficiary at market value would result in a CGT event in terms of the ITAA which excludes the GVSR.

3.2	
3.3	A donation of a discretionary interest from one beneficiary to another beneficiary at an inadequate value would result in a GVSR CGT event in terms of the ITAA.

3 Part D: Ordinary disposal implications (CGT events excluding any GVSR)	
4.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing), for "the Australian fixed trust structure provided," a CGT events (excluding any GVSR events) may result from the trustees' action:
4.1	The trustees vest the trust's asset (120 shares) in beneficiary A, when dissolving the trust.
4.1	
4.2	The trustees distribute the trust asset's (80 shares) to beneficiary A.
4.2	
4.3	The trustees sell trust's capital asset (80 shares) at market value ($1 200 000), and distribute the capital gain ($800 000) to beneficiary A.
4.3	
4.4	Adding a new beneficiary to the trust.
4.4	
4.5	Removing beneficiary A from the trust.
4.5	
4.6	Appointing a new trustee to the trust.
4.6	
4.7	Removing an existing trustee from the trust.
4.7	

3 Part E: Interest in a fixed trust	
5.	A capital gain or loss can occur after a disposal of a capital asset of an Australian fixed trust, add any commentary explaining whether you agree with this statement below:
5.1	A disposal of a fixed interest in a trust's capital asset by a beneficiary, could result in a capital gain or a loss for the beneficiary.
5.1	

3 Part F: Measuring Value shifting	
6.1	The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets of an Australian fixed trust, before and after any of the seven trustees' action mentioned previously can be measured.
6.1	
6.2	A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying Australian fixed trust's assets, before and after any of the seven trustees' action mentioned previously can be measured.
6.2	

6.3	The cost base of each of the beneficiary's interests (beneficiary A, B and C) in the underlying Australian fixed trust's assets before any of the seven trustees' action mentioned previously can be measured.
6.3	

3 Part G: Value shifting implications (GVSR)	
7.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing) for "the Australian fixed trust structure provided," value shifting in terms of the **"**GVSR**"** may result from the trustees' actions:
7.1	The trustees vest trust's asset (80 shares) in beneficiary A, when the trust is dissolved.
7.1	
7.2	The trustees distribute trust's asset (80 shares) to beneficiary A.
7.2	
7.3	The trustees sell trust's assets (80 shares) at market value ($1 200 000), and vest or distribute the capital gain ($800 000) to beneficiary A.
7.3	
7.4	Adding a new beneficiary to the trust.
7.4	
7.5	Removing beneficiary A from the trust.
7.5	
7.6	Appointing a new trustee to the trust.
7.6	
7.7	Removing an existing trustee from the trust.
7.7	

3 Part H: Other trustees' actions	
8.1	Discuss and provide examples any other Trustees' actions in detail (excluding the seven trustees' actions examined in the previous section) for an Australian fixed trust structure provided fixed trust that may result in a value shifting in terms of the "GVSR."
8.1	

3 Part I Additional Comments	
9.1	If you have any additional comments regarding this study of "GVSR" regarding the Australian fixed trust structure provided, kindly provide your comments in the in the space below.
9.1	

SECTION 4: PARTS A to I applies only to Australian Fixed Unit Trusts

Summarised fixed trust structure

The fixed unit trust structure (the Australian Fixed unit trust structure) is summarised below for ease of reference:

Summarised fixed unit trust structure	
Fixed attributes of trust structures	
Trustees:	Mr. X, Mrs. X and Mr. Y who is the independent trustee
Beneficiaries:	A, B and C who are children (blood relatives) of Mr. X and Mrs X
Appointor:	Mr Z is the appointor of the trust.
Settlor:	Mr. X's father is the founder of the X Family Trust.
Trust assets:	The trust owns capital assets (120 unlisted shares in Company (Pty) Ltd) at the current market value $15 000 per share and a base cost of $5 000 per share. The shares were bought by the trust 6 years ago, at a cost of $5 000 per share for investment purposes, out of the trust's own funds (not from any donated funds).
Residents:	All the natural and juristic persons mentioned above are Australian tax residents.
Market Value of 80 shares:	The market value of 80 the trust's shares is $1 200 000 (80 x $15 000). The company's auditors have verified the market value of shares.
Base cost of 80 shares:	The cost of 80 the trust's shares is $400 000 (80 x $5 000).
Capital Gain of 80 shares:	The sale of 80 shares of the trust at market value results in a capital gain of $800 000 ($1 200 000 – $400 000).
Variable attributes of the trust structure	
Trustees' powers:	Limited power regarding the distribution of trust assets. Trustee act administrators or curators of trust capital assets. The trustees have non-discretionary powers.
Ownership and control of trust's assets:	The beneficiaries own the units which gives them a proportional share of the trust capital.
Beneficiaries' rights:	Non-discretionary rights, the trust's units vest equally in beneficiaries A, B and C.

4 Part A: Nature of the trust's assets	
1.	After each statement below regarding the nature of the trust's assets in any Australian fixed unit trust, add any commentary explaining whether agree with the statement.
1.1	The disposal of a capital asset of a non-discretionary trust could result in either a capital gain or loss.
1.1	
1.2	The revenue or capital nature of a non-discretionary trust's assets or proceeds of such trust's assets, can be ascertained by the tests developed in case law.
1.2	
1.3	The definition of a capital asset of a non-discretionary trust for capital gains purposes, would be the same as an asset for income tax purposes (before any capital gains event).

4 Part B: Income tax (excluding capital gains) implications	
2.	When each of the seven following trustees' actions occur in isolation for "the Australian fixed unit, trust structure provided," an income tax (excluding capital gains) implication may result. State if you agree or disagree with the above statement.
2.1	The trustees vest the trust's capital assets (80 shares) in beneficiary A.
2.1	
2.2	The trustees distribute the trust's capital assets (80 shares) to beneficiary A.
2.2	
2.3	The trustees sell trust capital assets (80 shares) at market value ($1 200 000), and distribute the capital gain ($800 000) to beneficiary A.
2.3	
2.4	Adding a new beneficiary to the trust.
2.4	
2.5	Removing beneficiary A from the trust.
2.5	
2.6	Appointing a new trustee to the trust.
2.6	
2.7	Removing a trustee from the trust.
2.7	

4 Part C: Donations implications	
After the statement below regarding an interest in any Australian fixed unit trust, add any commentary explaining whether you agree with the statement.	
3.1	A donation of an interest in a fixed unit trust from one beneficiary to another beneficiary for no or inadequate consideration, will be subject gift tax.
3.1	

3.2	A donation of a discretionary interest from one beneficiary to another beneficiary at market value would result in a CGT event in terms of the ITAA which excludes the GVSR.
3.2	
3.3	A donation of a discretionary interest from one beneficiary to another beneficiary at an inadequate value would result in a GVSR CGT event in terms of the ITAA.
3.3	

4 Part D: Ordinary disposal implications (CGT events excluding any GVSR)	
4.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing), for "the Australian fixed unit trust structure provided," a CGT events (excluding any GVSR events) may result from the trustees' action:
4.1	The trustees vest the trust's asset (80 shares) in beneficiary A.
4.1	
4.2	The trustees distribute the trust asset's (80 shares) to beneficiary A.
4.2	
4.3	The trustees sell trust's capital asset (80 shares) at market value ($1 200 000), and distribute the capital gain ($800 000) to beneficiary A.
4.3	
4.4	Adding a new beneficiary to the trust.
4.4	
4.5	Removing beneficiary A from the trust.
4.5	
4.6	Appointing a new trustee to the trust.
4.6	
4.7	Removing an existing trustee from the trust.
4.7	

4 Part E: Beneficiaries' interest in a trust	
5.	A capital gain or loss can occur after a disposal of a capital asset of an Australian fixed unit trust, add any commentary explaining whether you agree with this statement below.
5.1	A disposal of a fixed interest in a trust's capital asset by a beneficiary, could result in a capital gain or a loss for the beneficiary.
5.1	

4 Part F: Measuring Value shifting	
6.1	The market value of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets of an Australian fixed unit trust, before and after any of the seven trustees' action mentioned previously can be measured.
6.1	

6.2	A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying Australian fixed unit trust's assets, before and after any of the seven trustees' action mentioned previously can be measured.
6.2	
6.3	The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying Australian fixed unit trust's assets before any of the seven trustees' action mentioned previously can be measured.
6.3	
4 Part G: Value shifting implications (GVSR)	
7.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing) for "the Australian fixed unit trust structure provided," value shifting in terms of the **"**GVSR**"** may result from the trustees' actions:
7.1	The trustees vest trust's asset (80 shares) in beneficiary A.
7.1	
7.2	The trustees distribute trust's asset (80 shares) to beneficiary A.
7.2	
7.3	The trustees sell trust's assets (80 shares) at market value ($1 200 000), and distribute the capital gain ($800 000) to beneficiary A.
7.3	
7.4	Adding a new beneficiary to the trust.
7.4	
7.5	Removing beneficiary A from the trust.
7.5	
7.6	Appointing a new trustee to the trust.
7.6	
7.7	Removing an existing trustee from the trust.
7.7	
4 Part H: Other trustees' actions	
8.1	Discuss and provide examples any other Trustees' actions in detail (excluding the seven trustees' actions examined in the previous sections) of an Australian fixed unit trust may result in a value shifting in terms of the "GVSR."
8.1	
4 Part I Additional Comments	
9.1	If you have any additional comments regarding this study of "GVSR" regarding an Australian fixed unit trust, kindly provide your comments in the in the space below.
9.1	

	Thank you for your valuable contribution in this research project.

APPENDIX D (Interview guide-UK)

An Analysis of Trustees' Actions in Value Shifting Arrangements in Estate-Planning Trusts: A Practical Framework for Tax Practitioners Informed by Experts' Perceptions under the Income Tax Act

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DEPARTMENT OF TAXATION

Letter of Introduction

Mr EMB de Freitas: Mobile: +2782 338 3576

Dear Participant

INTERVIEW UK OVERSEAS TRUST EXPERT REGARDING VALUE SHIFTING ARRANGEMENTS IN TRUSTS

Mr. EMB de Freitas is doing research for a doctoral thesis in the Department of Taxation at the University of South Africa. The purpose of this research is to investigate Value Shifting Arrangements (VSA) in the context of South African resident trusts, which is aimed at assisting both the trustee and professionals who deal with trusts. The initial part of his research will be a literature review and analysis of case law. The second phase involves an online research questionnaire for a wide spectrum of professionals who deal with trusts. In the third phase, selected South African experts in the field of trust estate planning and the taxation of trusts will be interviewed. For the fourth phase your participation in an interview in your capacity as an overseas United Kingdom tax specialist is kindly requested to obtain an informed understanding of how VSA applicable to family trusts are dealt with in your country. The information you provide will be compared to the South African legislation on VSA for family trusts to establish any potential analogies or refinements that may be required by the South African context of VSA of family trusts.

Your participation in the interview will be appreciated and attached is the interview guide. All your responses will be treated confidentially and will be consulted in collaboration with both a literacy study and data collected from the online survey. Data collected will only be used for statistical analysis. No individual or company specific information of any participants will be revealed.

Mr. EMB de Freitas will be contacting you for the interview at a time, which is most convenient for you. Your contribution on Value Shifting Arrangements of resident trusts will add substantive value to the body of knowledge pertaining to the tax of resident trusts used in estate planning and is appreciated.

Yours sincerely



……..
PROF AP SWANEPOEL
ACTING COD: DEPARTMENT OF TAXATION
COLLEGE OF ACCOUNTING SCIENCES
TEL: 012-429 2054

GENERAL INFORMATION

- All the questions in this interview are based United Kingdom trusts and tax legislation.
- The purpose of this interview is to obtain an understanding Value Shifting in United Kingdom resident trusts used in estate planning, to how this compares with South African value shifting arrangements.
- Two overseas countries have been selected for interviews and correlation purposes.
- The focus of the study is trustees' actions that could result in a Value Shifting Arrangement.
- Your participation in this interview, should take approximately 60 minutes and will significantly contribute to the success of this research study. Your interview responses will be added, to the responses from the online survey of professionals dealing with trusts and that of overseas estate planning and tax specialists interviewed. This will be added to the strong literacy research and analysis of relevant tax cases already conducted as a basis of this study.
- This interview guide forms part of a research project to qualify for a PhD degree (Taxation) at the University of South Africa.
- For this research, resident trusts and resident beneficiaries in an estate-planning environment will be investigated for Value Shifting Arrangements.
- Discretionary and non-discretionary interest in possession trusts (fixed trusts) provided within defined trust structures will be examined in this interview.
- Most of the interview questions require that you comment on the statements provided, statements which you find are contentious or cover grey areas may require more discussion than that of the statements which you may find less contentious or straightforward.
- The same battery of tests is applied to all three trust structures, so if a response to a question is the same as covered in a previous trust, your response need only state that it is similar. Also refer to previous trust structure which has the same response without any detailed commentary.
- After each statement or question a blank space has been provided for your response.
- A hardcopy of all your transcribed responses to the interview questions will be sent to you, after conducting the interview on request by yourself.
- The information and data provided by you will be treated as strictly confidential and kept in accordance with UNISA's *Policy on Research Ethics.* Your responses, together with those of other respondents, the interviews with specialists and the literature research will be used to compile a complete view.

Thank you for your participation without any compensation and in adding value to not only this research study but also to the body of knowledge pertaining to the tax of resident trusts in estate planning.

Mr. EMB de Freitas

Postal Address:	**Telephone:**	**E-mail:**
PO Box 66265 Riebeeckstad 9469	Work: 057 – 910 3625 Home: 057 – 352 1926 Mobile: 082 338 3576	edefreitas@cut.ac.za

Supervisor: Prof AP Swanepoel, Department of Taxation, College of Accounting Sciences, University of South Africa

Interview number	

PARTICIPANTS'S DEMOGRAPHIC DETAILS

PLEASE MARK WITH AN "X" AND ONLY SELECT ONE ANSWER PER QUESTION/STATEMENT

1.	**Gender:**	Male	
		Female	
		Neutral	
2.	**Position currently held:**	Academic	
		Partner/Director in private practice	
		Specialist/Consultant	
		Manager	
		Team member	
		Government/Public official	
		Other (Please Specify)	
3.	**Work environment:**	Internationally Affiliated	
		National Firm	
		Small to Medium-Size Firm	
		Outside Practice	
4.	**Number of years of experience in trusts:**	0 to 2 years	
		3 to 5 years	
		6 to 10 years	
		More than 10 years	
5.	**State Your Professional Affiliations:**		
6.	**Acting as trustee:** Are you currently a trustee of a trust?	Yes	No

INTERVIEW STEPS

Firstly, the definition of a Value Shifting Arrangement (South African) and the Value Shifting (United Kingdom) are provided for ease of reference. Secondly, the Trust Structure fixed attributes under investigation are provided with the settlor; trustees; beneficiaries; and trust's assets identified, for the purpose of being consistently applied in each type of trust examined. Thirdly, the interview has three sections dealing with the three types of trusts under investigation as follows:

1) Section 1 general background questions;
2) Section 2 deals with discretionary trusts;
3) Section 3 deals with a non-discretionary interest in possession trusts (fixed trusts).

DEFINITION OF A VALUE SHIFTING ARRANGEMENT

Value shifting arrangements are defined in paragraph 1 of the Eighth Schedule of the Act, (VSA) are below:

"Value shifting arrangement" means an arrangement by which a person retains an interest in a company, trust or partnership, but following a change in the rights or entitlements of the interest in that company, trust or partnership (other than as a result of a disposal at market value as determined before the application of paragraph 38), the market value of the interest of that person decreases and-

(c) the value of the interest of a connected person in relation to that person held directly or indirectly in that company, trust, or partnership increases; or
(d) a connected person in relation to that person acquires a direct or indirect interest in that company, trust, or partnership.

The above definition only applies to South African VSA. The same trustees' actions and tests that were applied in the South African tax experts and online respondents on VSA will be applied to the United Kingdom trusts. Also, the same sequence of tests will be applied to the United Kingdom trusts. Next the United Kingdom definition of the General Value Shifting will be provided, this interview only United Kingdom trusts used in estate planning according to the tax laws of the United Kingdom. (Offshore trusts, trusts for disabled beneficiaries and hybrid trusts are excluded from this interview).

Value Shifting: HMRC Internal Manual:

For ease of reference the HMRC Internal Manual: Capital Gains Tax (2021), describes value shifting as follows:

CG13230 - Value shifting: TCGA92 S29: scope TCGA92/S29 (2), TCGA92/S29 (4) & TCGA92/S29 (5), (the **TCGA92 S29).**

TCGA92/S29 can operate in three situations:

- *Where a person, or persons, who control a company use that control (see CG14620) so that value or valuable rights pass out of shares which they own (or are owned by persons connected with them) into other shares in, or rights over, the company.*
- *Where the owner of land (or any other property) sells it and becomes lessee, and there are subsequently arrangements generally favourable to the lessor.*
- *Where rights or restrictions over any asset are reduced or removed by the person entitled to enforce them.*

In the situations outlined above, the value shifting rules deem a disposal (or part-disposal) by the person transferring value. There is a corresponding acquisition by the person or persons who receive the value.

The market value rule, TCGA92/S17 then operates, so that the person transferring the value is liable to Capital Gains Tax based on the amount which he or she could have obtained for the transfer, if the parties had been at arm's length.

If anything is received for the transfer of value, the rules add to this amount any additional amount which could have been obtained. So, again, liability arises on the full amount of the value transferred.

Interaction with other provisions

The normal capital gains rules apply to the deemed disposal under TCGA92/S29. So, for example, where the relevant conditions are satisfied or relief under the gift of business assets provisions (TCGA92/S165, see CG66450+) may be given against any gains.

Transfer of value between spouses or between civil partners of each other will not give rise to any gain (TCGA92/S58, see CG22200+).

TRUST STRUCTURE

It is assumed that in the two trust structures (discretionary and fixed trust structures) examined, each have the same fixed attributes which are provided below.

Each trust has three trustees namely: Mr X, Mrs X and Mr Y. Mr Y is an independent trustee. A, B and C (referred to as “A,” “B” and “C”) are the beneficiaries of the X Family Trust. All the beneficiaries are the children of Mr X and Mrs X. Mr X's father is the settlor of the trust. Mr Z is an independent professional and the appointor of the trust.

The trust has one trust asset which consists of 120 shares of a listed company, which are capital assets for capital gains tax purposes (referred to as “*Capital Assets*”). These shares are of capital in nature (sale of these shares will result in capital receipts) and are not stock in trade (sale of these shares will result in taxable receipts). The current market value is £15 000 per share, and original cost is £5 000 per share. These shares were purchased six years ago as an investment at a purchase price of £5 000 per share. When considering 80 these shares, they have a current market value of $1 200 000 (80x £15 000) and an original cost of £400 000 (80 x £5 000). Selling 80 shares at market value yields a capital gain of £800 000 (£1 200 000 – £400 000).

All the parties in the trust structure are United Kingdom tax residents. Each trust structure section of the interview begins with a summary of its fixed and variable attributes.

Assume that all the specific trustees’ actions which are investigated are permissible within the parameters of the trust deeds and when necessary, with the trust deed amendments.

SECTION 1: PARTS A and B apply only to general background questions.

1 PART A: Asset rights, ownership, and control	
1. Discretionary trusts:	
1.1.1	Briefly describe the trustees' powers to distribute trust assets held in a discretionary trust.
1.1.2	Briefly describe the ownership and control of assets held in a discretionary trust.
1.1.3	Briefly describe the beneficiary's rights to assets held in a discretionary trust**.**

1 PART B: Asset rights, ownership, and control	
2. Non-discretionary interest in possession trusts (fixed trusts):	
2.1.1	Briefly describe the trustees' powers to distribute trust assets held in a non-discretionary interest in possession trusts (fixed trusts).
2.1.2	Briefly describe the ownership and control of assets held in a non-discretionary interest in possession trusts (fixed trusts).
2.1.3	Briefly describe the beneficiary's rights to assets held in a non-discretionary interest in possession trust (fixed trusts).
2.1.3	

SECTION 2: PARTS A to I applies only to United Kingdom Discretionary Trusts

Summarised discretionary trust structure

The discretionary trust structure (the UK discretionary trust structure) is summarised below for ease of reference:

Fixed attributes	
Trustees:	Mr. X, Mrs. X and Mr. Y who is the independent trustee.
Beneficiaries:	A, B and C who are children (blood relatives) of Mr. X and Mrs X.
Appointor:	Mr Z is the appointor of the trust.
Settlor:	Mr. X's father is the founder of the X Family Trust.
Trust assets:	The trust owns capital assets (120 shares in an unlisted company) at the current market value of £15 000 per share and a base cost of £5 000 per share. The shares were bought by the trust 6 years ago, at a cost of £5 000 per share for investment purposes, out of the trust's own previous accumulated profit or revenue funds (not from any donated funds).
Residents:	All the natural and juristic persons mentioned above, are tax residents in United Kingdom.
Market Value of 80 shares:	The current market value of 80 the trust's shares is £1 200 000 (80 x £15 000).
Base cost of 80 shares:	The cost of 80 the trust's shares is £400 000 (80 x £5 000).
Capital Gain of 80 shares:	The sale of 80 shares of the trust at the current market value results in a capital gain of $£800 000 ($1 200 000 – $£400 000).
Variables attributes	
Trustees' powers:	Trustees have the power to distribute or vest trust's capital assets or capital profits from a trust to any of the trust's beneficiaries.
Ownership and control of trust's assets:	Trustees control the assets. The beneficiaries only have a *spes.*
Beneficiaries' rights:	The beneficiaries' rights (discretionary right) to the trust's assets, is subject to the discretion of the trustees.

2 Part A: Nature of the trust's assets	
1.	After each statement below regarding the nature of the trust's assets in any UK discretionary trust, add any commentary explaining whether agree with the statement.
1.1	The disposal of a capital asset of a discretionary trust could result in either a capital gain or a loss.
1.1	
1.2	The revenue (trading receipt) or capital nature (capital receipt) of a discretionary trust's assets or proceeds of such trust's assets, can be ascertained by the tests developed in case law.
1.2	
1.3	A capital asset (a capital receipt) of a discretionary trust for gains purposes, would be the same as are revenue asset (a trade receipt) with income tax implications.
1.3	

2 Part C: Donation implications	
3.	After the statement below regarding a discretionary interest in any UK discretionary trust, add any commentary explaining whether you agree with the statement.
3.1	A donation of a discretionary interest from one beneficiary to another for no or inadequate consideration, will be subject gift tax.
3.1	
3.2	A donation of a discretionary interest from one beneficiary to another beneficiary at market value would result in a disposal which excludes a value shifting.
3.2	
3.3	A donation of a discretionary interest from one beneficiary to another beneficiary at an inadequate value would result in a value shifting.
3.3	

2 Part D: Disposals	
4.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing), for "the UK discretionary trust structure provided," a capital gains disposal (excluding any value shifting disposal) may result from the trustees' actions:
4.1	The trustees vest the trust's asset (80 shares) in beneficiary A.
4.1	
4.2	The trustees distribute the trust asset's (80 shares) to beneficiary A.
4.2	
4.3	The trustees sell trust's capital asset (80 shares) at market value (£1 200 000), and distribute the capital gain (£800 000) to beneficiary A.
4.3	
4.4	Adding a new beneficiary to the trust.
4.4	

4.5	Removing beneficiary A from the trust.
4.5	
4.6	Appointing a new trustee to the trust.
4.6	
4.7	Removing a trustee from the trust.
4.7	
2 Part E: Interest in a UK discretionary trust	
5.	A capital gain or loss can occur after a disposal of a capital asset of a UK discretionary trust, add any commentary explaining whether you agree with this statement below:
5.1	A disposal of a discretionary interest in a trust's capital asset by a beneficiary, could result in a capital gain or a loss for the beneficiary.
5.1	

2 Part F: Measuring Value shifting	
6.	The market value of each of a discretionary beneficiary's interests (beneficiary A, B and C) in the underlying (UK discretionary) trust's assets, before and after any of the seven trustees' action mentioned previously can be measured.
6.1	
6.1	A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the (UK discretionary) underlying trust's assets, before and after any of the seven trustees' action mentioned previously can be measured.
6.2	
6.2	The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the (UK discretionary) underlying trust's assets before any of the seven trustees' action mentioned previously can be measured.
6.3	

2 Part G: Shifting value shifting disposals (TCGA92 S29)	
7.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing) for "the UK discretionary trust structure provided," value shifting in terms of the TCGA92 S29 may result from the trustees' actions:
7.1	The trustees vest trust's asset (80 shares) in beneficiary A.
7.1	
7.2	The trustees distribute trust's asset (80 shares) to beneficiary A.
7.2	
7.3	The trustees sell trust's assets (80 shares) at market value (£1 200 000), and distribute the capital gain (£800 000) to beneficiary A.
7.3	
7.4	Adding a new beneficiary to the trust.
7.4	

7.5	Removing beneficiary A from the trust.
7.5	
7.6	Appointing a new trustee to the trust.
7.6	
7.7	Removing a trustee from the trust.
7.7	
2 Part H: Other trustees' actions	
8.1	Discuss and provide examples any other Trustees' actions in detail (excluding the seven trustees' actions examined in the previous section) for a UK discretionary trust structure provided, that may result in a value shifting in terms of the TCGA92 S29.
8.1	
2 Part I Additional Comments	
9.1	If you have any additional comments regarding this study of value shifting in terms of TCGA92 S29 regarding UK discretionary trusts, kindly provide your comments in the in the space below.
9.1	

SECTION 3: PARTS A to I applies only to United Kingdom Non-Discretionary Trusts

Summarised non-discretionary trust structure

The vested trust structure (the UK non-discretionary trust structure) is summarised below for ease of reference:

Fixed attributes	
Trustees:	Mr. X, Mrs. X and Mr. Y who is the independent trustee
Beneficiaries:	A, B and C who are children (blood relatives) of Mr. X and Mrs X
Appointor:	Mr Z is the appointor of the trust.
Settlor:	Mr. X's father is the founder of the X Family Trust.
Trust assets:	The trust owns capital assets (120 unlisted shares in Company (Pty) Ltd) at the current market value of £15 000 per share and a base cost of £5 000 per share. The shares were bought by the trust 6 years ago, at a cost of £5 000 per share for investment purposes, out of the trust's own previous accumulated profit or revenue funds (not from any donated funds).
Residents:	All the natural and juristic persons mentioned above, are tax residents in United Kingdom.
Market Value of 80 shares:	The current market value of 80 the trust's shares is £1 200 000 (80 x £15 000).
Original cost of 80 shares:	The original cost of 80 the trust's shares is £400 000 (80 x £5 000).
Capital Gain of 80 shares:	The sale of 80 shares of the trust at market value results in a capital gain of £800 000 (£1 200 000 – £400 000).
Variables attributes	
Trustees' powers:	Limited power regarding the distribution of trust assets. The trust deed stipulates that the trust income and capital assets should be distributed to the beneficiaries for life.
Ownership and control of trust's assets:	The trustees manage the trust assets, but their powers are limited as the trust is a non-discretionary interest in possession trust. Beneficiaries have an absolute right to trust capital according to the trust deed.
Beneficiaries' rights:	The trust's assets vest equally in beneficiaries A, B and C.

3 Part A: Nature of the trust's assets	
1.	After each statement below regarding the nature of the trust's assets in any UK non-discretionary trust (fixed trust), add any commentary explaining whether agree with the statement.
1.1	The disposal of a capital asset of a non-discretionary interest in possession trust (fixed trust) could result in either a capital gain or a loss.
1.1	
1.2	The revenue (trading receipt) or capital nature (capital receipt) of a non-discretionary interest in possession trust's assets or proceeds of such trust's assets, can be ascertained by the tests developed in case law.
1.2	
1.3	A capital asset (a capital receipt) of a non-discretionary interest in possession trust for gains purposes, would be the same as are revenue asset (a trade receipt) with income tax implications.
1.3	

3 Part B: Income tax (excluding capital gains) implications (Taxable Receipts)	
2.	When each of the seven following trustees' actions occur in isolation for "the UK non- discretionary trust (fixed trust) structure provided," an income tax (excluding capital gains) implication may result. State if you agree or disagree with the above statement.
2.1	The trustees vest the trust's capital assets (80 shares) in beneficiary A.
2.1	
2.2	The trustees distribute the trust's capital assets (80 shares) to beneficiary A.
2.2	
2.3	The trustees sell trust capital assets (80 shares) at market value (£1 200 000), and distribute the capital gain (£800 000) to beneficiary A.
2.3	
2.4	Adding a new beneficiary to the trust.
2.4	
2.5	Removing beneficiary A from the trust.
2.5	
2.6	Appointing a new trustee to the trust.
2.6	
2.7	Removing a trustee from the trust.
2.7	

3 Part C: Donations implications	
After the statement below regarding a UK non-discretionary interest in an interest in possession trust (fixed trust), add any commentary explaining whether you agree with the statement.	
3.1	A donation of a non-discretionary in an interest in a trust from one beneficiary to another for no or inadequate consideration, will be subject to gift tax.
3.1	

3.2	A donation of an interest in a fixed trust from one beneficiary to another beneficiary at market value would result in a disposal which excludes a value shifting.
3.2	
3.3	A donation of an interest in a fixed trust from one beneficiary to another beneficiary at an inadequate value would result in a value shifting.
3.3	

3 Part D: Ordinary disposal Implications	
4.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing), for "the UK non-discretionary trust (fixed trust) structure provided," a capital gains disposal (excluding any value shifting disposal) may result from the trustees' actions:
4.1	The trustees vest the trust's asset (80 shares) in beneficiary A.
4.1	
4.2	The trustees distribute the trust asset's (80 shares) to beneficiary A.
4.2	
4.3	The trustees sell trust's capital asset (80 shares) at market value (£1 200 000), and distribute the capital gain (£800 000) to beneficiary A.
4.3	
4.4	Adding a new beneficiary to the trust.
4.4	.
4.5	Removing beneficiary A from the trust.
4.5	
4.6	Appointing a new trustee to the trust.
4.6	
4.7	Removing a trustee from the trust.
4.7	

3 Part E: Interest in a fixed trust	
5.	A capital gain or loss can occur after a disposal of a capital asset of a UK non-discretionary trust (fixed trust), add any commentary explaining whether you agree with this statement below:
5.1	A disposal of a fixed interest in a trust's capital asset by a beneficiary, could result in a capital gain or a loss for the beneficiary.
5.1	

3 Part F: Measuring Value shifting	
6.	The market value of each of the beneficiary's interests (beneficiary A, B and C) in the UK non-discretionary trust's underlying trust's assets, before and after any of the seven trustees' action mentioned previously can be measured.
6.	

6.1	A possible reduction in the market value of each of the beneficiary's interests (beneficiary A, B and C), in the underlying trust's assets, before and after any of the seven trustees' action mentioned previously can be measured.
6.2	
6.2	The base cost of each of the beneficiary's interests (beneficiary A, B and C) in the underlying trust's assets before any of the seven trustees' action mentioned previously can be measured.
6.3	

3 Part G: Shifting value shifting disposals (TCGA92 S29)	
7.	When each of the seven following trustees' actions occur in isolation (with the consent of the beneficiaries in writing) for "the UK non-discretionary trust (fixed trust) structure provided," value shifting in terms of the TCGA92 S29 may result from the trustees' actions:
7.1	The trustees vest (vested in possession) trust's asset (80 shares) in beneficiary A.
7.1	
7.2	The trustees distribute trust's asset (80 shares) to beneficiary A.
7.2	
7.3	The trustees sell trust's assets (80 shares) at market value (£1 200 000), and distribute the capital gain (£800 000) to beneficiary A.
7.3	
7.4	Adding a new beneficiary to the trust.
7.4	
7.5	Removing beneficiary A from the trust.
7.5	
7.6	Appointing a new trustee to the trust.
7.6	
7.7	Removing a trustee from the trust.
7.7	

3 Part H: Other trustees' actions	
8.1	Discuss and provide examples any other Trustees' actions in detail (excluding the seven trustees' actions examined in the previous section) for a UK non-discretionary trust structure (fixed trust) provided that may result in a value shifting in terms of the TCGA92 S29.
8.1	

3 Part I Additional Comments	
9.1	If you have any additional comments regarding this study of value shifting in terms of TCGA92 S29 regarding UK non-discretionary trusts (fixed trusts), kindly provide your comments in the in the space below.
9.1	
Thank you for your valuable contribution in this research project.	

APPENDIX E (Manual coding - Section 1, Part A)

		**Expert 1	**Expert 2	**Expert 3	**Expert 4	**Expert 5	**Expert 6
1.1	Disposal of capital asset results in a capital gain or loss? Disposal'+ capital asset =capital gain or loss (Discretionary Trust Structure defined in scenario in guide and discussed before commencement. All the rights and ownership agreed before answering questions.) Disposal.	**Yes disposal of capital asset could result in a capital gain or loss. (Agreed to trust definition and structure).** The Australian GGT rules are more codified than that of three RSA capital rules.	**Yes , capital loss or gain could result. (Agreed to trust definition and structure)**	**(Agreed capital gain or loss could result.) (Also agree to all definitions used in all three trust structures Emailed memo describing trust definitions and also included Transfer Duty perspective).** ***In a vested trust the trustees are the owners of the trust assets, the trust assets are vested in the beneficiaries. The beneficiaries have a personal right vis-à-vis the trustees to, depending on the provisions of the trust deed, enforce transfer of the relevant assets to them.******	**Agree**, for all three trusts; capital gain or loss front a disposal of a capita asset,(Also agree to all definitions used in all three trust structures).	Agree, disposal of capital asset could result in a capital gain or loss. for discretionary, vested or discretionary trusts. (Also: agreed to definitions in trust structure: real vas personal rights)	Agree for all three trusts, a disposal can result in a capital gain or loss. would occur. In a Discretionary Trust the beneficiary only has spes, the assets of the trust vest in the trustees. There are two broad categories of trusts, which Discretionary and Non-Discretionary Trusts. A Vesting and Bewind Trust are both Non-Discretionary Trust, the beneficiaries have rights to the trust's assets which are as follows: right of ownership in a Bewind Trust and an irrevocable right in terms of the trust deed or an irrevocable resolution passed by the trustees of Discretionary Trust.
		**Expert 1	**Expert 2	**Expert 3	**Expert 4	**Expert 5	**Expert 6
1.2	Capital and Revenue nature of an asset is ascertained by case law? Revenue or capital nature of an asset. Asset ? Cases discussed Natal Estates and Visser. Capital.	**Yes. Agreed** with cases brief touched in discussions.	**Yes,** agreed the cases briefly touched in discussions. Objective and subjective tests .	**Yes, agree with cases discussed.**	**Agree**, for all three trusts Agreed with Natal Estates (taxpayers changed the nature of the asset).	**Agree**, for discretionary, vested or discretionary trusts. **Besides case law also legislation defines prescribes the differences between revenue and capital ass**ets". Acknowledged a case law and example of Visser vs CIR, pointing out farmland value differs for donations tax and estate duty wen compared to CGT.	Agree for all three trust, the capital nature of the trust's assets can be determined b case law. The tests for the capital nature of an asset, irrespective in which trust the asset is held in has developed over time, and decided in the various court cases.
		**Expert 1	**Expert 2	**Expert 3	**Expert 4	**Expert 5	**Expert 6
1.3	A capital asset in a discretionary trust would also be considered the same as a revenue asset. Revenue Asset Gross Income; Capital Asset Eighth Schedule. Asset	The general principle is that you should not pay both income tax and capital gains tax on the same asset. Should be able to defend it. **Cannot be taxed twice on the same asset.** A capital asset for capital gains tax is **not the sam**e as am asset for income tax purposes.	**Disagree**; if one assumes that a capital asset is considered to be the same as a revenue asset. The sale or disposal of a capital asset and a revenue are mutually exclusive, one results in gross income, the other .	**No, disagree.**	**Uncertain, the respondent was prompted with the tax case Natal Estates in which the a capital asset was converted to a Revenue Asset by the actions of the directors. The respondent was not forced to explain his uncertainty so as to avoid interviewer bias.**	**Disagree, for** discretionary, vested or discretionary trusts. (An asset held as an investment is not the same as an asset held as trading stock). The sale of an asset cannot be both a revenue asset and a capital asset, one cannot be taxed twice on both a capital gain and gross income. **"The sale or disposal of a capital asset and a revenue are mutually exclusive, one results in gross income, the other a section 26 A inclusion".**	**Disagree for all three trusts,** a Capital Asset is for example an investment property purchased for investment purposes. A revenue asset is for example an item of stock. An asset can be either Capital or Revenue, **depending upon time point of time one is examining the asset.** Based on the Natal Estates case, an asset which original a Capital Asset was changed into a Revenue Asset. The asset can change from a Revenue to a Capital asset and vice versa. A property can be bought as an investment to earn to earn rental income, and the sale of the property would result in a capital gain or loss. Alternatively, if a property dealer buys and sell properties on a regular basis, the properties would be held as trading stock and included in Gross Income. Normal tax would result as a result of a sale of Revenue asset or stock in trade, and not a Capital Gain
		**Expert 1	**Expert 2	**Expert 3	**Expert 4	**Expert 5	**Expert 6
1.4	Capital assets same donations tax asset. Asset definition; Right to trusts assets=Asset? Interest l and to property? Donations Tax implication on Estate Planning and Trust Deeds	**Yes., it** could be possible to cede rights. Need to look at the requirement of a valid donation, needs to be completed.	**Agree** as to the nature of the asset but donations tax implications would only arise they vest in a beneficiary, and then an **exemption** applies in terms of section 56(1)(i) of the Act.	**Yes, agree a** asset can be donated and disposed.	**Agree**, for all three trusts	**Agree**, for discretionary, vested or discretionary trusts except in case of farms. For farms only 70 % of the market value is used for donations tax purposes and 100% of the value to determine the proceeds in a capital gain calculation.	***Agree for all three trusts, the same asset can be subject to both Donations Tax and Capital Gains Tax. For Capital Gains Tax, the asset should be of a capital nature.*******
		**Expert 1	**Expert 2	**Expert 3	**Expert 4	**Expert 5	**Expert 6
1.5	Capital assets same estate duty asset. Asset definition; Right to trusts assets=Asset? Interest l and to property? Estate Duty perspective trusts; Trust Deeds	**An asset could be subject to both capital gains tax and estate duty. Have has a similar question in practice. The possibility does exist the same asset could be taxed twice. The possibility does exist that a taxpayer can pay both estate duty and capital gains tax on the same asset. With reference to section 3 (2)(a) of the Estate Duty Act, when a person has control of assets, the assets are deemed to be his property which could arise in both estate duty and capital**	**Agree** as to the nature of the assets, but estate duty would only apply if they **vest** in a beneficiary and form part of the estate of the recipient, not before. Case law holds that a ***spes* (or mere expectation)**, which is a contingent right to the assets of a trust which realises when a trustee exercise discretion does not form part of one's estate.	**No, disagree** as the statement refers to a discretionary trust. Sections (3(3) (d) of the Estate Duty **Act would have to first apply**. Respondent 4 also provided me with an opinion on residential properties which are also considered to be an assets in terms of the **Transfer Duty Act**. In the event of the sale of an interest in a company or trust which owns a residential property transfer duty is applicable. ***It would depend upon the wording of the trust deed,*** *if the trust deed stipulates that upon the death of a beneficiary prior to distribution the vested interest would devolve upon the remaining beneficiaries alive, then I would disagree with the statement. If the trust deed does not have such clause the vested interest could be part of the deceased beneficiary's estate.****	**Agree**, for all three trusts	Agree, for discretionary, vested or discretionary trusts except in case of **farms**. For farms only 70 % of the **market value** is used for donations tax purposes and 100% of the value to determine the proceeds in a capital gain calculation. Respondent 4 stated that an interest in a discretionary trust is **a mere spes.**	**Agree for all three trusts.** A capital asset could be same as an asset for Estate Duty tax purposes, when looking at an asset in isolation. Capital assets held in a Discretionary trust are **excluded from the estate of a natural person**, before the asset has been vested in the beneficiary. In Discretionary Trust, the beneficiary's rights only a hope or spes, and such interests are excluded from the estate of the beneficiary **(estate planner)**. The only times when a discretionary trust's assets can be included I the Estate Planner's Estate is when the Estate the beneficiary can exercise control over the asset before his or her death.
	Agreed		Disagreed		Uncertain		

APPENDIX F (Language editing certificate)

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5 November 2025

Mr E.M.B. de Freitas

Senior Lecturer: Accounting
Faculty of Management
Sciences

Central University of Technology, Free State (CUT)

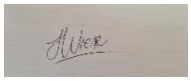
DECLARATION OF LINGUISTIC REVISION OF THESIS

To whom it may concern

I, Dr Laurika Wiese, hereby declare that I am a qualified and professional language practitioner, and that I have linguistically revised the doctoral thesis titled "*An Analysis of Trustees' Actions in Value Shifting Arrangements in Estate-Planning Trusts: A Practical Framework for Tax Practitioners Informed by Experts' Perceptions under the Income Tax Act"* for Mr. E.M.B de Freitas.

Yours sincerely

DR L WIESE



BA (Languages)(UNISA) (1995); BA Hons (Translation Studies) (UNISA) (1999); MA HES (UFS) (2014); PhD (UFS)(HES) (2019); PGDiP (LD)(USB)(2022)

APPENDIX G (Ethical clearance certificate)

UNISA COLLEGE OF ACCOUNTING SCIENCES ETHICS REVIEW COMMITTEE

Date 2019-03-14

ERC reference: 2019_CAS_10

Name: EMB de Freitas
Student/ Staff #:
06162975

Dear Mr EMB De Freitas,

Decision: Ethics Approval from

2019-03-14 to 2022-03-14

Researcher: EMB de Freitas defreitasemb@telkomsa.net

An Analysis of Trustees' Actions in Value Shifting Arrangements in Estate-Planning Trusts: A Practical Framework for Tax Practitioners Informed by Experts' Perceptions under the Income Tax Act

The proposed research may now commence with the provisions that:

I. The researcher(s) will ensure that the research project adheres to the values and principles expressed in the UNISA Policy on Research Ethics.

2. Any adverse circumstance arising in the undertaking of the research project that is relevant to the ethicality of the study should be communicated in writing to the College of Accounting Sciences Research Ethics Review Committee.

3. The researcher(s) will conduct the study according to the methods and procedures set out in the approved application.

4. Any adverse circumstance arising in the undertaking of the research project that is relevant to the ethicality of the study should be communicated in writing to the College of Accounting Sciences Research

Ethics Review Committee.

5. The researcher(s) will conduct the study according to the methods and procedures set out in the approved application.
6. Any changes that can affect the study-related risks for the research participants, particularly in terms of assurances made with regards to the protection of participants' privacy and the confidentiality of the data, should be reported to the Committee in writing, accompanied by a progress report.

7.The researcher will ensure that the research project adheres to any applicable national legislation, professional codes of conduct, institutional guidelines and scientific standards relevant to the specific field of study. Adherence to the following South African legislation is important, if applicable: Protection of Personal Information Act, no 4 of 2013; Children's act no 38 of 2005 and the National Health Act, no 61 of 2003.

8.Only de-identified research data may be used for secondary research purposes in future on condition that the research objectives are similar to those of the original research. Secondary use of identifiable human research data requires additional ethics clearance.

9.No field work activities may continue after the expiry date of this certificate.

Note:

The reference number of this certificate should be clearly indicated on all forms of communication with the intended research participants, as well as with the Committee.

Yours sincerely,

Prof L J Erasmus
Chair of CAS RERC
E-mail: erasmlj1@unisa.ac.za
Tel: 012 429 8844

Prof L Ntsalaze
Acting Executive Dean CAS

APPENDIX H (Similarity report)

Similarity Report

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AUTHOR
EDUARDO MANUEL BOAVENTURA DE FREITAS

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166857 Words

CHARACTER COUNT
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PAGE COUNT
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Summary