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OFFSHORE WEALTH -

Moving Assets offshore in an era of growing uncertainty

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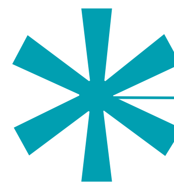

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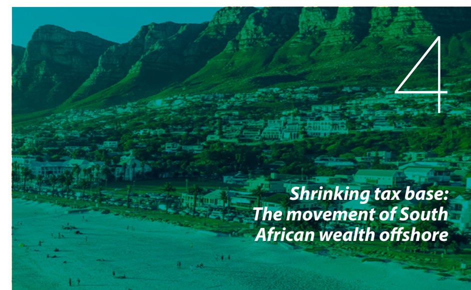

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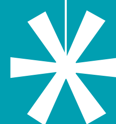

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SHRINKING TAX BASE: The movement of South African wealth offshore

▶ **ANGELIKA GOLIGER,** Africa Chief Economist, Ernst & Young Advisory Services (Pty) Ltd

Despite the growth of South African's individual net wealth, it has seen a decline in the five-year Compound Annual Growth Rate (CAGR) from 11.2% in 2013 to 6.3% in 2019, according to data from the South African Reserve Bank (SARB). This article delves deeper into the issue of a shrinking tax base.

Tax revenue growth from individuals has been less ebullient in recent years. Between 2010 and 2015, the inflation-adjusted personal income tax grew by 11.4%. This has declined to 8.8% over the three years between 2016 and 2019. If one includes the impact of COVID-19 in 2020 and 2021, South Africa's personal income tax revenue has grown by 5.8% CAGR since 2016 – about half the compound annual growth rate seen between 2010 and 2015.

Viewed from a taxpayer perspective, the number of Personal Income Tax (PIT) payers grew by 7.0% between 2003 and 2012. Since 2012, some of these gains have been eroded with a -2.1% decline in the number of taxpayers, according to the South African Revenue Service (SARS). This decline is on top of an already small base: there were only 5.2 million registered individual taxpayers in 2020; not all of them contribute to personal income tax revenue.

Both trends in terms of the value of individual tax revenue and the number of taxpayers have been driven by the deterioration in economic growth in recent years, which reduced the ability of firms to grow, raise salaries, and hire more people. The outlook for South Africa's economy is expected to remain muted. According to the latest figures from the South African Reserve Bank's (SARB's) Monetary Policy Committee, world gross domestic product (GDP) is expected to have grown between 1.4% and 1.8% by 2023. The unemployment rate has reached the untenable level of 35.3% in the last quarter of 2021, and this trend is likely to persist.

"Gabriel Zucman, in his 2015 book, The Hidden Wealth of Nations*, estimates that global household financial wealth held offshore equates to about 10% of GDP"*

In addition to affecting pay-as-you-earn (PAYE) tax, with individual taxpayers losing their jobs or having to contend with squeezed incomes, the economic environment has also affected households' overall levels of wealth. According to data from the SARB, South African's individual net wealth, while growing, has seen a decline in the five-year CAGR from 11.2% in 2013 to 6.3% in 2019. It has recovered slightly to 7.0% in 2021 but growth remains below previous highs. So, the overall taxable base from a wealth perspective is not growing as fast as it has been.

At the same time, many skilled and educated South Africans have moved to countries such as the United States, United Kingdom, Australia, and the Netherlands over this period, seeking new opportunities and taking their income (and taxes) with them. Another nuance to this is that households, even without physically moving to another country, have increasingly invested their assets offshore. Generally, investors have been keen to maximise offshore exposures to counterbalance weaker economic prospects locally.

Measuring the value of offshore assets (not all of which can be classified as tax evasion) is a tricky business, with sources of information spanning from data collected by the International Monetary Fund (IMF) and the Bank for International Settlements to data leaks, such as the Pandora and Panama Papers. Gabriel Zucman, in his 2015 book, *The Hidden Wealth of Nations*, estimates that global household financial wealth held offshore equates to about 10% of world GDP. In South Africa's case, offshore wealth rose from 0.61% of GDP to 0.64% between 2015 and 2020 or by R0.42 billion, according to calculations of the United Nations (UN)[1]. These offshore stock investments were determined to be evenly split between tax haven and non-tax-haven countries. In Nigeria's case, it was estimated that offshore stock rose from 0.18% to 0. 28% of GDP over the same period.

In the 2022 Budget, National Treasury announced a significant increase in the maximum offshore asset allowance for mutual and pension funds from 30% to 45%. Usually, this means that there will likely be a major jump in offshore investment. However, the timing of the war in Ukraine, means that the decision to invest offshore is not as simple as it once was. At this point, South Africa is making a stronger investment case relative to previous years and other markets. Higher commodity prices have boosted the Rand and have improved South Africa's current account balance. So, the economy, at an aggregate level, is likely to be less volatile compared to other emerging markets and the country's star has risen for those who are looking to invest in resources as Russia is no longer investable. However, higher commodity prices cannot be reliably counted upon going forward and financial markets are in for volatile times, with rapidly accelerating interest rates across developed and emerging markets and continued economic and geopolitical uncertainty.

So, noting the dilemma of the shrinking personal income tax revenue and taxpayer base, what is to be done? A clear low hanging fruit would be to open immigration for skilled workers beyond the current allowances, as well as to fast track and simplify the VISA process for these workers. These are potential taxpayers who could boost personal income tax revenue levels.

In the medium to long-term, a growing economy is the most significant factor when it comes to sustainably growing tax revenue collection. The IMF, in its most recent Article IV consultation on South Africa, found that implementing the economic reform and fiscal consolidation agenda could result in South Africa's GDP growth reaching 3.6% by 2025, compared with their baseline view of 1.9%. This could reduce South Africa's fiscal deficit from -8.3% of GDP in 2021 to -1.8% of GDP by 2025. There is no way of getting around the difficult decisions and hard work needed to drive the economy forward. While the government has made significant strides in opening the electricity market, in releasing broadband spectrum and in bringing in competition to South Africa's transport infrastructure, there is still more to be done to ensure sustainable economic growth levels going forward. Major reforms must continue in an expedited manner to ensure a softer landing for the economy when commodity prices eventually come down.

1. Schuster, C. 2021. *Offshore Wealth: Data and Measurement*. Available at: https://unctad.org/system/files/non-official-document/20211206-13_IFFsInterregionalWs_Practice_OffshoreWealth_Data_Method%235_en.pdf

OFFSHORE INVESTING: REWARDING BUT RISKY

▶ **RENEÈ ROE,** Independent Financial Advisor at Edge Wealth

This article delves into why South Africans are considering offshore investments in some form or another; offshore investing is playing an increasingly bigger role in the financial planning of South African investors and with good reason – there are many financial and tax benefits to offshore investing.

Benefits of investing offshore

1. Diversification to optimise your portfolio: When it comes to investing, the one term that you are guaranteed to hear or read about is 'diversification'. In financial terms, diversification can be defined as allocating capital in such a way that it reduces exposure to any particular asset or risk. Diversification is the main advantage of offshore investing; diversification across currencies, asset classes, nations, businesses, and sectors spreads risk and allows one to benefit from a broader base of funds and from the world at large.
2. Protection against a weak or falling local currency: The South African rand (ZAR) is a volatile currency; it acts as a proxy for emerging markets. It tends to overreact to political, economic, social, and other unrest. Historically, the ZAR has depreciated and it is expected to continue this trend. Investing offshore may offer a hedge against the depreciation of the ZAR.
3. Exposure to growth opportunities and hard currency: The South African investment environment is incredibly small compared to the global investment environment. Offshore investing gives access to companies, industries, and sectors that are either underrepresented or not available for investment in South Africa at all. When investing offshore directly, it also allows access to hard currencies such as the US Dollar, British Pound, and the Euro.
4. Tax and cost efficiency and ease of tax administration: Certain offshore products such as offshore endowments or sinking funds can be used as wrappers for your investments. This may offer a few taxes and other benefits for your offshore funds. These types of offshore products are tax-efficient for high marginal taxpayers. When tax is paid at a set rate of 30% with Capital Gains Tax levied at 12%, it can protect your offshore assets against death taxes in different countries; beneficiaries can be nominated, which saves on executors' fees and allows for continuity planning; grant of probate is not required; and, in some instances, it protects against creditors. Offshore endowments and sinking funds also allow for easier tax administration as taxes are paid within the wrapper.

5. Reaching offshore goals: Investing offshore directly may help you fund any international liabilities, that is, matching offshore liabilities with equivalent assets will help you reach your international goals. These goals may include spending a lot of time overseas and needing access to funding; importing many goods; retiring overseas; traveling; or sending your children for further schooling in another country. Hard currency exposure will again provide protection against a depreciating ZAR when you are working and saving towards these international goals.

Risks associated with investing offshore

1. Market and currency risks: Unfortunately, investors sometimes perceive offshore investing as being risk-free, especially when they take the negative sentiments towards South Africa into account. However, this is not the case as there are a variety of risks associated with offshore investing. Whereas the COVID-19 outbreak has caused global chaos, the Russian invasion of Ukraine and the recent increases in US interest rates highlight just how volatile the offshore markets can be. Markets have been risky and volatile for most of the year to date, with European and US markets being the hardest hit. The rest of the world grapples with issues similar to those in South Africa; we are not unique in this regard. Currency risk takes place when the ZAR appreciates, thus reducing the value of offshore investments when viewed in ZAR terms. Although investing in other currencies is an opportunity, investors must be mindful of income needs in South Africa, especially when they are reliant on their investments,
2. Situs tax and grant of probate: Offshore investing may come with more costs and taxes than you have bargained for. Not only must you be aware of the South African regulations on taxes and estate duty, but you also need to be aware of any regulations and taxes of the country in which you are holding this investment. Situs tax is applied to UK- and US-based offshore investments. The UK calls it 'inheritance tax', the US calls it 'estate tax' and it is collectively known as 'situs tax'. A 40% situs tax is levied on UK assets exceeding £325 000 upon death, whereas situs tax is initiated at $60 000 at the top bracket of 40% in the US. Situs tax needs to be paid before South African estate duty can even be considered. This can result in a large chunk of wealth not going to your beneficiaries; it highlights the importance of setting up appropriate offshore structures.
   A grant of probate simply means that you need to appoint an offshore executor in the jurisdiction where your assets are held. This person manages all your assets outside your South African estate, which effectively leads to more fees paid upon death.
3. Other tax implications: Disposing of offshore investments triggers a capital gains event – 40% of the difference between the base cost and proceeds of the sale will be added to your taxable income and taxed at your marginal tax rate. For direct offshore investments, the foreign capital gain or loss will need to be determined and converted to ZAR using a spot rate at the time of sale. It is important to determine your potential foreign capital gain before disposing of assets to avoid paying unnecessary taxes. South African citizens pay tax on worldwide income and will pay tax on foreign interest and dividends earned from direct and indirect offshore investments, albeit with a tax exemption afforded to foreign dividends earned. Upon death, South African estate duty is still applicable to offshore investments.
   South African investors are also limited to the amount that they can take offshore per year; up to R1 million can be sent offshore as a single discretionary allowance without applying for tax clearance. A further R10 million can be sent offshore as a foreign capital allowance but you will need to apply for tax clearance from the South African Revenue Service (SARS).
4. Costs of offshore investments: Offshore investing can be very expensive. Some companies do not have limits as to the amount of fees that can be charged – these fees can be eye-watering – so, it is crucial that investors do their research when looking at investing offshore. Many investors have had bad experiences with offshore investing due to issues such as high investment fees and taxes.
5. No guarantees: Offshore investing should not be seen as a silver bullet. Offshore investments may not outperform local investments in the short term; in some instances, it does not even outperform local investments in the longer term. Portfolios with a higher level of offshore exposure has historically presented with more volatile returns and the year-on-year negatives have been more extreme. Moving money offshore simply does not guarantee a higher return or a smoother ride. Whereas there are guaranteed products available, it may be incredibly stressful to have a high level of offshore exposure for those who derive their income from their investments. Sticking to an investment plan when there are no guarantees is difficult enough when investing locally and many are unnerved by small global market corrections. Consequently, they make changes at the wrong time.

Successful offshore investing relies on having the correct vehicle or structure and on understanding your own goals and capacity for risk. There are a variety of products that can be used to invest offshore. A new-generation product – offshore wrappers – offers quite a bit of tax and other benefits to those looking to diversify their direct offshore investing. But there are other options to consider; speaking to a qualified and knowledgeable financial advisor to fully understand the benefits and risks before taking the plunge and investing offshore, is vital.

OFFSHORE WEALTH TRANSFERS FOR SOUTH AFRICANS

HANNES BOTHA, Group Partner Hatstone & **DR ERIN NEL** Senior Associate at Hatstone

This article illustrates the exchange control mechanisms through which South Africans can transfer wealth offshore, the benefits of such transfers, the structures through which offshore wealth transfers can be made, as well as the risks associated with offshore wealth transfers.

In recent times, the wealth industry has seen an increase in business-related transfer of South African-earned or accumulated wealth to offshore jurisdictions. Although the term 'offshore' is often colloquially used to refer to any other foreign country but one's own, in the financial industry, the term is used to refer to investments in popular low tax jurisdictions, for example, in the Channel Islands, in the British Virgin Islands, in the Cayman Islands, etc. Certain landlocked countries such as Switzerland are also regarded as 'offshore' jurisdictions.

Offshore jurisdictions have had a negative reputation in the past as many investors have relied on more relaxed regulations and on strict privacy laws to hide from their tax liabilities. However, this is rarely the case these days due to the impact of the automatic exchange of information.

Offshore wealth transfer mechanisms

Wealth in the form of liquid assets can be transferred offshore in a variety of ways and the gatekeeper of these mechanisms is the Financial Surveillance Department of the South African Reserve Bank or FinSurv as it is more commonly known. FinSurv prescribes different requirements for the transfer of funds offshore, depending on the amount transferred. The allowances for direct offshore investments by individuals are classified as follows:

- Single discretionary allowance (SDA): Up to R1 million can be transferred per calendar year by South African individuals older than 18 and the funds can be used for any personal and legal purpose offshore, including investments.
- Foreign investment allowance (FIA): Up to R10 million can be transferred per calendar year by South African individuals older than 18 who are in good standing with SARS. The bank, acting as an authorised dealer, will remit the funds offshore upon receipt of a SARS tax compliance status verification result (previously known as a tax clearance certificate); and
- Special tax clearance certificate: More than R10 million can be transferred upon receipt of a 'letter of compliance' from SARS and application to FinSurv through the Authorised Dealer for special approval. This is a more lengthy and stringent process and it requires full details of the investment and reasons for the investment to be provided. This consent will typically be provided subject to specific conditions as to the purpose and structure of the investment. The 2022 National Treasury's Budget Speech included a relaxation of the limitation on investments via offshore trusts that, in theory, now allows investors to obtain special clearance to invest via offshore trusts.

Funds that have been externalised through the SDA or FIA process are not required to be returned to South Africa. However, if the purpose of the use of the invested funds changes, for example, if the applicant wishes to transfer the offshore funds as a gift to anybody else, FinSurv consent will be required, failing which the funds will have to be returned to South Africa. On the topic of gifts, the National Treasury recently relaxed the requirement to

"There is a wide range of benefits to transferring hard-earned wealth offshore, whether it be for short term investment growth opportunities or long-term family wealth planning endeavours"

repatriate gifts received from non-residents offshore, which may now be retained there. Additionally, residents are also allowed to lend or dispose of authorised foreign assets to other South African residents.

It should also be mentioned that the FIA process is only applicable to natural persons and therefore legal entities, trusts, partnerships, foundations, and clubs do not qualify to transfer funds offshore by these means. Companies can, however, invest offshore by using their foreign direct investment allowance and Authorised Dealers may approve offshore investment applications of up to R5 billion, subject to tax and reporting requirements being met. Offshore investments by companies exceeding R5 billion require prior written approval from FinSurv.

Examples of direct offshore investments include transferring funds to an offshore bank account or an offshore investment account. Alternatively, access to international investment markets can be obtained through indirect mechanisms, such as investing in rand denominated offshore unit trusts that are offered by local managers or through asset swaps. The investor benefits from asset managers' institutional foreign investment allowances to externalise funds to invest in offshore assets but the investor's funds never leave South Africa. The advantages to this approach are that no additional FinSurv approvals are required, there is no limit to the size of the investment, the investor has significant offshore investment exposure, and the investments can be executed in short timeframes.

That being said, these traditional forms of wealth transfers have also been supplemented by new mechanisms that were not possible in the past. Due to the removal of the prohibition on loop structures as of 1 January 2021, South African individuals are now able to bequeath their assets to an international structure (typically an offshore trust with the wider family as beneficiaries) in their will. There is a wide range of benefits to transferring hard-earned wealth offshore, whether it be for short term investment growth opportunities or long-term family wealth planning endeavours.
The removal of the loop structure prohibition has created additional benefits for South Africans wanting to move their wealth offshore. It is possible to establish an offshore structure to which South African corporate interests (or any asset for that matter) can be sold at market value or bequeathed. This will result in the growth of the South African assets vesting in the international structure. It also provides a mechanism (if structured correctly) through which dividends can be remitted offshore at favourable dividend withholding tax rates by relying on double tax treaties.

Risks and regulatory considerations

It is critical for South Africans to be aware of the estate planning implications related to offshore investments and that special care should be taken to incorporate or make provision for offshore assets. Depending on the jurisdiction in question, this could mean that the foreign investment is subject to what is referred to as 'forced heirship rules' which supersede the stipulations in a South African will. The laws of the foreign jurisdiction can also prescribe expensive processes or rules of probate by which the foreign assets may be distributed, for example, a foreign lawyer must be appointed to act as representative.

Despite local South African laws regulating the terms of estate duty liabilities, foreign jurisdictions may also impose additional death duty liabilities, also referred to as 'situs tax', due to ownership of foreign assets, which could have severe implications if the liquidity of an estate is required upon death.

In addition to the well-known risks related to the inheritance tax implications in the offshore jurisdiction, a risk that is often overlooked, is the risk of incorrect reporting by the offshore service providers.

The implementation of the Common Reporting Standard (CRS) by the Organisation for Economic Operation and Development (OECD) between more than 100 countries means that information about investors and their investments is automatically exchanged and shared with their respective tax revenue services. Reporting of itself will not have any tax consequences if the structures were set up correctly and if the information disclosed to SARS by the South African resident matches the information reported to SARS under CRS. However, in our experience, most offshore providers do not understand the South African tax and exchange control landscape, resulting in the establishment of offshore structures that do not work as intended, which is magnified by the reporting under CRS. It is, therefore, advisable for investors to work with advisors that have both a local and international presence or, at the very least, international service providers that have a proven track record of knowledge about the South African tax landscape.

More permanent solution: emigration

The information in this article specifically applies to investors that are tax and exchange control resident in South Africa. However, should their status change due to formal emigration or ceasing to be tax resident, the above would not necessarily continue to apply.

Conclusion

The relaxation of exchange control over the years and the general increase in the availability of international investment opportunities are welcomed; however, it creates a minefield for investors if they are not advised properly and the advice is not implemented correctly.

Having suitably experienced local advisors helping the investor navigate the pitfalls is no longer optional. Indeed, most offshore providers now insist on formal written advice from a local adviser before implementing a structure, which is a step in the right direction.

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THE LEGAL AND REGULATORY REQUIREMENTS OF OFFSHORE TRUST REPORTING

DEVON CARD, Director, Crue Invest (Pty) Ltd

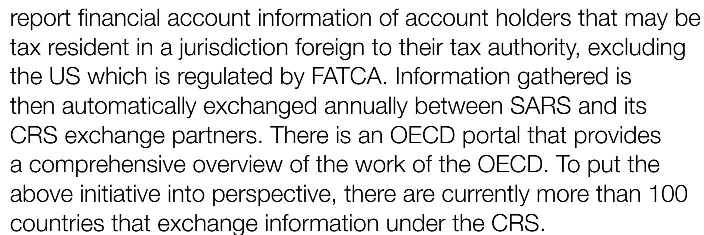
Certain legal and regulatory requirements are to be considered in reporting offshore trusts and holding companies such as Federal Insurance Contributions Act (FICA) compliant. This article aims to shed some light on South Africa's reporting obligations for reporting offshore trusts and holding companies as well as some of the global reporting standards to demystify legal and regulatory compliance.

According to the Common Reporting Standard (CRS), when setting up a foreign trust, the trustees are responsible for identifying the settlor, beneficiaries, and any other natural persons relevant to the trust. The trustees are then obliged to report the necessary financial information of these persons to the foreign revenue authority of the jurisdiction in which the trust is being created. If any of these persons are identified as South African residents, the information received by the authority will then automatically be exchanged with the SARS, a process known as the Automatic Exchange of Information. Early adopters of this initiative commenced the exchange of information in 2017 and the 'fast followers' committed to commence this process in 2018. Those countries that did not follow the process at the time, could still exchange information on request regarding a specific tax investigation or spontaneously, regarding information foreseeably relevant to a competent authority of another jurisdiction such as SARS. As such, the three methods of information exchange between tax authorities are (i) spontaneous exchange, (ii) exchange of information on request (EOIR), and (iii) automatic exchange of information (AEOI).

Where did this initiative start?

In 2010, with the idea of enhancing tax compliance by US citizens in foreign jurisdictions or those with offshore accounts, the US introduced the Foreign Account Tax Compliance Act (FATCA). In terms of this Act, foreign financial institutions are required to report information pertaining to US account holders to the US Internal Revenue Service (IRS). To make this agreement binding with other authorities, the US introduced a model intergovernmental agreement (IGA) which is an agreement between the tax administration of the US and those of other countries. Given the fact that the South African government has signed this agreement, reporting South African financial institutions have been obliged to comply with the requirements and obligations set out in the agreement since 1 July 2014. It is important to note that this agreement works both ways; the US is required to provide the same information to SARS in respect of South African residents with offshore assets, including foreign trusts.

In addition to the above, the Standard for Automatic Exchange of Financial Account Information in Tax Matters (the Standard) was developed in 2014 by the OECD – a document that encompasses the OECD's CRS. In terms of this agreement, financial institutions of CRS countries (called participating jurisdictions) are required to determine and



report financial account information of account holders that may be tax resident in a jurisdiction foreign to their tax authority, excluding the US which is regulated by FATCA. Information gathered is then automatically exchanged annually between SARS and its CRS exchange partners. There is an OECD portal that provides a comprehensive overview of the work of the OECD. To put the above initiative into perspective, there are currently more than 100 countries that exchange information under the CRS.

The due diligence procedures applied by financial institutions will generally be sufficient to identify the account holders and controlling persons. For example, a bank that opens a bank account for a trust with foreign beneficiaries could be expected to request a copy of the trust deed which reflects the identities of the named beneficiaries; or a share broker who maintains a share trading account for an offshore entity could expect that entity to provide information on its shareholders or other evidence that the entity is a financial institution.

What information must be reported under this agreement?

The following information must be reported in respect of each reportable person:

1. Name;
2. Address;
3. If an individual, their date of birth;
4. If an individual, their place of birth, (i.e. town); and
5. Taxpayer identification numbers (TINs) issued by the jurisdiction(s) of residence.

A nil return must be filed by a reporting financial institution (RFI) that did not maintain any reportable accounts during the relevant reporting period.

When must this information be reported?

Relative to the CRS and FATCA (US agreement), submissions are due annually by 31 May of each year. If not adhered to, penalties may apply. The reporting financial institutions are required to submit the returns in the prescribed form and manner.

How does this differ from what the rest of the world does?

The above practices have been adopted by many countries, although the United States has its own rules regarding the process; these rules differ. The US was also the country that started the initiative.

Whereas offshore trusts are commonly used to create an opaqueness about financial activities, hence the CRS and FATCA agreements; offshore holding companies can also be used for these purposes. A holding company is a company that owns at least 70% of another company's shares and has the authority to make management decisions, influences, and controls the company's board of directors. Its purpose is to hold the controlling stock or membership interests of the trading company, although the holding company does not conduct any operations, ventures, or other tasks for itself. These holding company structures are often used to avoid having CRS reporting shed light on the underlying financials of an individual or a business.

As such, the Model Mandatory Disclosure for CRS is designed to provide tax administrations with intelligence on both the design and supply of CRS Avoidance Arrangements and Offshore Structures. It acts as a deterrent against the marketing and implementation of these types of schemes where they are being used to circumvent CRS reporting or to obscure or disguise the beneficial ownership in an offshore vehicle. By way of explanation, note that a CRS Avoidance Arrangement is any arrangement which is designed or has the effect of circumventing CRS legislation or exploiting the absence thereof.

In terms of the Model Mandatory Disclosure for CRS rules, all steps and transactions that form part of the arrangement, including relevant details pertaining to the underlying investment, organisation, and individuals involved in the CRS Avoidance Arrangements or Offshore Structures must be disclosed. Disclosure must also include the relevant tax details of the Clients, Reportable Taxpayers and any Intermediaries involved.
It is important to note that the obligation to disclose such information automatically applies to every person who is an Intermediary to the structure, although such disclosure is limited to the information which falls within the ambit of

their knowledge, possession, or control. In this regard, there are limited rules designed to mitigate the compliance costs and administrative burdens associated with duplicate disclosures and these have been set out below. Any information that can be obtained by asking for it will be treated as within a person's control, although an Intermediary is not expected to go beyond the requirements of the applicable professional standards and existing Know Your Customer (KYC) rules when collecting and reporting information under these rules. Information required would include:

1. Tax Details of Clients, Intermediaries and Reportable Taxpayers;
2. Description of Arrangement; and
3. Jurisdictions where Arrangement has been made Available.

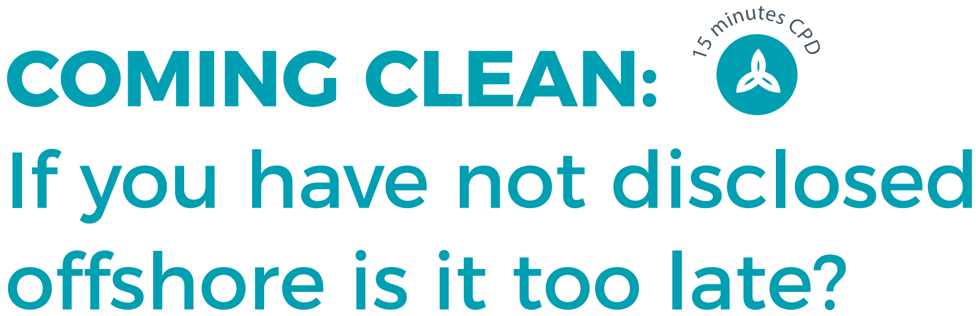
To ensure that SARS knows of companies created in South Africa, it is important to register a company with the Companies and Intellectual Property Commission (CIPC) in South Africa, which is an agency of the Department of Trade and Industry; such registration is mandatory in terms of the Companies Act. When a company is registered with the CIPC, it is not required to perform a separate SARS tax registration for income tax as the company will automatically be registered via a direct interface with the CIPC. Businesses that are not required to be registered include sole proprietorships and partnerships as these are not separate legal entities.

The steps required to register a company with the CIPC include the following:

1. Visit the CIPC website www.cipc.co.za and click on On-line transacting.
2. Click on Private Company Registrations.
3. Click on Customer Login.
4. Complete the required fields and click on Login
5. The landing page of E-services will be displayed. Click on Register a New Company.
6. Enter the ID number of the Director of the Company and click on the '+' sign.
7. The ID Number, Name and Surname and in case the Director is Disqualified or will not be displayed, then Click on Remove if you want to remove the Director. Click on the + sign if you want to add another director. Once all the Directors' ID Numbers have been captured, click on Continue to add all Directors and Incorporator details.
8. A screen, which requests you to capture the details of the directors, will be displayed. Click on Edit, complete the details of the directors, and click Save. Please note that directors cannot share email addresses and cell phone numbers.
9. The Company Registration: Directors and Incorporators screen will display. Complete the following required fields and click on Save:
   a. Director Type Surname;
   b. Name(s);
   c. Country of Origin;
   d. ID/Passport Number;

e. Director Status;
f. Appointment Date;
g. Date of Birth;
h. Cell Phone Number;
i. Email Address;
j. Physical Address; and
k. Postal Address.

10. On the next screen, click on Continue to complete the Company's details.
11. Complete the required fields relating to the Company and click on Save.
12. The next screen provides options regarding name reservation, namely:
    a. Apply for a name as part of this process;
    b. Use a name that has already been approved; and
    c. Register a company using an enterprise number as the name.
13. All director and company details will be displayed. Verify the correctness and click on Modify if you need to edit either the company details or the director details. Click on Lodge Company.
14. The following screen will be displayed if your company registration has been filed. Please note that the transaction is not yet completed. An email will be sent to the email address that you provided, indicating the required supporting documentation.
15. You can either click on Home to go back to the home page or on Logout.
16. Print the e-mailed forms and have the directors and incorporators sign where indicated.
17. Send the signed form and required supporting documents to eServicesCoReg@cipc.co.za for the process to be completed. The following supporting documentation is required:
    a. Certified identity copy of applicant;
    b. Certified copies of the Identity Documents of the Directors and Incorporators;
    c. The name confirmation certificate (COR9.4), if applicable;
    d. Power of attorney (if applicable); and
    e. For trust or company/juristic person as an incorporator, the resolution and certified ID copy of the duly authorised representative must be attached.



COMING CLEAN: If you have not disclosed offshore is it too late?

▶ **ROZANNE HEYSTEK–POTGIETER,** Financial Advisor and Fiduciary Services Specialist at Brenthurst Wealth

Holding undisclosed offshore assets is like a proverbial game of chess; every move matters, is 'check-mate' in favour of SARS inevitable? Will amnesty ever be on the table again?

Let us unpack what we mean by 'undisclosed assets'. The onus of taxpayers to disclose assets and income is the core value of our taxation system; opting to disclose and remain compliant relies on participating taxpayers. Multiple taxes are levied on globally held assets; for instance, income tax, capital gains tax, and estate duty. Undisclosed assets are hidden from the SARS in an attempt to evade (not avoid) subsequent taxation, with a reluctance to repatriate or even disclose the existence of those assets, out of fear of heavy penalties or even criminal prosecution.

The timeline of SARS' attempt to regularise these assets can be summarised as follows: Former Finance Minister, Trevor Manuel, on the introduction of the 2003 Exchange Control Amnesty Bill, noted the efficacy of the timing of the amnesty; South Africans had a prevailing desire to repatriate their foreign-held assets voluntarily and regularise their affairs due to greater international co-operation in tax compliance efforts and enhanced surveillance of international capital flows. The 2003 amnesty garnished in the range of 43 000 applications, a combination of exchange control amnesty sought from the South African Reserve Bank (SARB) and income tax amnesty applied for from SARS.

The SARS permanent Voluntary Disclosure Programme (VDP) is administered under the Tax Administration Act 2011, and it has been in effect since 1 October 2012. From 1 October 2016 until 31 August 2017, a Special Voluntary Disclosure Programme (SVDP) allowed non-compliant taxpayers to regularise their unauthorised foreign assets and income by voluntarily disclosing this information.

At the same time as the launch of the SVDP, South Africa agreed to abide by a Common Reporting Standard (CRS) as created by the intergovernmental economic organisation, the Organisation for Economic Co-operation and Development initiative (OECD). Even with a massive gear shift to ensure compliance, the success of the VDP could be imputable to the implementation of CRS; a global standard for the automatic exchange of financial account information between tax authorities.

If non-compliant taxpayers have since avoided amnesty, VDP, and SVDP, and still have not been 'caught out', they might soon be out of moves to dodge the taxman. Under CRS rules, Reporting Financial Institutions (RFIs) parties to CRS and the Foreign Account Tax Compliance Act (FATCA) rules, are required to provide SARS with information on offshore assets. A burden on all RFIs forces them to perform thorough due diligence and any discovered reportable account must be disclosed to the tax authorities. More than 100 jurisdictions have adopted the CRS rules, closing the gaps for any ability to truly continue hiding assets on a global scale. Entities such as offshore companies, offshore trusts, and foundations are not exempt from the due diligence processes required under the CRS rules.

Most recently, in 2021, SARS published a draft guide on its continuing VDP – a SARS-only disclosure programme. It has been met with tax experts branding it as not contributing to its primary objectives; it is further discouraging non-compliant taxpayers from making disclosures.

An aspect that most non-compliant taxpayers, who continue to avoid disclosing to SARS via the available channels, is about what happens to these types of assets on their passing. When appropriate estate planning occurs, these types of assets might or might not be disclosed to the future executor of the estate. An executor cannot be complicit in the taxpayer's non-compliance, the end of failure to submit information is thereby reached during the proper administration of the deceased estate. The executor will have to submit final tax returns, which include capital

"More than 100 jurisdictions have adopted the Common Reporting Standard (CRS) rules, closing the gaps for any ability to truly continue hiding assets on a global scale"

gains calculations, as well as calculate the estate duty liability and submit an estate duty return.

The executor is obliged to ensure that full and accurate disclosure is made of all relevant information as required in the income tax return. Misrepresentation, neglect, or omission to submit a return or supplying false information is liable to penalties and/or to additional assessments (together with interest) and/or prosecution.

Estate duty is levied on global assets, if the executor is aware of these assets, then they will be included as deemed property or property, depending on what ultimately happens to these assets if realised or ownership is transferred. If estate duty is payable by the estate, then it will go through a SARS audit process. The audit might yield the requirement to resubmit historical returns to include possible previously undisclosed income or require the estate to go through the VDP process or finalise whether VDP was applied for by the deceased prior to passing.

VDP forms part of the SARS guide to tax returns for deceased estates. However, it falls short of describing the extent of the liability taken on by the executor for the failure of disclosing assets, especially if unaware of themselves. If the executor has no choice but to comply, it begs to question whether a deceased estate can truly voluntarily disclose assets? Lastly, what is the future of the VDP, or are there any amnesty programme's in the SA taxpayer's future?

Recent events, such as SARS collaborating with the Irish Tax Authority (ITA) to clamp down on SA taxpayers who were Airbnb hosts in Ireland and who failed to disclose or partially disclose foreign income received, suggest that SARS is only doubling down on their efforts to end non-compliance. Amnesty programmes might never yield the same results as targeted operations such as these.

The advice to non-compliant taxpayers will always be to regularise their affairs and come clean with SARS, and not hope that SARS implements further amnesty programmes, which it most likely will not. With the sophistication of CRS and shared information directly to SARS, as well as the last draft guide, VDP is most likely your only move in resignation.

A comparison between an endowment policy and a unit trust in the offshore world

Investors all want to be offshore but they often neglect to consider which vehicle is more appropriate for them, an endowment policy or a unit trust, particularly when it comes to estate planning. This article attempts to compare the differences between the two.

▶ **HARRY JOFFE,** Head of legal services,
Discovery Life and Discovery Life International

Can a beneficiary be nominated?

An endowment policy is a life policy under the Long-Term Insurance Act 52 of 1998. If the policy has a life assured, a beneficiary can be nominated to receive the policy proceeds on the death of the life assured. This allows the proceeds to be paid out without incurring the executor's fees. It also ensures that the proceeds get paid out to beneficiaries directly, without having to pass through the estate and the whole winding-up process.

This is the major benefit of using an endowment wrapper in the offshore world, as the whole complex process of winding up a South African's offshore estate is often underestimated. Let us discuss some of the complications:

- First, if someone dies with assets in Europe, forced heirship will often apply to assets situated in that country. This means that descendents of the deceased inherit in fixed percentages, which generally overrides a will. Although it is possible to set up a special will that opts out of forced heirship provisions for nationals of other countries, this process is fraught with complexity and it is still very new.
- Second, doing a will in a foreign jurisdiction is not easy. You need to find an expert in that jurisdiction, which is not always that simple. Where do you find an expert to draft a Belgian will in South Africa?
- Third, although your South African will could technically be used and be valid offshore, it carries logistical challenges. The SA Master requires an original will. So do the local authorities offshore, which creates a delay unless the individual has duplicate originals. In addition, the South African will might have concepts that are not always the same in Europe. For example, the concept of a 'usufruct' might have a different meaning in some parts of Europe.
- Fourth, many countries, for example, the UK and the US, apply situs tax. This means that they apply their death duties on any assets situated in the country. Their rates are normally higher than the SA rates of estate duty; for example, both the US and UK rates go up to 40%.

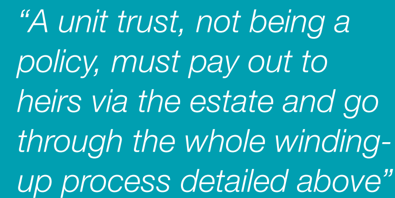
However, because the endowment allows for a nomination of a beneficiary to whom the proceeds are paid directly on the death of the life assured, it avoids the first three problems and even avoids the need for a foreign will or executor for the assets inside the wrapper.
In addition, because the endowment itself is normally housed in a tax centre, it avoids the issue of situs tax, even if the underlying assets are invested in a country that applies situs tax.

A unit trust, not being a policy, must pay out to heirs via the estate and go through the whole winding-up process detailed above.

Although there is no difference in the estate duty position as both are dutiable in SA, if paragraph 4q does not apply, then using an endowment policy with a beneficiary allows the planner to derive numerous estate planning benefits. This cannot be achieved with a unit trust.

Tax implications of the investment during the term

A unit trust is directly taxed in the investor's hands. That means the investor will pay tax on any interest earned and Capital Gains Tax (CGT) on any capital gains made, as well as any foreign dividends earned. It is important to stress that these taxes will be paid at the investor's tax rate. Interest will be taxed at the investor's marginal rate, while CGT will be included at 40% and taxed at the investor's marginal rate. However, it is also important to stress that the investor will only be taxed after the applicable rebates have been used up; that is, R23 800 interest rebate if the investor



"A unit trust, not being a policy, must pay out to heirs via the estate and go through the whole winding-up process detailed above"

is below 65 and R34 500 if they are above 65 and a R40 000 annual CGT rebate. It is also important to stress that CGT is only paid if and when units are sold or switched. While the units are held, no CGT is payable. This means that the investor might be liable for tax on interest at up to 45% and on capital gains made at up to 18%, but only if earnings are more than the rebates.

With an endowment policy, the tax is paid in the endowment policy fund, in terms of the five-fund approach. Assuming that the investor is a natural person, income will be taxed in the fund at 30%, with capital gains being taxed at 12%. This is potentially lower than the investor's marginal rates of 45% on the income side and 18% on the CGT side, but there are some important caveats to stress here:

1. With an endowment policy, because the tax is paid into the fund and not by the investor, the investor cannot use their interest or CGT rebates.
2. Tax is paid at 30% on the income side and 12% on the CGT side, irrespective of the investor's actual tax rates. This is again because the fund is the taxpayer and not the individual.
3. This means that if the individual has a marginal tax rate of above 30% on the income tax side and above 12% on the CGT side, and if they have used up their interest and CGT rebates, then investing in an endowment policy makes tax sense, as they will be bringing their tax rates down to the fund rates. However, if the individual has a marginal rate of 30% or below on the income side and 12% or below on the CGT side, then investing in an endowment policy makes no tax sense, as they will then be increasing their tax rate to the fund rate. The impact of the rebates should also not be ignored.
4. However, to me, the most important issue is tax simplicity. The offshore tax world is complex. The investor must obtain their annual interest earned and capital gains made from the company and then convert the foreign gains to rands. Quite often, they must calculate any capital gains made themselves, as many offshore companies only do a very basic calculation. Finally, the foreign dividend calculation is not simple as the investor must try to work out if the dividend received is net/gross of withholding tax. With an offshore endowment, all the tax is paid into the fund on the investor's behalf, which means the investor is spared all the tax calculations. With an offshore unit trust, all the calculations still need to be done. While the investor might be in a roll-up fund, the calculations will still need to be done when the units are eventually sold.

Conclusion

Although each case is different and although it is wrong to generalise (the investor might be in a roll-up unit trust, make no switches and therefore not be worse off taxwise in a unit trust), when it comes to estate planning, the offshore endowment wrapper with a SA insurer offers far more opportunities than does a unit trust.

THINKING OF USING A SOUTH AFRICAN OR FOREIGN TRUST: WHAT ARE THE TAX AND OTHER TRADE-OFFS?

MADELEINE SCHUBERT, Independent International and Domestic Tax Attorney associated with Boshoff Inc.

In a globalised world, one has the option to either use a domestic or foreign trust to structure one's affairs. However, the use of either option faces different trade-offs. Given your well-known expertise in domestic and international tax matters as it pertains to trust and estate law, this article aims to guide on the tax and other trade-offs that should be considered in deciding between South African and foreign trusts.

When you are considering whether to implement a single or multi-jurisdiction estate and/or business plan, which may incorporate one or more connected and/or associated structures across the world, it is important to venture carefully, as there are many landmines out there.

So where do you start?

Its starts with asking the right questions.

The most important question is, why would your client like to set up a structure in the first place? Is it to:

- Reduce income taxes?
- Reduce estate, inheritance, or similar global death taxes?
- Protect assets against personal, business, and political risks?
- Diversify passive and active investments across various jurisdictions?
- Create multiple cash flow streams?

Other questions are:

- Why a structure and not a product? Or vice versa? Do you know the difference?
- How much wealth do you have?
- What is the nature of your assets – passive, active or both?
- Where are your assets located currently or where 'should' they be located?
- What is your appetite for paying for costs and fees and what is the cost benefit ratio that you are comfortable with?
- Who is managing your wealth and how much direct and indirect control do they have over you? Is there an 'independent' party involved in the structuring to bring in objective and best practices?
- What are the subtle aspects of your family dynamics?
- Are you a South African tax resident?
- Where are your direct family members' tax resident?
- What nationalities are in the mix and what do they do?
- Are you or your children considering emigrating from South Africa at some point?
- If so, where to?
- If so, would you wish to retain business and/or other investable assets in South Africa?
- At what phase of your life are you currently in? Are you establishing and/or creating, building and/or maintaining, or are you ready to reap the rewards of your golden years?

- If you have trading businesses, do you have international clients and/or customers? Is there a scope to migrate part or all of your business from South Africa?
- Is there any current and/or potential global business trading happening now and with whom? And in which jurisdictions are they located? Are there multiple jurisdictions?
- What are your South African and/or global businesses' cash flow requirements?
- What is your investment strategy, for now, in future, and post your death?
- What other important and unique considerations, visions, and goals apply to your specific family?

Based on the answers to the above, you should then have a clearer understanding of the client’s specific family legacy structure needs and you can then start planning the appropriate structure.

Such a structure could be as simple as executing a well-drafted will or it may require a more complex design, which requires the incorporation of South African resident trust/s, and/or non-resident trust/s, and/or companies; and/or the incorporation of financial products in certain jurisdictions considering the client`s various personal and business requirements against the complex and current international developments.

With the relaxation of the prohibition against the creation of loop structures for South African exchange control residents in terms of Exchange Control Circular 1/2021 (‘the regulation’), there is an opportunity to incorporate a single offshore non-resident trust holding structure, whereby a family`s various international direct and indirect interest in the property, including property physically located in South Africa, is held.

However, successfully implementing such a structure is not as easy as it initially seemed. Despite the initial excitement in the industry to be able to consolidate a client`s assets using a single offshore non-resident trust structure, the Financial Surveillance Department's interpretation of Exchange Control Circular 1/2021 has discouraged most from venturing down this path; it has, for all purposes, become inapplicable.

For this reason, and where appropriate, for a client with an international asset base, incorporating separate resident and non-resident trust/s with or without underlining the interest in companies and/or products, remains the best route to go.

If there are any commercial transactions to be done between such connected cross- border entities, then this is to be done via arm`s length.

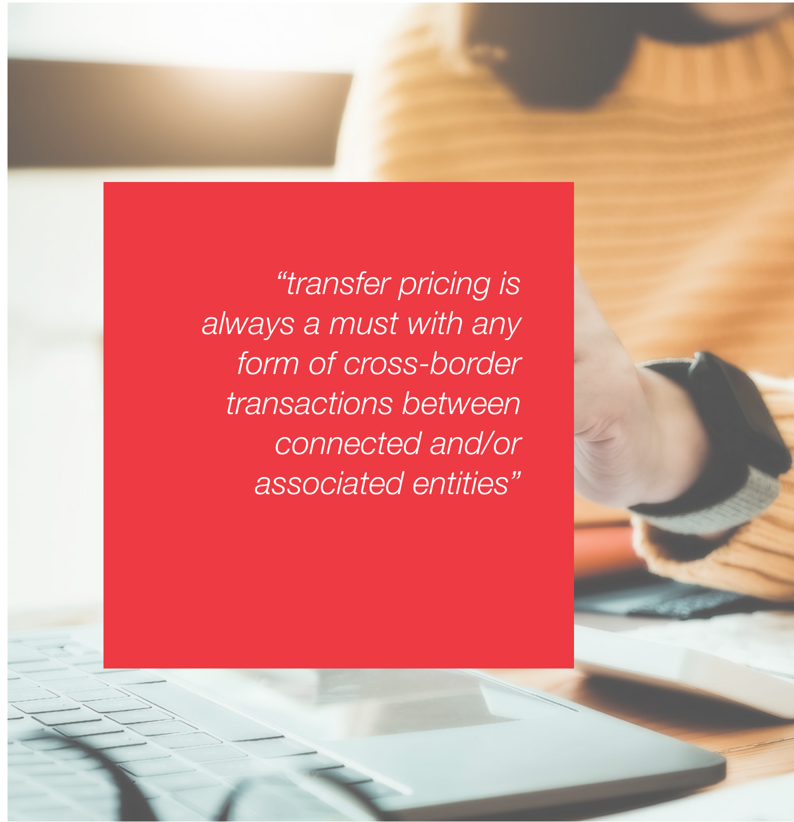
In creating and in operating a dual structure for a client, there will be an increase in ongoing operating costs associated with it, as opposed to only having a South African resident trust. The operating costs of South African resident trusts are small in comparison with those of non-resident offshore trusts and companies' structures. However, the reality and the importance of creating a secure assets protection strategy for a client may outweigh the cost of operating non-resident offshore entities.

The main disadvantage of consolidating all your assets in only a South African trust is that it cannot hold offshore direct investments without approval from the South African Reserve Bank`s financial surveillance department. Having assets directly offshore is an advantage for a client in that it remains the best strategy from an asset protection perspective against political uncertainty that comes from doing business and living in Africa.

When a client incorporates structures in their life, it is important that there are strong commercial reasons supporting such actions. Failure to manage this may lead to tax avoidance legislation or international instruments being invoked against such structures. Having a documented and written statement of intent when creating one is highly recommended.

From a South African law perspective, the court has confirmed that where a taxpayer wishes to implement a commercial transaction, he is entitled to choose the method to achieve his objective that yields the lowest tax charge and the taxpayer is under no obligation to choose the method that yields the highest tax charge (*CIR v Conhage Limited* 61 SATC 391).

This abovementioned principle should also hold in the international landscape but be careful because the international tax instruments that manage this space have become more complex as they are driven by the OECD BEPS 2 project.



"transfer pricing is always a must with any form of cross-border transactions between connected and/or associated entities"

Specifically, transfer pricing is always a must with any form of cross-border transactions between connected and/ or associated entities. This is not only the South African transfer pricing legislation that must be observed, the transfer pricing rules of the other transacting party`s country must also be observed.

Other possible international tax avoidance considerations that could impact the taxation of proceeds, and/or royalties, and/or dividends, and/or interest, and/or management fees arising from and paid to cross-border connected persons.

Ultimately, in the international space, it is important to remember that the tax treaties have a dual purpose: the one is the avoidance of double tax, the other is to manage tax avoidance practices internationally.

Where you consider the incorporation of non-resident companies, you must be aware of any domestic substance requirements for such an entity in that specific jurisdiction

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(if any). If there are none, such jurisdictions might just be one of those jurisdictions listed on the OECD black or grey list on the basis that promotes harmful tax practices. Doing business in such countries with mainly EU countries may hamper business transactions and the flow of funds to and from such a country.

Control is another important aspect to consider and if your client requires absolute control, you are in for a challenge whether it is a local or offshore trust structure. Concerning local trust, any control may result in a trust to be regarded as an alter ego trust resulting in all the assets being regarded as those of its founder.

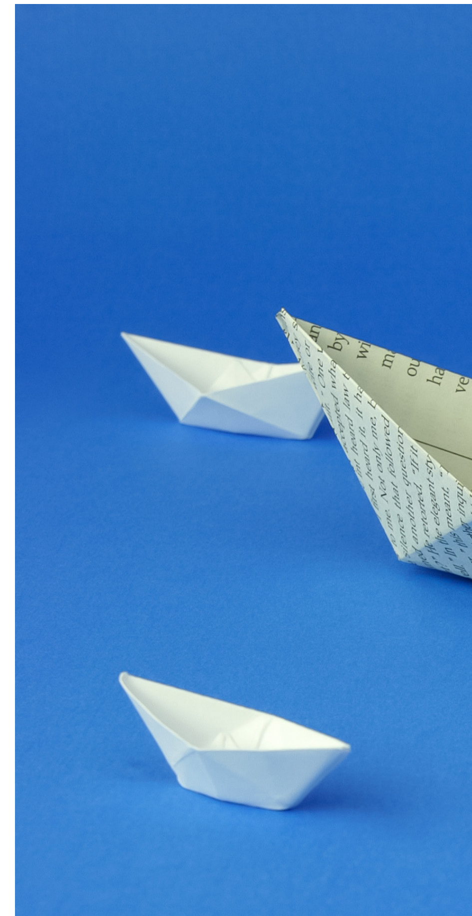
In the case of a non-resident trust with a South African tax resident protector or where it owns a non-resident company where the client is part of the Board of Directors, the principles applicable to the place of effective management, must be clearly understood and managed. Failing to observe these rules may result in such entities being regarded as a South African tax resident which could have costly tax implications associated with it.

In addition, the tax residency status of a trust`s discretionary beneficiaries is very important as the impact and treatment of benefits from such a trust may have different legal and tax implications in various jurisdictions. Be very careful here; specialised country-specific advice is required where there is a different tax residency involved.

Lastly, if one of those discretionary trust beneficiaries is currently a Russian national and they fall within the scope of the various EU and other countries' sanctions, the full non-resident structure may now be compromised as all the EU countries, including Switzerland, US, UK, Australia, and Canada have determined that no professional providers will be able to maintain such trust structures with Russian nationals. Although South African professional providers are not prohibited from rendering such a service, it would be prudent to steer away from such a complex matter.

Given the above, deciding to use offshore non-resident and resident trusts or both of them is not an easy decision. It is a complex matter and you must obtain independent expert advice to ensure that any structure or structures meet the client's current and future financial needs, goals, and vision.

WHAT TO CONSIDER BEFORE REPATRIATING YOUR OFFSHORE FUNDS



▶ **MICHAEL HALDANE**, Managing Director, Global & Local, The Investment Experts

The current situation, where banks are normalising their interest rates to keep up with inflation and the war between Russia-Ukraine, has severely impacted our global markets and the financial position of South Africans. Looking at this, many South Africans are disinvesting their offshore investments but are not aware of the procedure and what the implications are. In this article, we explain how you can bring your funds back to South Africa and what the consequences are.

Today, many South Africans are investing in offshore investments because they seem incredibly attractive and because investing offshore allows you to diversify by spreading your risk across different economies and geographic regions. This will give an investor the ability to earn growth in various countries and currencies, while keeping in mind that investing is a long-term game of five to seven years minimum.

A South African citizen can take up to R11 million offshore per calendar year, subject to tax clearance from SARS. The clearance is a formality and will be granted to any person whose tax affairs are in good standing with SARS. The first R1 million may be taken offshore without prior clearance from SARS. If the funds are already offshore, you do not need to repeat the clearance process.

If the investment is in the investor's name, then the process is quite straightforward and it does not involve many steps.

One of the more efficient ways is to move the offshore funds into a Foreign Currency Account (FCA). This can be done through a withdrawal or transfer. A Foreign Currency Account is a transactional account denominated in a currency other than the home currency and can be maintained by our local banks such as First National Bank, Standard Bank, Nedbank or ABSA, or banks in other countries. The account also allows the investor to invest in international currencies namely US Dollar (USD), British Pound Sterling (GBP), EURO (EUR), and Australian Dollars (AUD). This account can be used for personal or business needs and, depending on the account, you can even earn interest.

The advantages of moving the funds into a Financial Currency Account are as follows:

- Hold multiple currencies: The investor can send or receive funds in different currencies while avoiding exchange rates.
- Leverage exchange rates: The investor will have the ability to switch among currencies which will help you take advantage of strong exchange rates.

> *"The South African banking protocols require that any transfer of offshore funds in foreign currency to the South African bank account needs to comply with the balance of payments reporting process"*

- Earn interest: Many foreign currency accounts earn interest on select currencies. The interest is offered in tiers with better rates.
- Overdraft protection: If the investor is unsure of the timing of their foreign currency payments, many banks will allow the investor to go into a temporary deficit on specific currencies, although this may be expensive.
- The investor will not need to worry about short-term currency fluctuation.

The following are drawbacks of opening an FCA account:

- Fees: The investor can expect to be charged special cash handling fee and overdraft fee on some of the transactions.
- High minimums: The investor may be required to keep a daily minimum balance in the account.
- Low interest: Some banks do not offer high rates as the standard savings bank account.

If the investors would like to bring the funds back to South Africa, it is possible but it is considered expensive as the foreign exchange transfer is through a normal banking system. Certain banks do have accounts that allow forex transactions to be processed. The South African banking protocols require that any transfer of offshore funds in foreign currency to the South African bank account needs to comply with the balance of payments reporting process. This process involves completing a balance of payments application form to support the inward payment of the foreign currency into a South African bank account. This means that the bank will sell foreign currency and purchase South African Rands.

There are not many constraints involved when recalling offshore funds back to South Africa. However, we have listed a few things to be on the lookout for.

Exchange Rate

When moving funds into an individual South African bank account we need to convert the foreign currency to Rands using the exchange rate. The exchange rate is the value by which two currencies can be traded for one another. The fact that the value of the currency ▶

is constantly fluctuating in relation to other currencies only seems to matter to most people when they plan to move funds from offshore to onshore or vice versa. The exchange rate has a tremendous influence on the economy both in the near term and over prolonged periods. This means that the individual may gain or lose when moving funds.

Fees

Moving funds from offshore to onshore will charge an inward fee. The fee varies among different service providers.

Forex Administration Fee

If the trading is done through a broker, the broker will usually charge an administration fee on top of the inward fee. The administration fee is normally built into the exchange rate that you will be quoted.

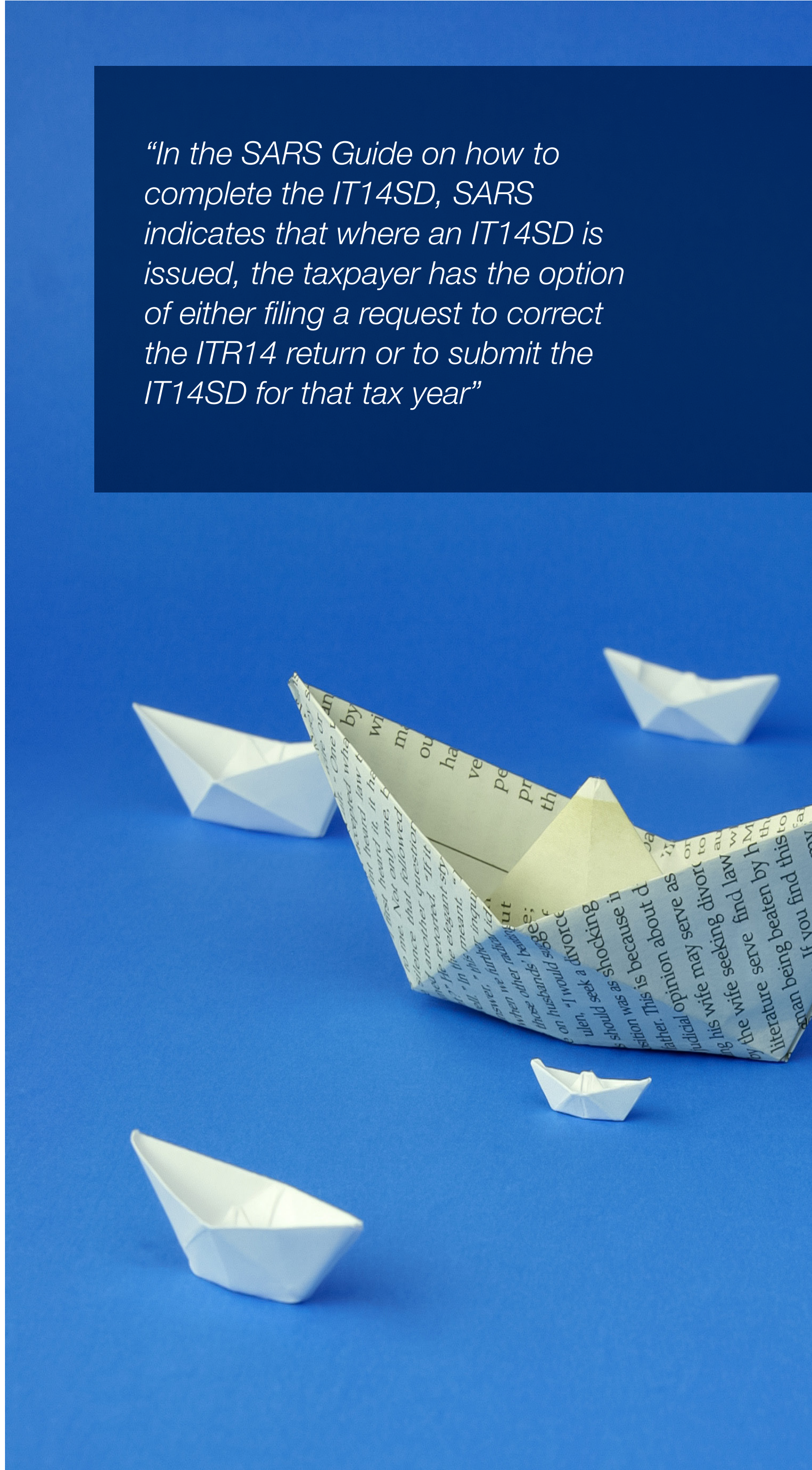
It is important that investors use a company that can assist with transferring the funds in and out of South Africa and that is aware of the foreign exchange regulations within South Africa.

Tax

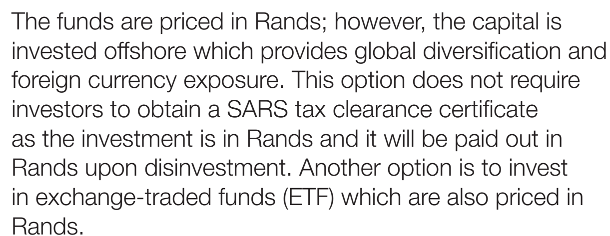
It is important that an individual gets a full picture before making any decisions. When you invest offshore, the tax you may be required to pay depends heavily on the way in whichyou choose to invest.

If the funds are invested in discretionary investments, then individuals will pay capital gains tax at a maximum effective rate of 18%, which means they will be liable for tax on all gains on their original investment value, regardless of whether those gains are from capital growth or currency movements. The individual will also be liable for tax for foreign dividends and foreign interest. Foreign dividends are included in your taxable income and are taxed at an effective rate of 20%. The value of foreign interest is also included in your taxable income.

Investors who are not comfortable investing directly into offshore investments can invest in foreign Rand-denominated funds. There are several investments and asset managers in South Africa who offer these types of funds.



> *"In the SARS Guide on how to complete the IT14SD, SARS indicates that where an IT14SD is issued, the taxpayer has the option of either filing a request to correct the ITR14 return or to submit the IT14SD for that tax year"*



The funds are priced in Rands; however, the capital is invested offshore which provides global diversification and foreign currency exposure. This option does not require investors to obtain a SARS tax clearance certificate as the investment is in Rands and it will be paid out in Rands upon disinvestment. Another option is to invest in exchange-traded funds (ETF) which are also priced in Rands.

South Africa's growth prospects are indeed dreadful, however, the biggest factor influencing the returns of offshore assets for South African investors is the Rand. The movement of the Rand can enhance or detract from the returns of offshore investments. Therefore, the decision to move funds onshore needs to be seriously considered. Instead of trying to time the market, we suggest that investors should ask themselves how to diversify their investments by taking a long-term view and by balancing the benefits of diversification with their investment objectives and risk tolerance.

One thing to remember before trying to avoid market volatility is that it is inevitable and that trying to time the markets can be a job and a half. One way to deal with market volatility would be to avoid it altogether. This would mean staying invested in the offshore funds and not being distracted by what may be short-term fluctuations. It is better to play it safe than to take the risk and regret it immediately once you have realized how much value your investment has lost.

In certain cases, you may find that moving your funds at the time when you moved it, had caused more damage than if you were to do absolutely nothing. If you are absolutely certain about your decision to move your funds back to South Africa, then having a trading strategy based on empirical data would be a smart move.

IS SOUTH AFRICA READY AND IN NEED OF A WEALTH TAX?

▶ **DENNY DA SILVA,** Director Designate, Bake McKenzie

While some may dispute the astonishing level of paydays and private wealth in South Africa, the purpose of this article is not to dwell on this; rather, to focus on whether it is time for South Africa to introduce a wealth tax. Is it the right thing to do? Does it make sense? Is it fair? Will it make a difference?

The question about introducing a wealth tax in South Africa has been thrust back into the limelight following the recent announcement of some astonishing executive paydays, in addition to considering the significant amount of private wealth in South Africa. In the recently published *Africa Wealth Report 2022*, it was noted that South Africa is home to more than twice as many millionaires than any other African country and that South Africa ranks 28th in the world by this measure, placing it ahead of major economies such as Turkey, Argentina, Malaysia, and Thailand.

While some may dispute the astonishing level of paydays and private wealth in South Africa, the purpose of this article is not to dwell on this; rather, to focus on whether it is time for South Africa to introduce a wealth tax. Is it the right thing to do? Does it make sense? Is it fair? Will it make a difference?

The case for a wealth tax

The ever-widening pay gap has been a feature of the South African landscape for a very long time. On 1 March 2022, the South African minimum wage has increased from R21.69 to R23.19 per hour. This translates to a monthly salary of R3 710.40 if one uses an average of 160 working hours per month. This demonstrates the inequalities that exist in South Africa. A wealth tax may go a long way towards stabilising the economy, especially in a post-COVID environment.

"The unit, known as the High Wealth Individual Taxpayer Segment (HWI) is currently co-located with the Large Business and International Taxpayer Segment (LB&I)"

The option to increase other taxes is also very limited. Increasing the South African corporate tax rate is not necessarily an option, given the global move to reduce corporate taxes and, despite announcing a reduction in the corporate tax rate to 27%, South Africa still has a high rate by international standards. Increasing the VAT rate again would also not be a step in the right direction, as this would have an adverse impact on the poor. So perhaps a wealth tax can be justified. In a recent study by Chatterjee, Gethin, and Czajka - *Why South Africa needs a wealth tax now* - the authors submitted the following idea of a progressive wealth tax, which is applicable only to the richest 345 000 South Africans (1% of the adult population) with a net wealth currently above R3.6 million:

QUANTUM OF WEALTH	TAX RATE
R3.6 million and R27 million	3%
R27 million to R119 million	5%
Above R119 million	7%

The authors noted that the impact on such individuals would not be material and that they would still have a significant level of wealth. For example, a billionaire would end up paying R67 million in wealth tax, leaving a post-tax wealth of R933 million.

It may also not be that difficult for the SARS to administer the wealth tax. The number of individuals that would be subject to the wealth tax would be small enough that administration should not be cumbersome. This is further simplified by the recently established unit at SARS, tasked with focusing on individual taxpayers with wealth and complex financial arrangements. The unit, known as the High Wealth Individual Taxpayer Segment (HWI) is currently co-located with the Large Business and International Taxpayer Segment (LB&I). While the unit currently focuses on ensuring compliance by high-net-worth individuals, its work will potentially pave the way for a wealth tax as they build the necessary data to justify imposing one.

The case against a wealth tax

On the face of it, a wealth tax may make sense as an easy fix to South Africa's economic woes but there are also reasons why it may not be the best way forward. South Africa's base of high-net-worth individuals is in decline, with the *Africa Wealth Report* estimating that approximately 4 500 high net-worth individuals (HNWIs) have left South Africa over the past decade (2011 to 2021) and, more concerning, that of the 15 South African-born billionaires in the world, only five of them still live in South Africa. While a decline in HNWIs is not unique to South Africa, it is indicative that a wealth tax may not be the best move.

There is also the fact that South Africans already pay a significant amount of effective tax when one takes into account all the direct and indirect taxes paid. In a 2018 report published by the OECD, *The Role and Design of Net Wealth Taxes in the OECD*, it was concluded that from both an efficiency and an equity perspective, there are limited arguments for having a net wealth tax in addition to broad-based personal capital income taxes and well-designed inheritance and gift taxes. This holds true from a South African perspective when one considers that the effective capital gains tax on individuals at the top end is 18.6%, estate duty is 20% on the first R30 million, and 25% on the dutiable value of the estate above R30 million. Further, donations tax is 20% on the cumulative value of property donated not exceeding R30 million and 25% on the cumulative value exceeding R30 million; introducing a wealth tax may therefore be a step too far.

A wealth tax would also need to be carefully designed not to erode wealth because such taxes are generally imposed irrespective of the actual returns that taxpayers earn on their assets. It would therefore need to potentially be a once-off event or, at the very least, consider the taxes previously paid on the same wealth so that only the difference on a year-on-year basis is taxed. There would also need to be rules to govern the situation where a taxpayer's wealth diminishes on a year-on-year basis. In other words, the revenue authority cannot have its cake and eat it too. In summary, the design of the wealth tax would be critical and this in itself could take several years to achieve.

Final thoughts

A wealth tax does have its place in South Africa; yet, it should not be seen as the silver bullet to solve South Africa's economic shortcomings. It would certainly be a quick fix to the current economic woes faced in the country. However, stimulating the South African economy in the right direction should be the primary goal, while job creation and a business-friendly environment should be the priority. This would result in an increased individual taxpayer base, in increased corporate income taxes, and ultimately, in more taxpayers for the wealth tax!

INVESTING OFFSHORE: ARE YOU SURE YOUR TAX HAVEN MAKES SENSE?

ELKE BRINK, Wealth Advisor, PSG Wealth

Looking at the overall stock investments in all global investment bodies, does it make sense to invest in a tax haven? This article unpacks ways in which inheritance is taxed in other countries and in South Africa.

Investing offshore allows you to spread your investment risk across different economies, regions, sectors, and securities; it also allows you to find more opportunities. Locally, there are approximately 1 300 funds registered with the Financial Sector Conduct Authority (FSCA). Globally, there are more than 200 000 different funds available. Similarly, there are approximately 350 stocks listed on the Johannesburg Stock Exchange's (JSE's) main board, whereas there are roughly 60 000 equities listed globally. When one area of the portfolio may be under pressure from region specific risks, another area of the portfolio may be unaffected. This will support performance and will reduce overall portfolio volatility. It also offers access to specialist sectors that are not available locally, for example, biotechnology and global brands such as Microsoft, Nestlé, and Johnson & Johnson.

When it comes to building and to optimising a resilient portfolio, your investment structure or vehicle and its accompanying planning, are equally important to the investment portfolio itself. Ensure that you are taking the possible tax implications, estate planning as well as continuity planning into account from the start. The reason why we are taking our funds offshore is generally to protect them – therefore, offshore investments need to be done properly.

The first point that needs to be understood is what happens at the time of death, as the treatment of the investment upon the investor's death may differ from the way in which it is treated in South Africa; it may vary depending on where the funds are domiciled. Every country tries to maximise its tax revenue. For this reason, the place (situs) where an asset resides for tax purposes becomes extremely important. This

becomes the link (nexus) that a country uses to tax an asset as income, capital gains or as wealth tax. As each country uses a different nexus, it is possible that more than one country can tax the same asset. When investing in offshore assets, it is therefore always important to take the situs rules of the relevant countries into consideration.

At the time of death, there are estate taxes that need to be provided for. For example, estate taxes are called: 'inheritance' tax in the UK; 'estate taxes' in the US; and 'estate duties' in SA. In the UK, the first £325 000 of an estate is exempt from taxes, but thereafter it is taxed at 40%. As the estate is taxed on the same assets in SA, it will receive a rebate of 20% against local estate duties. Similarly, in SA, everything bequeathed to your spouse is exempt. In the US, only the first $60 000 of an estate is exempt from taxes, with the residue taxed on a sliding scale up to 40%. The double taxation agreement with the US exempts shares taxed in the US from estate duties in South Africa. There is no relief for spousal bequests.

Determining the tax implication in the different jurisdictions will vary depending on which type of offshore asset you want to invest in. If you are specifically looking at offshore shares, then where the company (of the share that you are buying) is registered will determine the situs taxes to be paid. This applies to UK and to US rules.

It is well known that there are many tax havens available worldwide; ranging from Isle of Man to Jersey or to Mauritius, to name but a few. Investors do tend to forget that each one of these countries will also have probate tax (situs) payable. Also, depending on the nature of your investment, you might stil be liable for inheritance tax, even if your investment is domiciled in a tax haven. For example, if the fund or share is US listed, you might still be liable for US inheritance tax – then quickly change your tax haven to a 40% plus tax implication.

This is where the correct structure or vehicle comes into play and why we would advise making use of an offshore endowment or sinking fund policy structure in certain scenarios. These policy structures can be used as a wrapper for your investments in some instances provided that they are suitable for your specific situation. They can offer some of the following benefits mentioned below.

- Tax efficiency for high marginal income tax-paying individuals and trusts.
- You can nominate beneficiaries and therefore save on executors' fees.
- Policy structures are also good vehicles for continuity planning because you can nominate beneficiaries.
- You can protect offshore assets against higher death taxes in foreign jurisdictions.
- You will have protection against creditors (section 63 of the Long-term Insurance Act not afforded to sinking funds).
- Ease of tax administration, especially for offshore investments because all taxes are paid within the wrapper.

"When it comes to building and optimising a resilient portfolio, the investment structure or vehicle and its accompanying planning are equally important to the investment portfolio itself"

Offshore endowments and sinking funds still form part of your South African estate for estate duty purposes.

With a direct offshore investment (no wrapper), the offshore asset will be included in the deceased estate as property. Should the asset be taxed in an offshore jurisdiction, a credit can be provided should there be double taxation agreements between SA and the other country. Unfortunately, in some jurisdictions, inheritance tax can be as high as 40% for the non-resident investor's assets; this consideration should be taken into account carefully when you are deciding where to invest. Another option to consider is whether an offshore trust may be suitable for offshore investments. This is an expensive route to follow and may not be suited to your specific need.

Trusts separate the control of assets, the ownership of capital, and the entitlement to the income from these; they are primarily used as a vehicle to protect assets. The main reasons to structure a trust are to:

- provide for someone too young to look after their money (minors);
- provide for someone who is too ill to look after their money;
- pass on a valuable asset; and
- mitigate inheritance tax – in some cases.

For example, in the UK, the government has progressively tightened the rules on trusts to the point where their use to secure a tax benefit has become unattractive and the costs of administering the trust are expensive. Trusts can be expensive to maintain, they are vulnerable to future changes in tax regulations and they require very able trustees to administer them.

When it comes to expanding your offshore portfolio, speaking to a qualified wealth adviser has become more important than ever because many technicalities need to be considered. Offshore exposure is an invaluable component of your portfolio and it offers many opportunities. However, structuring your offshore investments according to your goals and needs is imperative and speaking to an adviser is strongly recommended.

MAURITIUS REMAINS THE IDEAL JURISDICTION FOR SETTING UP YOUR TRUST

▶ **FAZEEL SOYFOO,** Partner, Andersen & **AZIZA TIMOL,** Assistant Tax Manager, Andersen in Mauritius

Recent changes to the tax legislation have not affected the attractiveness of the Mauritian Trust – the fact remains that Mauritian Trusts continue to provide a tax-efficient solution for wealth and succession planning, aided by the safe ecosystem of the Mauritian International Financial Centre.

Why Mauritian trusts?

Mauritius has seen exponential growth in recent years in the number of trusts being set up on the island – many of those by South African individuals. The legislative framework in force provides a conducive environment for setting up trusts in Mauritius, with the usual benefits of the tried and tested Mauritian International Financial Centre (IFC) added to the mix.

Indeed, the relatively low cost of implementing and maintaining a trust in Mauritius; the safe and secure environment; enabling legal and regulatory framework with the Privy Council of the UK as the final court of appeal; political stability; ease of doing business on the island; and network of tax treaties available to residents, make the Mauritian trust the ideal vehicle to safeguard your assets. The Mauritian IFC provides all the tools to establish and administer trusts, both for residents and non-residents while benefiting from the tax advantages that the island offers, which include no capital gains tax or inheritance tax. Also, there is no exchange control in Mauritius, so there is no restriction on repatriation and distribution of funds.

Key features and types of trusts

Generally speaking, trusts fall into the following broad categories: Discretionary Trust, Purpose Trust, Charitable Trust, and Corporate Trust, which include pension and employee benefit trusts. The trusts that are set up in Mauritius can have a maximum of four trustees, one of which needs to be a qualified trustee who is duly regulated by the Financial Services Commission (FSC), hence ensuring the proper management of the trusts.

The Mauritian trust has certain characteristics that make it an attractive vehicle for asset protection and investment. Some of the key features are:

1. Anti-avoidance provisions in relation to forced heirship rules, which may be applicable in other jurisdictions where the settlor is resident or a national – this means that any asset you settle during your lifetime in a Mauritian trust will not form part of your estate upon your death, thus ensuring control over whom and in which proportion, your estate and wealth would be distributed.
2. Appointment of a Protector – The Trusts Act allows for the appointment of a Protector who oversees the activities of the Trustee and who acts as an advisor. The Settlor may act as the Protector.
3. Confidentiality – The Trusts Act seeks to protect all confidential information pertaining to a trust. There is no requirement to register a trust and to disclose the beneficiaries or owners of a Mauritian trust. The Mauritian trust is also very easy to set up and a simple 'declaration' of trust signed solely by the trustees is sufficient evidence to recognise the creation and existence of a Mauritian trust.
4. Asset Protection – Assets held in a trust are protected from being challenged for reasons such as succession rights, marriage or divorce, and insolvency of a settlor or beneficiary.
5. Avoiding probate – A well-structured trust may help to avoid the need to obtain a grant of probate or letters of administration before a deceased's estate can be wound up and distributed.
6. Distribution by a trust – Distributions by a Mauritian trust are considered as dividends. Dividends paid by a Mauritian resident trust are exempt from income tax in Mauritius and dividends paid by a non-resident Mauritian trust are considered as not derived from Mauritius and hence not subject to income tax in Mauritius.

Taxation of Mauritian trusts

Recently, we have seen quite significant changes to the taxation regime of the Mauritian trust, triggered by the base erosion and profit shifting (BEPS) project of the Organisation

for Economic Co-operation and Development (OECD) and the island's commitment to enhance its position as a jurisdiction of substance and repute; all this leading to some major overhaul of the tax landscape in Mauritius.

A trust is considered as tax resident in Mauritius where the trust is administered in Mauritius and where a majority of the trustees are resident in Mauritius, or alternatively, where the settlor of the trust was resident in Mauritius at the time when the instrument creating the trust was executed. Previously, however, Mauritian tax laws offered an exemption for trusts which satisfied the following conditions:

a. The settlor of the trust is a non-resident or holds a Global Business License (GBL); and
b. All the beneficiaries are non-residents or hold GBLs or, the trust is a purpose trust whose purpose is carried out outside Mauritius.

Such a trust had the option to file a Declaration of Non-Residence (DoNR) to the Mauritius Revenue Authority (MRA). The income of the non-resident trust was exempt in Mauritius and it had no requirement to submit any income tax return in Mauritius.

Changes to the taxation regime of trusts brought by The Finance (Miscellaneous Provisions) Act 2021 (FA 2021), came as a surprise and left some uncertainty across the industry regarding the residency and taxation of a Mauritian trust. This uncertainty has led the MRA to issue a Statement of Practice (SOP), SP 24/21 Trusts & Foundations, to provide some clarity and guidance on how resident and non resident trusts would be subject to tax in Mauritius.

Changes brought by FA 2021 and clarifications from SP 24/21

FA 2021 repealed the tax exemption which was provided to non-resident trusts. A grandfathering period until the Year of Assessment (YOA) 2024/25, with an exception for trusts that derive income from certain intellectual property assets has, however, been granted for trusts set up before 30 June 2021 and which meet the previous conditions to file a DoNR. A resident trust is subject to tax at 15% on its worldwide income, whereas a non-resident trust, after any applicable grandfathering period, will be liable to tax only on its Mauritian source income at 15% – the foreign source income of a non-resident trust will not be subject to income tax in Mauritius.

The above changes left some room for interpretation with regard to the taxation regime of trusts, particularly in relation to when a trust would be considered non-resident in Mauritius. Mauritian tax laws provide that a company that has its Central Management and Control (CMC) outside Mauritius is considered a non-resident; it was unclear whether this would also apply to trusts (which fall under the definition of a company for Mauritian tax purposes). Also, until that point, Mauritian tax laws did not provide any guidance on how to determine the CMC of a trust.

This is where the MRA's SOP came in. The MRA, through SP 24/21, confirmed that a trust which has its CMC outside Mauritius would be considered non-resident. SP 24/21 further continued to clarify what would constitute CMC in Mauritius for a trust as follows:

1. The trust is administered in Mauritius and a majority of the trustees are resident in Mauritius;
2. The settlor of the trust was resident in Mauritius at the time when the instrument creating the trust was executed or at such time as the settlor adds a new property to the trust; and
3. A majority of the beneficiaries or the class of beneficiaries appointed under the terms of the trust are residents in Mauritius.

The SOP issued by the MRA provided much guidance and relief to the industry. Implicit from the above factors to determine the CMC of a trust in Mauritius is the understanding that all three conditions need to be satisfied for a trust to have its CMC in Mauritius and thus be considered as tax resident in Mauritius. Based on this clarification, the trusts that were previously used to file a DoNR should meet the criteria for them to be classified as a non-resident for Mauritian tax purposes.

As a result, such trusts, which were previously exempt from tax in Mauritius, will not be required to pay any tax in Mauritius on income derived from outside of Mauritius. New trusts that are set up going forward will also enjoy this benefit unless their CMC is in Mauritius.

The extent to which the trust derives income from Mauritian sources, will be subject to tax at 15% but this can be reduced to an effective rate of 3% for certain types of income such as interest, subject to meeting certain conditions of substance. Dividends and capital gains remain exempt.

A trust whose exclusive purpose is to conduct charitable activities will continue to be exempt from tax in Mauritius. All trusts registered in Mauritius will now be required to file tax returns in Mauritius, irrespective of whether they are considered a resident or not.

Expected changes in the taxation of trusts

Further enhancements are expected to the legislation governing the taxation of trusts in Mauritius. The enhancements are expected to be geared towards further simplifying the tax regime of Mauritian trusts, consistent with the requirements of the OECD's BEPS project.

We also expect other changes to be brought in to enhance the prevailing legislation applicable to trusts, confirming Mauritius' position as an attractive jurisdiction to set up a trust in Mauritius and giving further comfort, both from a tax and non-tax perspective.

In the meantime, Mauritius remains a well-regulated, tax-efficient and cost-effective jurisdiction to set up and administer trusts, hence its ongoing success and popularity.

INDIVIDUAL WEALTH PLANNING:

DOES DUBAI REMAIN A VIABLE OPTION IN THE POST-BEPS ERA?

▶ **HUGO VAN ZYL,** trading as Wegkaner

The UAE has announced a 9% corporate tax rate as of July 2023. It is indeed lower than the internationally agreed minimum corporate tax of 15%, yet it clearly sends the message that the UAE government is taking note of both the BEPS Pillar and Pillar 2 pressure on low tax jurisdictions.

On 31 January 2022, the United Arab Emirates (UAE) announced the introduction of a 9% federal corporate tax (CT) on business profits (CT regime) effective for financial years starting on or after 1 June 2023. The UAE's Federal Tax Authority (FTA) as part of the Ministry of Finance, has been extremely transparent in both the implementation and consultation process.

The standard CT at 9% on taxable profits exceeding
AED 375 000, may not apply to Multinational Entities that fall within the scope of BEPS Pillar 2, as they may face a higher tax rate.

At the time of this article, the FTA's Corporate Tax Submission Public Consultation Form has not finalised all tax policies and compliance requirements. The Public Consultation Document: UAE Corporate Tax remains open for comment until 19 May 2022, 'on aspects of the proposed CT regime that may help to reduce compliance cost and complexity and improve certainty for the tax administration and taxpayers alike. Comments on areas that are otherwise not covered in this document are also welcomed'.

For most wealth planners, the new CT regime is a red flag, yet it should not be a deterrent to families and wealth managers who are considering the UAE as the preferred location for the family office or holding regime.

Both single-family offices (SFOs) and multi-family offices (MFOs) flourished as the UAE government ensured the most attractive and tax-efficient business environment. For most family offices, nothing will change despite the BEPS changes such as corporate tax rates, increased ultimate beneficial owner (UBO), and CRS reporting.

The UAE is one of the few countries where a residency visa follows immediately upon registration of a local company or the registration of the local branch of an external company. A most attractive incentive for family office relocation or set-up in Dubai.

The UAE Corporate Tax Regime

CT will apply to all local companies and to other legal persons incorporated in the UAE, as well as to foreign legal entities that have a permanent establishment in the UAE or businesses that earn UAE-sourced income.

The CT regime is subject to certain tax exemptions as well as to zero rate tax on business income.

Free Zone companies (Free Zone Persons) will be within the scope of the UAE CT (albeit possibly at 0%) and subject to tax return filing requirements. The UAE CT regime, however, 'will honour the tax incentives currently being offered to Free Zone Persons that maintain adequate substance and comply with all regulatory requirements'.

"The DIFC Free Zone in the UAE is an attractive location for both single family offices (SFOs) and multi-family offices (MFOs)"

Investment funds, regulated investment funds, and Real Estate Investment Trusts that are typically owned or managed by family offices, can apply to the Federal Tax Authority (FTA) to be exempt from UAE CT subject to meeting certain requirements.

Individuals employed in the UAE will mostly remain tax-exempt, which will allow high-net-worth individuals (HNWIs) or their key staff in the family office to relocate and to reside tax free in the UAE.

The business profit taxation of individuals would generally depend on whether the business activity requires the individual to obtain a commercial license or equivalent permit from the relevant competent authority (e.g. the relevant Department of Economic Development or registration authority of a Free Zone) in the UAE.

The following general tax rules and exemptions are anticipated at this stage:

- Capital gains and dividends exemption, subject to a final set of conditions.
- Most intragroup transactions and corporate restructuring will be exempt and encouraged.
- Double tax treaty will be retained and expanded, to most probably include a USA treaty; foreign tax credits may reduce CT.
- UAE businesses will need to comply with the transfer pricing rules and documentation requirements of the Organisation for Economic Co-operation and Development (OECD).

Family offices in the UAE will remain a fast-growing industry

Most family offices are based in a free zone with Dubai's DIFC free zone, as the mainland rules can be opted for a limited period only. All businesses in the UAE, including family offices, need to obtain a business license and some category of trade which is regulated, whereas others are not regulated.

Certain HNWI families, including Emirati families may opt to operate as a mainland family and avail to UAE Law 9 of 2020, providing for Family Property Contract, regulating family administration and property ownership for 15 years (renewable) at a time. This contractual arrangement is often required to manage Sharia Law's forced succession rules.

A Free Zone SFO must be 100% owned by the same family and 100% of the SFO shareholding must be held by the family or within the family's intermediary or ultimate passive holding vehicle. An SFO can be held by the HNWI or lineal descendants of the relevant family, provided that the Sharia Law forced heirship and restrictions are adequately addressed. Using a DIFC Foundation may be the easiest solution to ensure that no deceased estate needs to be registered in the Dubai Personal Courts.

An MFO is typically a Free Zone Company or Person (FZCO) that is probably formed,

"The residence visa of the individual does not call for a huge investment and it is not restricted by age and the ability to speak a local language "

but always managed, by UAE professional service providers or advisory firms, managing the affairs of multiple families and/or multiple SFOs under one roof.

Companies and individuals in the International Financial Centre are subject to the specially enacted laws, which are applicable only in the DIFC, which ease the day to day operations and administration. The most well-known act allows for non Muslims to register a will, which then need not follow Sharia Law succession rules.

Any family who chooses to own assets, be it immovable property or UAE registered companies, needs to ensure that the succession plan is in order and that it is duly communicated and registered.

The Dubai Wills Service was established by Resolution No. 4 of 2014 that was issued by His Highness Sheikh Maktoum bin Mohammed bin Rashid Al Maktoum in his capacity as the President of the Dubai International Financial Centre (DIFC). Subsequently, the Dubai Law No. 15 of 2017 that was issued by his Highness Sheikh Mohammed bin Rashid Al Maktoum in his capacity as the UAE's Vice-President and Prime Minister and as Ruler of Dubai, re-enforced the inheritance rules as well as the wills and probate regulation for non-Muslims.

The said laws and regulations eased the succession challenges that face foreign investors and resident visa taxpayers in the UAE.

Wealth planning and succession planning in the UAE left to the skilled service provider

In December 2021, the well-known UAE mogul, Majid Al Futtaim, passed away, leaving his estimated $6.1 billion estate somewhat unresolved. It is said that ten people, including three wives, one son, and six daughters, may have claims on the estate according to the Bloomberg Billionaires Index.

The estate of the late Majid Al Futtaim (estimated $6.1 billion) includes a substantial investment in an Al Futtaim group holding multinational entity (MNE estimated at $16 billion) that inter alia owns Middle East supermarket chain Carrefour, a renowned indoor ski hall, the opulent Mall of the Emirates that spreads across 17 countries and several foreign businesses.

Consequently, Dubai's leader, Sheikh Mohammed bin Rashid Al Maktoum, appointed a special judicial committee headed by Essa Kazim, chairman of the group that runs Dubai's stock exchange, to deal with possible disputes.

Appointing a judicial committee as was done in the case of Al Futtaim's deceased estate, is

a relatively rare occurrence that is reserved for high-profile deaths. Most HNWIs are best advised to use the DIFC or other free zone's most friendly family offices regimes or for Muslim families to sign a so-called family property contract prior to their demise.

Family office options in the UAE as part of a succession plan and wealth management strategy

The new CT regime is not the only issue to be considered by HNWIs using the UAE as a preferred location in the administration of the wealth or family office. As can be seen from the above, the new tax regime may indeed not impact the wealth administration or wealth planning where a well-structured family office is in place.

The family office and free zone company or the DIFC foundation as opted for by so many, needs to be properly constituted, well-staffed, and funded to ensure a convincing substantial business presence in the UAE. All UAE companies need to annually file ultimate beneficial owner (UBO) and economic substance reports (ESRs). Very soon CT regime filing will be required

Dubai and specifically the DIFC laws, ensure that the UAE remains the leading destination for family offices and for HNWIs who wish to remain traditional tax havens. Albeit that the UAE is not completely out of the woods when it comes to BEPS compliance, the extensive double tax treaty network as well as the respect for freedom of testation counts in their favour.

For most wealthy families and wealth advisers, the Dubai attraction is the ease of sourcing the best skilled international family officers and relocating them to a central Dubai office. The residence visa of the individual does not call for a huge investment and it is not restricted by age and the ability to speak a local language.

Terms of the South African Reserve Bank relaxation on loss of pay (LoP) rules, now allow for a Dubai SFO or MFO to invest back into South Africa. The UAE South Africa double tax treaty ensures that all the family office employees can easily cease to be SA tax residents provided that they spend adequate time in the UAE residing in their registered leased (Ejari) apartment, should they not acquire a Dubai residence of their own. The Ejari lease register allows for easy tax compliance on ceasing SA tax residency.

For HNWIs and their advisers, the next strategy meeting should perhaps include the question: Why not use the UAE and the Dubai International Financial Centre as the family office hub?

WHY JERSEY FOR WEALTH PLANNING?

▶ **DR RUFARO MUCHEKA,** Business Development Consultant, Africa, Jersey Finance

This article aims to analyse the potential of Jersey to be a central hub for raising capital for African businesses and the growth potential that such an investment could yield for the continent.

With six decades of experience, Jersey has earned a reputation as a leading jurisdiction in providing support to individuals and families with their cross-border wealth management planning and aspirations.

Throughout these six decades, Jersey has adapted to a constantly evolving private wealth landscape as clients have become more sophisticated and diverse in their investment strategies, while they were responding to increasingly complex international regulatory and transparency initiatives.

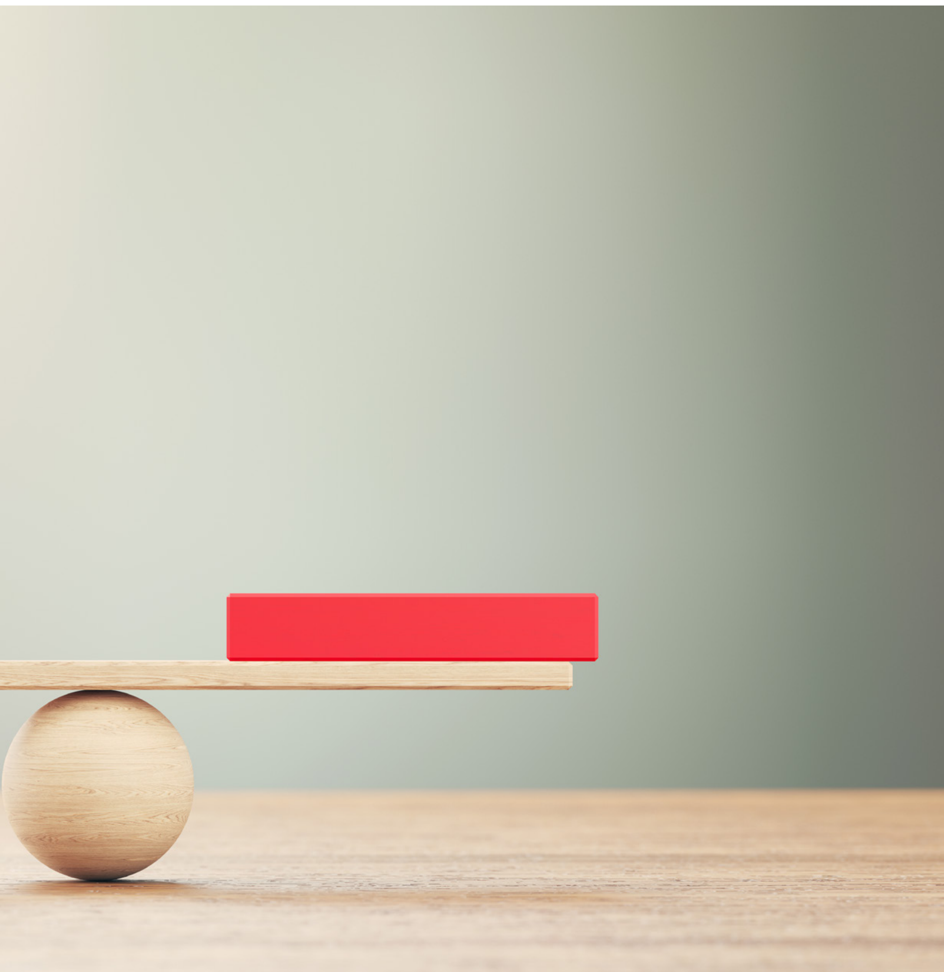
Today, in the wake of a global financial crisis and a pandemic that has led to perhaps the greatest shared period of mass disruption in a generation, there is further evolution in the private wealth mindset – particularly as families gear up for a period of significant wealth transfer and as the next generation comes to the fore with stewardship and responsibility high on their agenda.

Further, digital disruption is fundamentally changing the environment in which wealth advisors are working; this clearly creates challenges and opportunities for jurisdictions. Against this evolving backdrop, forward-thinking jurisdictions that can offer stability, legal certainty, and ease of doing business, such as Jersey, are becoming keenly sought after.

Seamless delivery

Jersey has long been heralded for its pro-business environment; it offers a wide range of structuring options combined with seamless delivery.

It is home to the highest concentration of the Society of Trust and Estate Practitioners (STEP) Members in the world (1 300) and it has close to 14 000 qualified private and corporate wealth professionals working across the legal, banking, and accounting industries that have vast experience in working across international borders.



"Tax continues to be paid by the beneficial owners in their home jurisdiction and, where applicable, by the underlying investment in its home jurisdiction"

In fact, the global expertise, which Jersey has gained, is a key differentiator that includes a deep and growing reach into Africa. Recent research conducted by the Centre for Economics and Business Research (Cebr) on behalf of Jersey Finance, has found, for instance, that Jersey's financial services sector supports approximately £6 billion of African gross domestic product (GDP) and 916 000 jobs across the continent each year.

The most notable factor cited by the research for choosing Jersey was the on-island availability of world-class professional and legal services. This holds true not only for the well-established but also for those at the beginning of their journey, largely because of the comprehensive range of services on offer.

World-class regulation

The fact that Jersey firms administer more than £1.14 trillion assets in trust and in asset holding vehicles (Cebr) with clients spanning the Americas, Europe, the Middle East, Asia Pacific and Africa, of course, reflects the scale of private capital flow that Jersey supports. It can do this thanks to the stability, quality, and flexibility of Jersey's trust law – a template adopted by many other jurisdictions worldwide – and its adoption of international regulatory standards.

While the precise benefits of a trust will depend on the residence and domicile of the settlor and beneficiaries, Jersey trusts offer considerable advantages to privacy, asset protection, and succession planning. In addition, the Island is self-governed with a long tradition of political, legal, and regulatory stability as well as close ties with the United Kingdom and the European Union, while being independent of both.

Historically, a considerable driving force for business in Jersey was instability in a client's home country. That still rings true today but the flexibility on offer means that clients can truly tailor structures to meet their needs and integrate them with their wider wealth framework from discretionary trusts and private trust companies to

"While the precise benefits of a trust will depend on the residence and domicile of the settlor and beneficiaries, Jersey trusts offer considerable advantages to privacy, asset protection, and succession planning"

foundations and corporate vehicles. There are, for example, no forced heirship laws, no rules against perpetuities, and beneficiaries can be added as required.

From a tax perspective, where there are no Jersey resident beneficiaries, a trust is only liable for tax on Jersey source income. In addition, Jersey bank deposit interest is not treated as Jersey source income when received by trustees, as long as the trust has no beneficiaries resident on the island.

Add to this, Jersey's high-quality tax transparency framework, which adheres to global transparency and reporting standards such as the Common Reporting Standard (CRS), the Foreign Account Tax Compliance Act (FATCA), and to endorsements from international bodies such as the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD) and MONEYVAL; it is easily understood why high-net-worth (HNW) clients would look to Jersey for high-quality private wealth support. Other jurisdictions simply cannot offer the same level of transparency and certainty.

Evolving next generation

Meanwhile, the aspirations of the 'next generation' are increasingly influencing the behaviours and priorities of families, from their investment strategies and philanthropic frameworks to their adoption of digital technologies and their asset and wealth structuring.

As such, tax is increasingly not the main decision driver; succession planning has become a significant priority for families, particularly with the experiences of the pandemic shining a light on the importance of having robust long-term plans in place for sudden and unexpected disruption to family leadership and direction. Acceleration of thinking about Environmental, Social and Governance (ESG), and purpose-driven investing is also having a major impact.

Jersey has long supported clients with responsible and sustainable asset and wealth management solutions, impact investment, and philanthropic endeavours. That is why in 2021, Jersey Finance has launched its own sustainable finance strategy and vision, designed to put Jersey on a path to being recognised as the leading International Finance Corporation (IFC) for sustainable finance in the markets in which it operates by 2030.

A neutral environment

Tax neutrality has become a key component of Jersey's proposition to facilitate efficient cross-border investment – it's a straightforward, no-nonsense approach that clearly differentiates Jersey from other jurisdictions which have opted to pursue a Double Tax Agreement (DTA) approach that can be complex and potentially challenging as substance and transparency requirements evolve in future.

The concept of tax neutrality is simple; it means that by not imposing additional layers of tax, decisions can be made on their economic merits alone. Tax continues to be paid by the beneficial owners in their home jurisdiction and, where applicable, by the underlying investment in its home jurisdiction.

So, the use of a tax-neutral international finance centre such as Jersey should result in no more or no less tax being payable. It is simple and fully transparent.

With the introduction of automatic exchange of information agreements, such as the Common Reporting Standard framework, it is a system that ensures all individuals are tax compliant too.

With their forward-thinking approach, unrivalled experience, robust regulatory and legislative frameworks, and tried and tested range of high-quality structures, IFCs such as Jersey remain perfectly positioned in a rapidly evolving global private wealth landscape and should be front and centre in supporting the aspirations of private clients in Africa.

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About
Jersey Finance

Jersey Finance has a clear aim: to promote and represent Jersey as a future-focussed international finance centre (IFC). We are perfectly placed to work with clients worldwide, with offices in Jersey, Dubai, Hong Kong and New York; representation in London, Johannesburg and Shanghai; and virtual offices in Mumbai.

Learn more about Jersey as an IFC:

Dr Rufaro Mucheka
Business Development Consultant - Africa

Find details of Jersey Finance's international offices at: jerseyfinance.je/contact

Jersey Finance

THE ISLE OF MAN AS A CENTRAL HUB FOR SOUTH AFRICAN BUSINESSES EXPANDING OFFSHORE

▶ **HANNEKE FARRAND,** Director, Farrand Global Limited (Isle of Man) and Farrand Attorneys Inc. (South Africa)

Many South African businesses, including family businesses, who are looking for a foothold in the northern hemisphere, need to carefully consider the multifarious reasons for choosing a particular jurisdiction for their offshore hub.

One consideration could be proximity to the markets in which the business is to operate. The British Crown dependencies (including the Isle of Man) provide proximity to sophisticated European markets while boasting political and economic stability. For many South Africans, stability is a crucial consideration in deciding where to locate the hub for their offshore investments.

In practice, a basic structure which is often encountered, is a trust with an underlying company or group of companies (the 'Basic Structure'). When dealing with family businesses, this structure is appropriate to provide for the safeguarding of wealth for generations to follow. The Isle of Man offers well-regulated fiduciary service providers and it has the benefit of a long-running history of facilitating international investments for South African tax residents.

A less obvious advantage is the Isle of Man's legal system, which takes its cues from the United Kingdom and the jurisprudence developed there over centuries. Part of this legal system is the recognition of trusts, which is important to South Africans who are familiar with the flexibility and advantages, as well as the recognition of foundations for investors, who come from civil law jurisdictions where trusts are not as favourably recognised. A strong legal system along with well-regulated and well-respected fiduciaries are critical considerations in determining the jurisdiction to house businesses built by families over many years, possibly over generations. The advantages of this type of stability are often not appreciated during the planning phase but are essential to protect generational wealth in the long term.

Funding the Basic Structure from South Africa

When considering the use of the Basic Structure as a hub for offshore investments, an important further consideration is South Africa's exchange control regime, which, notwithstanding the Treasury's pronouncements in the recent past, still operates under a negative bias framework where the export of capital from South Africa is generally prohibited, except under certain limited circumstances. Treasury has said that the South African exchange control regime would shift to a positive bias framework, where the export of capital would generally be allowed, subject to certain exceptions. Yet, at the time of writing this article, the shift has not yet materialised and South Africa's exchange control regime still limits the ability of South African tax residents to invest abroad.

Since February 2022, tax compliant South African private individuals may invest 'foreign capital in excess of R10 million foreign capital allowance per calendar year via foreign domiciled and registered trusts' (Exchange Control Circular No. 8/2022, the 'Circular'). This has expanded the use of offshore trusts which are already popular vehicles to hold foreign investment portfolios and, increasingly, international businesses. The Currency and Exchanges Manual for Authorised Dealers, the 'Manual', which was updated by the Circular as of 25 April 2022 at the time of writing, now provides that:

> *The Financial Surveillance Department will consider applications by private individuals who wish to invest in excess of the R10 million foreign capital allowance limit, in different asset classes. Such investments, if approved, could be facilitated via a foreign domiciled and registered trust. This dispensation would also apply to private individuals who have existing authorised*

"The Isle of Man offers well-regulated fiduciary service providers and it has the benefit of a long-running history of facilitating international investments for South African tax residents"

foreign assets, irrespective of the their value. In terms of the TCS system, a TCS PIN letter will be issued to the taxpayer that will contain the tax number and TCS PIN. Authorised Dealers must use the TCS PIN to verify the taxpayer's tax compliance status via SARS eFiling prior to effecting any transfers.

While South African private individuals have the financial conduct authority (FCA) available to them, South African corporates have a similar dispensation available, namely the foreign direct investment dispensation (FDI).

Under the FDI, South African corporates are entitled to make bona fide offshore investments into companies, including where the investment falls outside the company's current line of business of up to R5 billion per company, per calendar year without reference to the FSD.

The FDI requires obtaining a 'lasting interest' of the South African corporate in the offshore entity; broadly, this involves a long-term relationship and a significant degree of influence on the management of the offshore entity which has been determined to be 10% or more of the ordinary shares or voting power.

Practical example of the Basic Structure

In recent years, we have seen that a typical offshore structure has a dual purpose: it is often used as an umbrella structure for the creation and preservation of wealth and, as a second tier, the ownership structure for expanded international business operations. Such a structure would typically contain a discretionary trust (the 'Trust') holding two subsidiaries: a passive investment company for wealth preservation purposes ('Passive Co') and an active trading entity ('Op Co') which would transact and hold further subsidiaries in the family business.

Op Co should be able to utilise existing agreements for the avoidance of double taxation (DTA) between its jurisdiction (i.e. where Op Co is a tax resident) and the jurisdiction of the further subsidiaries in the family business. For example, DTAs would likely provide relief from certain withholding taxes such as dividend withholding taxes and interest withholding taxes, which are usually the most relevant for investors.

Most DTAs that we have encountered provide Article 9 for the application of the arm's length principle for the determination of where profits are to be taxed in terms of the so-called separate entity approach. Applying the above example, transfer pricing principles would require that, inter alia, the interest rate on a loan from Op Co to one of its subsidiaries would need to be at arm's length: both the lender's (e.g. Op Co) and borrower's (e.g. Op Co's subsidiary) perspective should be taken into account in determining whether, inter alia, the cost of the loan (principal and interest rate) are at arm's length and would be the same had Op Co and Op Co's subsidiary been independent third parties.

The relaxation of the prohibition on loop structures, which are subject to disclosure requirements and related amendments to the Income Tax Act, 1962, has attracted the attention of South Africans looking to invest abroad. In theory, one of the main advantages that arise because of the relaxation is that South African investors, including individuals and companies, are no longer required to operate expensive mirror structures where one subsidiary would be limited to South African investments with a sister company responsible for offshore investments. In practice, the application of the new rules relating to loop structures is still being developed and it is critical that the necessary approvals are in place well in advance before the transaction steps are finalised.

South Africans and their businesses are now, more than ever, in a position to become global citizens and the above is one example of how an offshore structure can be used. Compliance with South African tax and exchange control regulations is, however, only the first step in global expansion. The next, but equally critical step, is a thorough understanding of the regulatory environment in which the Basic Structure is established. Advisors and bankers in all offshore financial centres need to comply with stringent anti-money laundering and with countering the financing of terrorism regulations. Ultimately, the best advice becomes academic if funds cannot flow through the structure.

While the development of the local regulatory environment to facilitate offshore investments has been slow, important steps have already been taken; the above being only a few examples of these shifts.

CASE LAW WRAP-UP

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TAXPAYER M V SARS (IT 45585) *(14 January 2022)*

Issue

The issue before the Tax Court in this matter was the application and interpretation of sections 9(4) and 10(3) of the Employment Tax Incentive Act, No. 26 of 2013 ("ETI Act") to ascertain whether the appellant is entitled to recover the understated employment tax incentive ("ETI") amount.

Facts

The appellant ("the taxpayer"), a registered employer for purposes of withholding and payment of employees' tax, submitted its employer declaration ("EMP201") timeously for the ETI tax period, being 1 September 2017 to 28 February 2018.

The taxpayer was eligible to receive ETI in respect of its qualifying employees in terms of section 6 of the ETI Act and to claim R3,757,633.00 for the ETI tax period as a reduction of its Pay as You Earn ("PAYE") debt, of which R2,344,503.00 was claimed by the taxpayer. However, in submitting its self-assessment, the taxpayer underdeclared the full ETI amount that is eligible to receive.

The taxpayer objected to the self-assessment and, thereafter, submitted a revised EMP501 on 19 July 2018 in an attempt to have the correct tax refund amount assessed in view of the revised EMP501.

The taxpayer included the understated amount of R1,413,130.00 in its revised EMP501 and subsequently requested a refund from the respondent ("SARS") and requested a reduced assessment for the ETI tax period.

SARS disallowed the objection, and the taxpayer thereafter sought an alteration of its assessment and costs in terms of section 129(2)(b) and 130(1)(a) of the Tax Administration Act, No. 28 of 2011.

The taxpayer's case

The taxpayer contended that the understated ETI amount of R1,413,130.00 is an unclaimed amount and that it is entitled to a reduced assessment to that effect.

SARS' case

SARS argued that sections 9(4) and 10(3) of the ETI Act create a timeframe following which a taxpayer will not be able to claim an amount and therefore forfeits amounts claimed outside of this time frame.

The taxpayer had to have submitted its EMP501 by 31 May 2018 for the ETI tax period. As the taxpayer failed to claim the understated amount within the respective timeframe provided, in terms of sections 9(4) and 10(3) of the ETI Act, any unclaimed ETI amount would be construed to be nil.

Outcome

The Tax Court found in favour of the taxpayer and the assessment was altered to the effect that the taxpayer's entitlement to receive payment of the previously understated amount.

Core Reasoning

The Tax Court, as its initial point of departure, considered the relevant principles expressed in Cool Ideas 1186CC v Hubbard and Another where the fundamental test of statutory interpretation was expressed in so far as the words in a statute must be given their ordinary grammatical meaning unless this would lead to absurdity; furthermore, noting that a statutory provision should be interpreted purposively, properly contextualised, and construed consistently with the Constitution.

The Tax Court noted that, for purposes of this matter, the ETI Act does not expressly contain provisions pertaining to the forfeiture under which any eligible employer forfeits their claim to ETI.

VAT IT SA

WELCOMES NEW CORPORATE INCOME TAX DIRECTOR

VAT IT South Africa is pleased to announce the appointment of Nadia van Aswegen as the new Corporate Income Tax Director.

Nadia completed her SAICA articles with PwC and is a qualified Chartered Accountant (CA(SA)).

After completing her training contract, she joined PwC's Corporate International Tax department where she gained 9 years of valuable experience. Nadia managed integral projects and received various prestigious awards for serving clients and leading teams.

Throughout her career, Nadia gained valuable experience working with multi-national companies including JSE listed and mid-tier companies. She also obtained experience across a variety of industries including construction, healthcare, FMCG, and the entertainment and media industry. Her experience includes involvement in due diligence assignments, managing income tax compliance, income tax audits, the drafting of tax opinions, as well as voluntary disclosure applications and dispute resolution.

Nadia's achievements and career experience will undoubtedly prove valuable to VAT IT SA's new and existing clients. She has a passion for innovation and a talent for guiding clients through challenging tax legislation and finding tax-efficient solutions to meet their objectives. We firmly believe Nadia will enhance the support we provide to our clients and ultimately confirm VAT IT SA as one of the leading tax specialist firms in South Africa. **Read more here.**

You can contact Nadia for assistance with any Corporate Income Tax related matters

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Linkedin: https://www.linkedin.com/company/vat-it-sa

Section 2(1) of the ETI Act makes provision for the ETI whilst section 2(2) makes provision for two methods for an eligible employer to claim ETI. The first method is by deduction of the monthly qualifying amount from the employee's payable tax to SARS. The second method is by receiving payment of the ETI amount if such amount as contemplated in section 10(2) of the ETI Act.

The taxpayer's claim is based on section 2(2), whilst its entitlement to claim an excess amount at the end of an ETI tax period on its EMP501 is based on section 10(1).

Sections 9(4) and 10(3) are interpreted to prevent the taxpayer from claiming or benefiting twice for the same ETI.

The Tax Court upheld the taxpayer's stance that there is a distinction between the return for the relevant period in May 2018, and the relevant period itself ending on 28 February 2018, and held that a further distinction must be drawn between the date on which the relevant periods end and the date on which the deeming provisions of section 9(4) and 10(3) take effect (being 1 March 2018 and March 2018 respectively).

The Tax Court further interpreted section 10(3) to mean that at the end of the period for which the taxpayer is required to submit a return, the employer loses its entitlement to recover unutilised ETI by rolling it over to the next succeeding month or period.

Furthermore, section 9(2) and Section 9(3) were interpreted to mean that a taxpayer may fail to claim available ETI as an unclaimed amount and will be treated as an excess in terms of section 9(1). In this respect, the taxpayer did not lose the benefit of available ETI that it initially failed to claim.

By applying the relevant principles and interpreting the provisions purposively and in context, it is evident that the purpose of section 9(4) and 10(3) is that an employer cannot use a reimbursed unclaimed amount to reduce a further PAYE debt (or to benefit twice from the same ETI).

Takeaway

Timing is crucial in tax matters, and the meaning of legislation must be carefully considered in claiming incentive benefits. However, an error on the part of a taxpayer does not generally preclude correction.

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE V SASOL CHEVRON HOLDINGS LIMITED (CASE NO 1044/2020) [2022] ZASCA 56 (22 APRIL 2022)

Issue

The issue before the Supreme Court of Appeal ("SCA") in this matter was whether the High Court was correct in its

decision that the review application of Sasol Chevron Holdings Limited ("the taxpayer") was instituted within the prescribed 180-day period as required in section 7(1) of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA").

Facts

In 2014, the taxpayer purchased certain movable goods from Sasol Catalyst, a division of Sasol Chemical Industries (Pty) Ltd ("the supplier") for exportation from South Africa to Nigeria. As the vendor, the supplier elected to supply the goods to the taxpayer and levy tax at the zero rate in terms of section 11(1) of the Value Added Tax Act, No. 89 of 1991 ("VAT Act"). The taxpayer, however, did not export the goods within 90 days of the date of the sale as required by regulation 15(1) of the Export Regulations.

As a result, the supplier addressed a letter to SARS on 30 January 2015 for a VAT ruling extending the prescribed 90-day period within which the goods sold to the taxpayer were required to be exported in relation to its tax invoices issued during August to December 2014. Presumably, in anticipation that its request for an extension would be acceded to by SARS, the supplier had substituted the initial zero-rated tax invoices with replacement tax invoices, in which the taxpayer paid the VAT levied by the supplier at the then standard rate of 14%.

Subsequently, on 6 July 2015, the supplier applied to SARS for an extension of the time-period within which the taxpayer's application for a refund of the VAT paid for the goods concerned could be submitted to the Vat Refund Authority. In a comprehensive letter of 7 November 2016, SARS declined the application for such extension in relation to the tax invoices issued in August, September, and October 2014, however acceded to the supplier's request for the tax invoices issued in November and December 2014.
Following further representations made by the supplier to SARS to reconsider the application, SARS reiterated its previous stance in two subsequent letters dated 6 December 2017 and 26 March 2018, respectively. The taxpayer thus instituted a review application under PAJA seeking, inter alia, an order to review and set aside SARS' decision of 6 December 2017. The present appeal by SARS, with leave of the High Court, is directed against that order.

The taxpayer's case

The taxpayer adopted the stance that the review application was instituted within 180 days after the dates stipulated in paragraphs (a) and (b) of section 7(1) of PAJA. It, therefore, embraced the reasoning that prevailed in the High Court, which in essence held that although SARS took its decision on 6 December 2017, it provided its reasons in support thereof on 26 March 2018. Therefore, as the review application was instituted on 21 September 2018 (and then served on 25 September 2018), this meant that it was still within the 180-day period prescribed by section 7(1). Hence, it concluded that it was not necessary to apply for an extension of time under section 9(2).

SARS' case

In opposition to the taxpayer's case, SARS argued that its letter of 26 March 2018 was no more than a recapitulation of the position that it had consistently adopted since 2016. In doing so, it contended that its impugned decision was not taken on 26 March 2018, but instead on 6 December 2017. This meant that the High Court was not empowered to enter into the substantive merits of the review application, and instead, should have dismissed the review application on the basis that it was instituted outside the 180-day period without an application for the extension of that period as required in terms of section 9(2) of PAJA. It also relied on the case of Aurecon South Africa (Pty) Ltd v City of Cape Town [2015] ZASCA 209 ("Aurecon") to contend that section 7(1) of PAJA explicitly provides that the proverbial clock begins to tick from the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to the taxpayer.

Outcome

The SCA found in favour of SARS and the appeal was upheld with costs awarded against the taxpayer.

Core reasoning

In view of the fact that section 7(1) of PAJA is a time limitation provision, the SCA had emphasised throughout its judgment, that the taxpayer did not bring any application for the extension of the 180-day period in terms of section 9(2) of PAJA.

Further, the SCA made reference to the case of Mostert NO v Registrar of Pension Funds and Others [2017] ZASCA 108, which emphasised its rationale that "[a]bsent such extension the court has no authority to entertain the review application at all".
As for the SARS' reliance on the Aurecon case, the SCA found it to be of considerable force, the fact that the parties continued to exchange further correspondence beyond 6 December 2017 did not detract from the truism that SARS' impugned decision was taken on 6 December 2017. It went on to say that, taking as one's logical point of departure, the requirement in section 7(1) that "any proceedings for judicial review … must be instituted without unreasonable delay and not later than 180 days' after either of the dates referred to in paragraphs (a) and (b)", the word "institute" when considered contextually and purposively, as it must be, means to commence the review proceedings by issuing the process and effecting service thereof on the decision-maker whose administrative action is impugned. As such, the SCA held that taxpayer's review application was instituted outside the 180-day period prescribed in section 7(1).

Takeaway

The takeaway, in this case, is that where a litigant foresees that it might be hit by the time limitation provision of section 7(1) of PAJA, it remains necessary for it to always consider the appropriateness of an application for the extension of the 180-day period under section 9(2) of PAJA.

TAXPAYER H V COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE (SARSTC IT14213) (9 FEBRUARY 2022)

Issue

The issues before the Tax Court in this matter were two-fold, i.e., (i) whether the interest sought to be deducted by the appellant ("the taxpayer") was incurred whilst carrying on a trade; and (ii) whether it was incurred in the production of income.

Connected to the two issues was the question of whether the respondent ("SARS") had successfully discharged its onus resting for the imposition of the understatement penalty against the appellant.

Facts

The taxpayer is an investment holding company with its assets comprising, in the main, unlisted shares in subsidiary entities, loans advanced to the subsidiaries and cash. It claimed that during the time relating to this appeal (2011 year of assessment), it conducted a trade in money lending with a specific purpose of making a profit from on-lending borrowed funds to its subsidiaries. All money borrowed was free of interest, according to the appellant, and was used for share investing activities, whilst interest bearing borrowings were applied towards lending to such subsidiaries.

Pursuant to an audit, SARS issued a letter of findings to the taxpayer and noted its intention to disallow the intertest deduction of R68 133 602.00. Instead, SARS would limit the allowed deduction to the amount of interest received (R34 936 000.00) and levy an understatement penalty. The letter recorded that SARS had concluded that the interest was not incurred whilst carrying on a trade, nor was it incurred in the production of income.

SARS accordingly allowed a partial deduction, stating that this was informed by the long-standing practice as set out in Practice Note 31 read with section 5(1) of the Tax Administration Act, No. 28 of 2011.

In its letter of response dated February 2015, the taxpayer disputed the respondent's conclusions, stating that notwithstanding its lending trade not being profitable in 2011, it was profitable in 2012. SARS finalised its audit on 8 April 2015 and issued the additional assessment on 28 April 2015. The appellant's objection having been disallowed, followed by a notice to appeal, led to the present appeal. For the sake of completeness, in September 2017, the appellant paid the full tax debt together with interest in the amount of R14 764 642.00. In addition, SARS withheld an amount of R1.6 million that was due to the appellant as set off against the same disputed debt.

The taxpayer's case

The taxpayer called its own witness, Ms Y, a chartered accountant, responsible for its tax compliance. Ms Y wrote the letter sent to SARS and conducted her own investigation into the SARS queries. Ms Y confirmed that the taxpayer only lent to the group subsidiaries and further that, after testifying with reference to the relevant annual financial statements of the taxpayer, she stated that the figures confirmed that the taxpayer had a profit motive. Ms Y testified that the taxpayer's profit motive was that for approximately five of the six years post 2011, the taxpayer demonstrably made a profit.

The taxpayer thus argued that the interest expense was incurred whilst carrying on a trade and was thus deductible in full. There was no basis for SARS to levy the understatement penalty.

The taxpayer's case rested on it being incorrect for SARS to evaluate the questions of its practice, as set out in the Practice Note, as an issue between the parties. The appellant opined that this was never an issue between the parties, and that it is common cause that in disallowing the interest deduction, SARS relied on its Practice Note.

SARS' case

SARS presented its case through the evidence of Ms G, a financial specialist, who confirmed that she noticed that the interest paid was always in excess of interest received, with the exception of 2008, where the interest received equalled that incurred.

Ms G noted that she did not account for bank interest in assessing the taxpayer's profit motive for its lending activities, because such interest was a result of cash pooling or cash management activities and had nothing to do with the appellant's lending trade. She further testified that the individual loans carried no security, were not recorded, and had no terms, and the taxpayer did not incur any other expense and had no staff to demonstrate how it managed the loans.

As to the understatement penalty levied by SARS, Ms G referred to the incorrect deduction which, in SARS' view, was not permissible in terms of section 24J(2) and, as a consequence, was prejudicial to SARS and the fiscus, and all the information uncovered during the audit was always with the taxpayer's knowledge. SARS thus considered that there was a substantial understatement and levied a 10% understatement penalty. Ms G concluded that the respondent had appropriately levied the penalty.

Specifically, SARS argued the following further points in contention –

I. The taxpayer borrowed at an interest rate of 8.28% per annum, but extended loans to subsidiaries at interest rates of between 0%, 5.29%, 6.22% and at times, 8.29% per annum. The interest rates imposed by the taxpayer demonstrated no commercial sagacity and exposed the appellant's transactions as nothing more than furthering the

group's interests, by enhancing the earning capacity of the subsidiaries. The transactions, according to SARS were about funding unproductive loans.

II. The taxpayer's borrowings were far less than its receivables; and

III. The taxpayer's lending transactions extended only to its subsidiaries.

Outcome

The appeal was dismissed with costs awarded against the taxpayer.

Core reasoning

The court reasoned that it was not common cause, nor correct that SARS relied on Practice Note 31 in disallowing the interest deduction. The undisputed facts are that the interest expenses, in SARS' view, based on the requirements in section 24J(2), are not deductible. However, in allowing the partial deduction, it relied on the Practice Note as a common practice. The court held that the Practice Note is a non-issue.

In considering whether the taxpayer was carrying on a trade as a money lender at the time, the court held, by citing Solaglass Finance Co. (Pty) Ltd v Commissioner for Inland Revenue 1991 (2) SA 257 (A) ("Solaglass"), that the following guidelines are a means of establishing whether one is carrying on a trade as a moneylender or banker, where there had to be an intention to lend to all and sundry provided they were, from the taxpayer point of view, eligible:

I. The lending had to be done on a system or plan which disclosed a degree of continuity in outlays and re-obtaining capital for further use and which involved a frequent turnover of the capital.

II. The obtaining of security was a usual, though not essential, feature of a loan made in the course of a moneylending business.

III. The fact that money had on several occasions been lent at remunerative rates of interest was not enough to show that the business was of moneylending was to be continued. There had to be a certain degree of continuity about the transactions.

IV. As to the proportion of the income from loans to the total income, the smallness thereof could not be decisive if the other essential elements of a moneylending business existed.

The court also held that the principles in Solaglass also guided the court in ITC 1771, where SARS' decision to disallow a deduction for revenue loss was confirmed. This led to the court concluding on this aspect that the appellant was not carrying on a trade in moneylending.

As to the lack of profit motive, the court referenced the rates of interest charged when on-lending and the fact that the loans carried no terms. It took cognisance of SARS' contention that the taxpayer could never earn any interest income, let alone profit, as it borrowed money at high rates on-lent at either zero, substantially less interest or at the same interest rate that it was charged.

As to whether the interest expense was incurred in the production of income, the court held that the important and overriding factor is the purpose for which the expenditure was incurred and what it effects. The court is required to assess the closeness of connection between the expenditure and the income earning operations. After analysing the transactions, the court held that the taxpayer's lending transactions demonstrated neither a profit-making purpose nor the intention to produce income, and the taxpayer failed to demonstrate that the interest expenses were incurred in the production of income.

Takeaway

The concept of commercial expediency and the indirect facilitation of the taxpayer's trade must relate to the taxpayer's own trade.

BINDING RULINGS

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BINDING PRIVATE RULING: BPR 371 PUBLIC BENEFIT ACTIVITIES CARRIED ON FOR THE BENEFIT OF THE GENERAL PUBLIC (9 MAY 2022)

Issue

This ruling determines whether activities carried on by a public benefit organisation will comply with the requirements of the definition of a "public benefit organisation".

Facts

The applicant was established by company A. The applicant is required, by agreement with a third-party donor, to make quarterly contributions to socio-economic and enterprise development initiatives in neighbouring communities.

The applicant is an approved public benefit organisation. It applies contributions by donors for the benefit of local communities.

Contributions must be directed towards those in need in a specified geographical area. The proximity and need factors are therefore the criteria according to which beneficiaries are selected. The applicant must assist communities in certain focus areas, including –

- socio-economic development.
- enterprise development.
- education and skills development.
- job creation.
- health care; and
- safety and security.

The applicant's funding round starts with a request for proposals from the general public made through established community forums, including community hall initiatives.

A committee established by the applicant reviews the proposals and conducts a detailed evaluation process. A shortlist of projects is then submitted to the trustees for further deliberations.

The feasibility of the projects, as well as their projected social impact on the relevant communities, are evaluated. Projects which are aligned with the applicant's objectives and public benefit activities will be selected based on definite and quantifiable public benefit being demonstrated by a a funding application. Project funding will not be awarded based on any personal or other relationship with the trustees, the applicant, or any of its associated entities.

The proposed transaction will involve the funding of four projects: a bakery, vegetable tunnels, a poultry project and a small manufacturing concern.

The applicant considers that the proposed transaction will benefit the local community as amounts awarded will result in the creation of employment, skills development, and the enhancement of local enterprise.

Ruling

This ruling made in connection with the proposed transaction is as follows:

a. The proposed transaction will comply with paragraph (c)(i) of the definition of a "public benefit organization" in section 30(1).

BINDING PRIVATE RULING: BPR 372 WITHHOLDING TAX ON FOREIGN ROYALTIES (10 MAY 2022)

Issue

This ruling provides direction relating to whether lease payments for the use of equipment will constitute royalties in terms of a tax treaty between South Africa and another country, and whether the withholding taxes to be levied will meet the requirements of section 6quat(1A).

Facts

The applicant and the co-applicant are resident companies that own and let equipment in South Africa. Where there is an additional demand in certain other countries, such equipment

will, by prior arrangement, be provided on a temporary basis to entities resident in those countries in exchange for rental payment that cover the cost for the applicant and the co-applicant. Each of the foreign countries concerned has entered a convention with South Africa for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (treaty). In each case, the treaty defines a royalty in article 12 as, amongst others, “payments of any kind received as a consideration for the use of, or the right to use, industrial, commercial or scientific equipment”.

The equipment is made available for an extended period to the foreign entities and the following will be agreed:

- The equipment will remain in the foreign country during the peak season until demand has dropped, as opposed to returning them to South Africa on the completion of each individual lease to an individual customer concerned.
- The foreign entities will –
  - » have full access and possession of the equipment to make business related rentals.
  - » assume responsibility for any risk as regards damage, theft, etc.
  - » take responsibility for repairs, maintenance, insurance, etc.
  - » make the equipment available only for business related rentals in the foreign country and not for private or other matters; and
  - » return the equipment where it makes economic sense for both the applicant and the co-applicant and the foreign entities.

Conditions and assumptions

This BPR is subject to the following additional conditions and assumptions:

a. Neither the applicant nor co-applicant has a permanent establishment in the foreign countries.

Ruling

The ruling made in connection with the proposed transaction is as follows:

a. the amounts to be paid to the applicant and the co-applicant will constitute royalties as defined in the relevant treaties.
b. any amounts which must be withheld as withholding taxes on those royalties under the laws of the countries concerned will meet the requirements of section 6quat(1A) and the applicant and the co-applicant will therefore be permitted to claim rebates in respect of the withholding taxes which are levied by the other countries in terms of article 12 of the relevant treaty; and
c. no view is expressed on any potential transfer pricing implications of the proposed transaction.

BINDING GENERAL RULING (INCOME TAX): BGR 60 DISQUALIFICATION AS A QUALIFYING COMPANY UNDER SECTION 12R(4)(B) (22 FEBRUARY 2022)

Issue

This ruling provides guidance on the interpretation and application of the excluded activities under section 12R(4)(b) conducted by a qualifying company located within a Special Economic Zone (“SEZ”). It does not address any aspect of the accelerated building allowance available under section 12S. This ruling sets out SARS’ view.

Facts

The disqualified activities under section 12R(4)(a) relate to certain specific manufacturing activities that are not targeted as part of the income tax incentive. Section 12R(4)(b) allows for the Minister to proclaim through the issuing of a gazette certain further non-manufacturing activities

to constitute a disqualifying activity. The list of non-manufacturing activities in the gazette relate mainly to ancillary activities that support the main trade of a qualifying company.

Both subsection 12R(4)(a) and (b) refer to “a company that conducts any activity” and “is not a qualifying company”. Applying the same strict interpretation under both paragraphs, as is required following the judgement in Western Platinum Ltd v C: SARS, would result in a qualifying company being disqualified to participate in the income tax incentive as it is conducting a disqualified activity under section 12R(4)(b), which may only be an ancillary activity to the main trade of the qualifying company.

Such an interpretation creates an absurdity as some of the activities listed in the Government Gazette are required to be undertaken as part of most business processes. The proper approach to the interpretation of statues was decided in the case of Natal Joint Municipal Pension Fund v Endumeni Municipality in which the judgment confirmed that it is incorrect to simply apply a purposive interpretation if the ordinary meaning does not give rise to an absurd or ambiguous result. In the case of an absurd or ambiguous result, a sensible and business-like interpretation taking into account the purpose of the legislation should be adopted.

The courts also noted that it is important when giving words and expressions their ordinary meaning, to consider the context in which such words or expressions is contained. Since the purpose of the SEZ regime is to promote investment in certain under-capitalised manufacturing and industrial sectors and thereby create jobs, a business-like interpretation must be adopted. This interpretation would mean that, if an activity listed in the said Government Gazette is ancillary to the manufacturing or industrial process undertaken by the qualifying company, then the qualifying company would not be disqualified from the income tax incentive under section 12R(4)(b). However, if any activity under section 12R(4)(b) is a separate income-earning activity that is conducted on a continuous basis, then that activity would result in the disqualification of that company as a qualifying company.

Ruling

A qualifying company will be disqualified from the income tax incentive under section 12R for that year of assessment if it conducts any activity listed in the Government Gazette. However, where that activity is an integral part of the manufactured product to protect or transport the final product, it is accepted that it is not disqualified, provided the secondary product is not sold separately.

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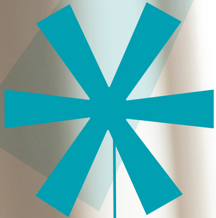

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