

Special Voluntary Disclosure Programme

Introduction

The Special Voluntary Disclosure Programme (SVDP) which will commence on 1 October 2016 for a period of 6 months, has two parts: disclosures relating to tax, which concerns the South African Revenue Services (SARS), and disclosures relating to foreign exchange control, which concerns the South African Reserve Bank (SARB). SARS has published its first draft legislation on 12 April 2016, and the new draft legislation was published on 20 July 2016.

A media statement was made available on 24 February 2016 which outlined both the SARS and SARB sides of the SVDP, and the first draft legislation from SARS was very similar to what was announced in the first media statement. However, the new draft legislation has a completely new approach, which is discussed below. As this is not the final legislation, more changes can be expected, and we only hope that they do not prove to be drastic.

SARB made its notice on the SVDP available on 13 July 2016, which follows closely with what was announced in the media statement of February. No material changes to the SARB's position are expected, although changes may still be made.

SARS

Initial draft legislation

Initial SARS submissions were structured in such a way that only 50% of all previously undisclosed income would be included in taxable income, and 100% of all investment returns since 2010 would be included in the taxable income. However, with the new draft legislation SARS has departed from the approach of differentiating between 'active income' or 'seed capital', and 'passive income'.

New draft legislation

In terms of the recent Tax Laws Amendment Bill, SARS will now exempt all tax on previous undeclared income, and will tax 50% of the 'untaxed' foreign assets at its highest value during the period of 1 March 2010 and 28 February 2015 ('the period'). The new draft legislation therefore provides that 50% of the highest value of the aggregate of all foreign assets between 1 March 2010 and 28 February 2015 that were derived from undeclared income, be included in taxable income and subject to tax in South Africa. The value of the assets will be the market value, determined in the relevant foreign currency, and translated to South African Rand at the spot rate at the end of the tax period in which the highest value fell.

Calculation

It will therefore be necessary to calculate the value of foreign assets for every month of the period between 1 March 2010 and 28 February 2015, exclude any part which is not derived from undeclared income, translate the amount to South African Rand at the relevant spot rate, and determine what the highest value during the period was. Half of that amount will then be included in taxable income in the 2015 tax year.

Donations tax and estate duty liabilities

The new media statement and the explanatory memorandum that were published together with the initial draft legislation, provides that undeclared income that originally gave rise to the assets would be exempt from income tax, donations tax, and estate duty liabilities that may have arisen in the past. However, we believe that the wording of the new draft legislation does not currently give effect to this intention. It is therefore unclear whether past transgressions regarding donations tax and estate duty liabilities will be forgiven.

Deeming provisions: Assets disposed of before 1 March 2010

Furthermore, should a taxpayer wish to apply for relief in respect of assets disposed of prior to 1 March 2010 (other than by way of a donation or loan to a trust), special deeming provisions are available in order to enable him to do so. For example, if a taxpayer had undeclared income but spent it before 1 March 2010, he would be able to make use of the SVDP through special deeming provisions which provide that he may elect to have the assets deemed to be held by him during 1 March 2010 to 28 February 2015. The assets' value will then be the highest value while actually held and not disposed of, calculated the same as with normal assets, or where that value cannot be determined, a reasonable estimate of the value will be accepted.

Deeming provisions: non-resident trusts

Trusts may not participate in the SVDP, however, donors and beneficiaries of non-resident trusts may apply through deeming provisions, by electing to have the foreign assets deemed to have been held in their estate. Various requirements apply in this regard. Once the election has been made to have the assets deemed to have been held by the person, that person will be deemed to have dealt with the assets in the same manner the trust has, will be liable for capital gains on the disposal of the asset, and the deceased estate may be liable for estate duty on the value of the asset. See addendum A for more details.

Capital gains effect

The current effective Capital Gains Tax (CGT) rate is 16.4%, at the highest marginal rate. The effective tax rate under the SVDP, at the highest marginal rate, is 20.5%. It may therefore be beneficial under the current draft legislation to make use of the normal voluntary disclosure programme instead of the SVDP in the case of CGT rich assets.

SARB

For the disclosure of exchange control contraventions, relief may be granted to South African residents if the unauthorised foreign assets for which the relief is sought were held on or before 29 February 2016. Full disclosure of all unauthorised foreign assets has to be made, including the source

of all such assets and details of the manner in which the assets were transferred and retained abroad.

A levy will be raised based on the market value of the assets as at 29 February 2016, calculated as follows:

- **If the assets are repatriated: 5%** of the value of the assets, or the sale proceeds thereof, which must be paid from foreign-sourced funds;
- **If the assets are retained abroad: 10%** of the value of the assets, which must be paid from foreign-sourced funds;
- **If the 10% levy cannot be paid from foreign-sourced funds: 12%** of the value of the assets, if the assets are retained abroad, and the levy cannot be paid from foreign-sourced funds.

Examples of foreign assets held that may give rise to the need for an application to SARB:

- Sale, cession or assignment of intellectual property by South African residents, without FinSurv approval;
- Foreign liabilities incurred to acquire foreign assets with recourse to South Africa, without FinSurv approval;
- Acquisition of a direct or indirect interest in a foreign asset as a result of retention of funds abroad which should have been repatriated to South Africa, or as a result of remitting funds abroad without FinSurv approval (for example, acquisition of foreign securities, retention abroad of export proceeds, unauthorised spending on credit cards resulting in foreign assets, inheritances from South African deceased estates with unauthorised foreign assets); and
- Loop structures (which must be unwound).

Deeming Provisions

Although resident trusts may participate in the SARB SVDP, non-resident trusts may not. Resident donors in relation to discretionary non-resident trusts may elect that the foreign assets held by the trust which are in contravention of the Income Tax Act (ITA) or the Estate Duty Act (EDA), are deemed to have been held by them. A levy equal to 5% or 10% of the value of the asset will be payable, depending on whether or not the assets are repatriated. See Addendum A for more information of the deeming provisions.

Administrative relief outside of the SVDP

Disclosure of other type of contraventions, and previous contraventions which are no longer regarded as contraventions, can also be made to SARB, outside the ambit of the SVDP, and therefore not by way of an SVDP application. Instead, disclosure will have to be made to FinSurv via an Authorised Dealer. Most of these disclosures will not give rise to a levy.

Disclosures can be made in the following cases:

a) Natural Persons:

- **Immigrants** are required to declare whether they are in possession of any foreign assets, and to undertake that they will not place such foreign assets to the disposal of another South African resident. Immigrants who have not done so will have the opportunity to do

- so before 31 March 2017, which declaration will regularise the possession and retention abroad of the foreign assets;
- **Foreign inheritances and legacies received from non-resident estates prior to 17 March 1998** had to be declared, and residents who have not done so will have the opportunity make the declaration before 31 March 2017, which declaration will regularise the possession and retention abroad of the foreign assets;
 - **Foreign inheritances and legacies from resident estates with foreign assets** have to be declared to Finsurv:
 - o Where the foreign assets were previously held in compliance with the regulations, the retention of the assets abroad will be allowed subject to the condition that the foreign assets may not be placed at the disposal of other residents, or used to create a loop structure. No levy will be payable by the resident.
 - o Where the foreign assets were previously held in contravention of the Regulations, such assets must be repatriated to South Africa and no levy will be payable, however, if the assets are retained abroad, a 10% levy will be payable. Loop structures must be unwound.
 - o Where the resident beneficiary held the foreign assets inherited in contravention of the Regulations, for example the *beneficiary* created a loop structure *after* receiving the inheritance, the beneficiary must apply for administrative relief under the SVDP, and the relevant levies will apply.
 - **Foreign earned income prior to 1 July 1997** had to be repatriated to South Africa, and residents who have not done so may declare such income before 31 March 2017, which declaration will regularise the possession and retention abroad of the foreign assets.

b) Corporate entities and approved foreign investments (AFI):

- Declaration and regularisation can be done by residents with approved foreign investments who have not, prior to 29 February 2016, and not in compliance with the approval granted:
 - o Annually submitted financial statements and progress reports to FinSurv;
 - o Lodged share certificates in respect of such AFI with Authorised Dealers;
 - o Placed the expansion of their AFI on record with FinSurv;
 - o Declared and repatriated dividends prior to 26 October 2004;
 - o Placed on record with FinSurv the disposal of all or part of the AFI, including dilution of interest by issuance of new shares, and / or where the proceeds of such disposal have not been repatriated to South Africa
- Declarations relating to failure to declare dividends, which were not repatriated to South Africa, and where such dividends were not used for purposes of the AFI, or the proceeds from a dilution or disposal of an interest were not repatriated to South Africa, must be dealt with by way of the SVDP, and a levy may be payable.

A voluntary disclosure made to SARB outside of the SVDP will result in a settlement of between 10% and 40% of the current market value of the unauthorised foreign assets having to be paid, however, if no voluntary disclosure is made either within or outside the SVDP, FinSurv may recover the full amount of the contravention.

Addendum A: Deeming Provisions regarding non-resident trusts

SARS

A trust, resident or non-resident, cannot participate in the SVDP for SARS's purposes.

However, a person who, in relation to a discretionary non-resident trust, is a donor or beneficiary, can make application under the SVDP if they elect that any foreign asset, which was held by the discretionary trust during the period of 1 March 2010 to 28 February 2015, be deemed to have been held by them for purposes of all tax Acts.

The election therefore creates a fiction that the assets were held by the donor or beneficiary, instead of by the trust. For as long as the fiction is in place it has the result that the asset is treated for all purposes as if it is really held by the person and not by the trust.

Certain requirements and consequences apply:

The applicant:

- in relation to a non-resident discretionary trust,
- the person must be a donor (or the deceased estate of a donor);
- or a beneficiary; and
- that person must elect that the asset be deemed to have been held by him for purposes of all tax Acts.

The assets:

- must be situated outside South Africa,
- must have been held by a discretionary non-resident trust between the period of 1 March 2010 and 28 February 2015,
- must have been acquired by the trust by way of a donation or derived from such a donation,
- must have been wholly or partly derived from any amount not declared to SARS as required by the EDA or the ITA, and
- must not have vested in a beneficiary at the time that the election is made.

The consequences:

The person is deemed to have

- held the asset from the date on which the trust acquired the asset,
- received the same income and incurred the same expenditure in respect of that asset than the trust did, and
- dealt with the asset in the same manner as the trust dealt with the asset.

Termination of fiction:

The person is deemed to have held the asset until

- the trust disposes of the asset,
- the person would be treated as having disposed of the asset in terms of the ITA, or
- in the case of a deceased estate, company or other juristic person, the day before that person ceases to exist.

When the fiction terminates, the person must be treated as having disposed of the asset for consideration equal to the market value at date of disposal. The asset now forms part of personal estate for Estate Duty purposes.

SARB

SARB allows for participation in in the SVDP by a resident trust, but not by a non-resident trust.

However, similar to the SARS deeming provisions, the donor of a discretionary non-resident trust may, by way of electing the assets to be deemed to have been held by him, participate in the SVDP. Once again a fiction is created by the election, and the consequences are similar to those stipulated under the SARS section above.

Depending on whether or not the unauthorised asset is repatriated, a levy of 5% or 10% of the value of the unauthorised asset as at 29 February 2016, will be payable.

There are certain differences in the requirements and consequences to the SARS deeming provisions, and the details for the SARB are therefore set-out separately:

The applicant:

- a South African resident,
- who is a donor (or the deceased estate of a donor),
- in relation to a discretionary, non-resident trust,
- elects that the foreign asset be deemed to have been held by him.

The asset:

The asset must

- have been held by the trust on 29 February 2016,
- have been acquired by the trust by way of a donation, made by a South African resident (who has transferred or accumulated funds abroad, irrespective of whether it was done in contravention of the Regulations),
- have been wholly or partly derived from any unauthorised asset or any amount not declared by the donor to SARS as required by the ITA or the EDA, and
- not have been vested in any beneficiary at the time of the election.

Duration of fiction:

- The person who made the election is deemed to have held the asset from the date that the trust had acquired it,
- Until the trust disposes of the asset to any other person, at which date that person will be deemed to have disposed of the asset for consideration equal to its market value at date of disposal.