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Further update on the Special Voluntary Disclosure Programme in respect of offshore assets and income

2 February 2017 *6 min read*

INTRODUCTION

In terms of the Explanatory Memorandum on the Special Voluntary Programme ("SVDP"), the SVDP will be deemed to have come into effect on 1 October 2016 and will apply for a limited window period of eleven months up to 31 August 2017. The success of the current Voluntary Disclosure Programme is attributable, amongst other things, to the Common Reporting Standard ("CRS"), which is a new global standard for the automatic exchange of financial account information between tax authorities. Effectively, certain specific financial information will be automatically and regularly "pushed" to the state of tax residence of the beneficial owner of the financial assets.

THE COMMON REPORTING STANDARD

The result of CRS is that there will no longer be anywhere to hide, so to speak. In the case of South African tax residents, foreign financial institutions in participating countries will now gather information periodically on all account holders and send that information to SARS, who can then cross-check that information against their database to see if a taxpayer has declared that income (or asset) and is tax compliant in respect thereof. South Africa is an early adopter of CRS and will exchange and receive information from other early adopter countries as from September 2017 (after the window period for the SVDP has closed).

Under the current VDP, a non-compliant taxpayer would have to apply to the SARS VDP Unit for relief from understatement penalties and separately to the Financial Surveillance Department of the South African Reserve Bank for any exchange control contraventions. However, under the SVDP these two processes are now streamlined into one joint process in terms of which a single application for both tax and exchange control contraventions are submitted through the SARS eFiling platform. A comparison of the current tax VDP process and the SVDP is summarised below.

Current Tax VDP Process (VDP)		**New (Special) Tax VDP Process (SVDP-T)**	
1	Ongoing.	1	Commenced on 1 October 2016 and ending on 31 August 2017.
2	No time limitation on periods available for disclosure but in practice SARS accept 1 March 2001 as historical cut off.	2	Periods available for disclosure: 1 March 2010 – 28 February 2015
3	Tax rates: normal rates apply as per each tax year. Full donations tax if applicable.	3	40% of the highest market value of assets between above period will be included in taxable income.
4	Full, simple, interest, but no penalties.	4	No interest for 1 March 2010 to 28 February 2015.
5	50% add back of portfolio management fee costs, no deduction of trustee fee fees.	5	No other interest charged, and no penalties charged.
6	If in a trust or foundation, then excluded from estate duty (and excluded from death CGT).	6	Election for trusts and trust assets, which then fall into estate of elector for estate duty purposes (and for death CGT purposes).
Current Exchange Control Regularisation Process (Fin-Reg)		**New (Special) Exchange Control VDP (SVDP-E)**	
1	Levies	1	Levies

a)	Standard if funds retained abroad: 25% (living funder).	a)	Standard if funds left offshore: 10%.
b)	Standard if funds returned to SA: 20% (living funder).	b)	Standard if funds returned: 5%.
c)	Standard if immovable property: 35% (living funder).	2	No special dispensation for deceased funders.
d)	Standard if deceased funder but retained abroad: 10%.	3	If invested in immovable property: 12% levy (if no repatriated funds available).
e)	Standard if deceased funder but returned to SA: 0%.	4	No levy for reportable deceased estates, but must be placed on record.
2	Separate Application Process.	5	Linked (joint) Application Process with SARS.

Contraventions in respect of Value Added Tax, Skills Development Levies and Unemployment Insurance Fund Contributions are excluded from qualifying for relief under the SVDP. Further, taxpayers may still apply even they do not have any assets situated abroad post 1 March 2010 but are concerned that they might be identified through one of the global data leaks ie. HSBC and Panama Papers. Where the value of the contravention assets in this scenario cannot be determined, the Commissioner may agree to accept a reasonable estimate of the value of the said assets.

The question as to which disclosure programme would lead to the best outcome is dependent on each applicant's personal facts and circumstances. One is only allowed to apply for the SVDP if the facts fall within the time limitation stipulated above. However, if an applicant falls within the relevant time period limitation of the SVDP, the SVDP is a good option due to the fact that there is no interest for 1 March 2010 to 28 February 2015 and any undeclared income that originally gave rise to the assets abroad, will be exempted from income tax, donations tax and estate duty in the past (based on the method of calculation). Further, as the SVDP only requires the market value of the assets, less information is required (ie. each transaction need not be analysed). Another difference between the current tax VDP process and the SVDP is that trusts will not qualify for the SVDP. However, settlors, donors, deceased estates and beneficiaries of foreign discretionary trusts may participate in the SVDP if they elect to have the trust's offshore assets and income deemed to be held by them for tax purposes. This also means that the said assets will fall into their estates until such time that the asset is disposed of by the trust, the person is treated as having disposed of the asset in terms of the Income Tax Act or in the case of a deceased estate, company or other juristic person, the day before that person ceases to exist by operation of law.

On the exchange control side, the new special exchange control SVDP no longer makes provision for a deceased funder but on the other hand, the levies have been considerably reduced for living funders, both in respect of whether or not they elect to retain the funds offshore or repatriate the funds to South Africa. The levy for standard immovable property has also been considerably reduced.

CONCLUSION

In summary, the SVDP (in respect of both tax and exchange control) is favourable for applicants wishing to come forward and disclose their offshore activities in order to regularise their tax affairs before September 2017.

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