

Special voluntary disclosure and exchange control relief

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INTRODUCTION

Following the announcement of the Special Voluntary Disclosure Programme (SVDP) in the 2016 Budget Speech and the release for public comment of the initial draft revenue bills on 24 February 2016, the Minister of Finance published revised draft revenue bills on 19 July 2016 (Bills).

The SVDP provides non-compliant persons with "a final window of opportunity" to disclose their undisclosed offshore assets and income before the introduction of the new global standard for economic exchange of information between [tax](#) authorities, also known as the Common Reporting Standards (CRS), in September 2017. The CRS will require governments to obtain detailed account information from financial institutions and to share such information with other jurisdictions on an annual basis.

The enactment of the Bills will lead to the South African Revenue Service (SARS) and the South African Reserve Bank (SARB) expanding the existing Voluntary Disclosure Programme (VDP) rules for a limited period of six months from 1 October 2016 to 31 March 2017.

Applications for the SVDP must be submitted through the SARS efilings system in accordance with the current provisions contained in the Tax Administration Act. Applications will be considered by the SVDP unit which is jointly operated by the Financial Surveillance Department of SARB (FinSurv) and SARS.

Eligibility to apply for the SVDP for tax purposes is limited to individuals and companies who are not aware of any current and/or pending audits or investigations in respect of their foreign assets or foreign taxes. Trusts are specifically excluded from applying for the SVDP for tax purposes. However, settlors, donors, deceased estates and beneficiaries of foreign discretionary trusts may participate only in so far as they elect to have the trust's offshore assets and income deemed to be held by them. Persons would furthermore be ineligible to apply for the SVDP in respect of any amounts relating to information gathered by SARS through the international exchange of information procedure.

For exchange control purposes, both residents (individuals, sole proprietorships, partnerships, deceased estates, insolvent estates, South African trusts, close corporations and companies) and former residents would be entitled to regularise their unauthorised foreign assets. These persons would, however, be ineligible to apply if they are the subject of any current and/or pending investigation by FinSurv for contraventions of the Exchange Control Regulations, (Regulations).

TAX RELIEF

The Bills propose the following relief for tax purposes:

- 50% of the highest value of the aggregate of all assets situated outside of South Africa between 1 March 2010 and 28 February 2015 that were derived from undeclared receipts and accruals will be included in taxable income and subject to tax in South Africa. Thus the effective rate of tax will be 50% of 41% = 20.5%. Note that this is not limited to income, but apply to all receipts and accruals that should have been declared, which include exempt items and capital receipts (including sales of capital assets).
- The value to be calculated is the market value of the asset in the foreign currency, which must be translated to Rand at the spot rate at the end of each year of assessment, i.e. last day of February 2011 to 2015, inclusive.

- The undeclared receipts and accruals that originally gave rise to the aforementioned assets will be exempted from income tax, donations tax and estate duty for all years prior to 28 February 2015. This effectively indemnifies the taxpayer against all taxes and actions by SARS for all years prior to that date, but then the tax at the effective rate of 20.5% referred to above will be payable instead. Future income will, however, be fully taxed and assets declared will remain liable for donations tax and estate duty in the future, should the applicant donate these assets or pass away while holding them.
- Where the assets are held in a discretionary trust, the donor (or his or her deceased estate) or a beneficiary may elect that the assets be deemed to be held by him or her, and the latter can then apply. This deemed holding applies for all fiscal purposes, including estate duty, until the trust disposes of the asset, in which case the applicant is deemed to have sold the asset for market value proceeds. Once sold, the attribution rules under the Income Tax Act will then apply to a donor or funder of the trust, while awards to beneficiaries will be taxable where appropriate.
- Taxes and levies such as Value-Added Tax, Skills Development Levies and the Unemployment Insurance Fund Contributions are excluded from the SVDP, as is PAYE, but may still qualify under the existing VDP.
- Taxpayers who disposed of any foreign assets prior to 1 March 2010 may also apply for relief under the SVDP in terms of special deeming provisions.
- No understatement penalties will be levied where taxpayers understated their taxable income as a result of the non-disclosures if the SVDP application is successful. Interest will be payable, presumably from 1 March 2015 to date of payment.
- SARS may not pursue criminal prosecution for a tax offense if the SVDP application is successful.

EXCHANGE CONTROL RELIEF

The position in relation to the application for exchange control relief as detailed in Exchange Control Circular No 6/2016 (Circular) is as set out below.

The SVDP will provide South African exchange control residents and former residents the opportunity to regularize their exchange control affairs by disclosing their foreign assets that are held in contravention of the Regulations. The application is made through SARS e-filing together with the tax SVDP.

In terms of the Circular, exchange control relief may be granted provided that:

- the unauthorised foreign assets for which the administrative relief is sought were held by the applicant on or before 29 February 2016;
- applications are made within the six-month SVDP window period;
- the declaration made by the applicant is voluntary;
- the applicant makes full disclosure of all unauthorised foreign assets, stipulates the source of such assets and includes details of the manner in which such assets were transferred and retained abroad;
- the applicant furnishes all documentation and information as stipulated on the SVDP application form, including:
 - the market value of the unauthorised foreign assets denominated in the foreign currency of the country in which such asset is situated;
 - a description of the identifying characteristics and location of such foreign assets;
 - a valuation certificate by a valuator of the country where the unauthorised foreign asset is located, or a valuation by a sphere of government of the country where such asset is located, or an original or certified statement of account indicating the balance or market value, or any other form of proof of value of that foreign asset as FinSurv may on good cause shown allow to be submitted; and
 - a sworn affidavit or solemn declaration of the contravention; and
- the applicant furnishes any additional information relating to the unauthorised foreign assets as may be required in terms of the SVDP.

The proposed exchange control reliefs provided in terms of the SVDP are the following:

- A levy of 5% will be payable on the current market value of the unauthorised foreign assets if the assets or sale proceeds are repatriated to South Africa. This levy is increased to 10% where such assets are retained abroad.
- Both of the levies must be paid from foreign-sourced funds. Where insufficient liquid foreign assets are available to pay the 10% levy, an additional 2% levy would become payable to the extent that local assets are used to settle the levy.

- Individuals may not deduct their R10 million foreign capital allowance or any remaining portion thereof from any leviable amount and the levy may not be reduced by fees or commission.
- The levy must be paid within three months from the date of receipt of notification from FinSurv.
- Where the 5% or 10% levy is payable, the levy must be repatriated to South Africa to an account held at a local authorised dealer (such as a commercial bank) and must be converted into Rand at the ruling spot exchange rate. Where the unauthorised foreign assets are denominated in multiple foreign currencies, applicants will be allowed to convert those foreign currency amounts to the United States Dollar for purposes of the levy by using the ruling exchange rate as at 29 February 2016.

For certain types of contravention it will not be necessary to apply via e-filing and instead a declaration will be made to an Authorised Dealer. No levies will be payable. These contraventions include:

- foreign assets not declared by immigrants prior to immigrating;
- foreign inheritances (from a non-resident testator) received prior to 17 March 1998 (subsequent inheritances may be retained abroad without FinSurv approval or notification to them);
- foreign inheritances from South African resident testators out of legitimate funds, and application must be made to retain the funds abroad (if the funds were not legitimate the applicant can pay 10% to leave the funds abroad or pay nothing if they are repatriated); and
- foreign income earned prior to 1 July 1997 (income earned thereafter may be retained abroad without approval or the requirement to report it to FinSurv).

It is important to note that where residents decide not to utilise the SVDP they will, at the discretion of FinSurv, have to pay a settlement ranging from 10% to 40% on the current market value of their unauthorised foreign assets.

CONCLUSION

It will be noted that it is possible to apply for either the SVDP for tax or the "ordinary" VDP, and obviously one would choose the one that carries the lower cost. The "ordinary" VDP, however, requires much more detailed information, and is subject to interest (and possibly a penalty not exceeding 10%).

It is also possible to apply only for the tax SVDP if there is no exchange control contravention; or only the exchange control SVDP if there is no tax contravention.

But at its maximum, the combined effective rate could be as high as 30.5% (tax 20.5% and exchange control 10%) though the exchange control levy is based on the assets as at 29 February 2016, whereas the tax charge is based on the highest value at any of the last day of February 2011 to 2015.

Note that further amendments are still possible.

