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The special voluntary disclosure programme: an update and some practicalities and predicaments

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The Special Voluntary Disclosure Programme ("SVDP") kicked off on 1 October 2016 and runs until the end of June 2017. The SVDP consists of an exchange control leg and a tax leg.

INTRODUCTION

At the time of writing this article, the proposed law underlying the tax SVDP was contained in the Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill dated 19 July 2016 ("the Draft Bill"), which was discussed in our July Tax e-bulletin. Unlike the position with the exchange control SVDP, there were important developments to the tax SVDP since our July article, requiring an update of the position discussed in our previous article.

Since the publication of the Draft Bill, National Treasury announced certain amendments to the SVDP as contained in the Draft Bill in a Draft Response Document issued on 7 September 2016. The main amendments announced by Treasury related to the period for which the SVDP will run (extending it to the end of June 2017), and the inclusion rate forming the basis of the calculation of the tax payable on a successful SVDP (initially 50%) was reduced to 40%. Further amendments are expected to deal with certain technical difficulties not yet addressed.

SARS also issued a Guide (of which the second version was recently published) ("Guide") setting out more detail about the practicalities involved in applying for the tax SVDP.

In what follows, we would like to point out some of the practicalities relevant to an application for the SVDP, but we will also allude to some problematical areas which we experience in practice so far. We cast our discussion in a question and answer format.

WHAT ARE THE BASIC REQUIREMENTS TO APPLY FOR THE SVDP?

You can apply for the SVDP if you are:

- an individual,
- a company/CC, or
- a settlor, donor or beneficiary of a foreign discretionary trust and you elected to have the trust's offshore assets and income deemed to be yours, and
- SARS has not yet obtained information regarding the amounts in respect of which you want to apply for the SVDP under any international exchange of information agreement, and
- you or the foreign trust own offshore assets which derive from funds ("seed money") which were taxable in South Africa, but in respect of which the South African tax was not paid as required ("tainted funds").

HOW DO I CALCULATE THE AMOUNT PAYABLE UNDER THE SVDP?

Essentially 40% of the highest market value of the tainted funds (or, more correctly, the foreign assets derived from the tainted funds) during the period 1 March 2010 – 28 February 2015 must be included in an applicant's taxable income, which will attract income tax in accordance with the tax rates applicable to the 2014/15 tax year (when the maximum rate was 40%). Roughly speaking, thus, one could see the cost of the SVDP to be equal to 16% of the highest value of the offshore assets derived from tainted funds during the period 1 March 2010 – 28 February 2015.

The highest value is, according to the Guide, determined with reference to the highest ZAR value, converted at the spot rate applicable to the transaction date and/or the relevant year-end. We do not believe that this is strictly in accordance with the Draft Bill.

Also according to the Guide, a calculation must be done separately for each asset derived from tainted funds, and 40% of the highest value of each individual asset in the five-year period must be included in the taxable income for purposes of the SVDP. Again, we do not believe that this accords with the Draft Bill, where the words used are "the aggregate value of all assets".

The above covers all taxes, penalties and interest to SARS on the tainted funds up to 28 February 2015. No protection is offered in respect of taxes which became payable from 1 March 2015 onwards.

Although not payable as part of the SVDP process, note that Estate Duty and future income and capital gains tax on amounts arising in the trust will be an additional "cost" of opting for the SVDP in respect of an offshore trust where the assets of the trust are deemed to be those of the applicant.

WHAT SUPPORTING DOCUMENTATION IS REQUIRED?

SARS indicates in the draft Guide that it will require fairly substantive documentation to support an application. These include:

- Documentation proving the existence of the foreign asset, such as bank accounts, property registration papers, etc.
- Confirmation of the date on which the relevant foreign asset was acquired. SARS indicates that the following will be regarded as acceptable in this regard:
- For a foreign bank account: a letter from the bank
- For foreign shares: shareholder certificates (no mention is made of dematerialised shares)
- For foreign fixed property: the registration papers.
- SARS does, however, indicate that they would consider reasonable estimates of dates, if it is practically impossible to obtain the date and an acceptable explanation is provided of why it is impractical and how the date was estimated.
- Where applicable, a power of attorney (presumably this relates to a situation where a company is the applicant). Other information which SARS indicated will be required includes:
- A description of the source of the tainted income from which the foreign asset is derived;
- An explanation of the applicant's connection to the asset – i.e. whether the applicant owns the asset, whether the applicant is a shareholder or beneficiary of the owner of the asset, etc.; and
- A description of the structure that was utilised to create the asset. Interestingly, and unlike the exchange control position, there is no indication that asset valuations will be required, or the form these should take. Moreover, the Draft Bill does not give SARS any authority to prescribe that this level of detail must be given.

WHAT IF THE OFFSHORE FUNDS CONSIST OF A MIX OF TAINTED FUNDS AND FUNDS WHICH WERE PROPERLY TAXED IN SA PRIOR TO THEIR OFFSHORE TRANSFER?

The draft legislation contained in the Draft Bill is open to an interpretation that a person can apply for the SVDP even if the applicant's (or the trust's) offshore assets are derived from a mix of tainted and untainted funds. The challenge would be to separate the offshore assets derived from the tainted funds from those derived from the untainted funds, but if that could be done, the legislation does not appear to prohibit the SVDP to be taken only in respect of the assets derived from tainted funds.

In the draft Guide, SARS indicates, however, that the SVDP is not available in situations where only some of the foreign assets (or only parts of foreign assets) are derived from untainted funds. SARS indicates that, in such a situation, the normal VDP is the appropriate route to regularise the tainted funds. But if the assets are clearly separate, then SARS accepts that it will be possible to apply for the SVDP only on the tainted funds without dealing with the untainted assets (or apply for the SVDP on the tainted funds and apply for the regular VDP on the income only on the untainted funds).

At this stage it is thus not clear whether an applicant can elect to treat all foreign assets as being derived from tainted funds, even if they are partly derived from untainted funds, simply in order to be able to apply for the SVDP.

THE FORM – VDP01

The application for the SVDP must be submitted on Form VDP01, which can only be accessed through eFiling. With many aspects regarding the SVDP not certain yet, potential applicants are cautious to open the form on their eFiling profile, as it may turn out that they are not eligible for the SVDP. It would have been helpful if SARS published a copy of the form in the Guide.

CONCLUSION

The SVDP is a work in progress and with various aspects of it still not clarified it is expected that it will take a while before applications will be submitted. The amendments to be expected to the first draft legislation are to be welcomed, but many areas remain uncertain. It appears that the SVDP will, in many respects, involve practitioners liaising with SARS members of the SVDP unit in order to clarify aspects of the process and it would be an evolving process.

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