

SOUTH AFRICA - The Special Voluntary Disclosure Program (SVDP)

"... we never really learn from the first mistake or the second or third. It only hits us when we're given the last chance ..." - anonymous

As taxpayers around the world gear up for the new global automatic exchange of information regime, South Africa is providing one last chance for individuals, South African trusts and companies to come clean and disclose foreign assets held in contravention of the relevant exchange control and tax laws. The aptly named Special Voluntary Disclosure Programme (SVDP), that runs from **1 October 2016 to 31 March 2017**, is being offered through a joint SVDP unit, combining forces from the South African Revenue Service (SARS), dealing with the relevant income tax defaults and the Financial Surveillance Department of the South African Reserve Bank (FinSurv), dealing with exchange control contraventions.

As a precursor to the commencement of the SVDP, National Treasury issued the Rates and Monetary Amounts and Amendment of Revenue Laws Bill (SVDP Bill) on 18 July 2016, in which the relevant terms of the tax SVDP is set out. Although the SVDP Bill is still open for consultation, it is unlikely to result in any material amendments (if any), prior to promulgation. Similarly, on 13 July 2016, FinSurv issued terms pertaining to the exchange control SVDP, for which the consultation process is less formal and operates mainly through Authorised Dealers (generally large commercial banks in South Africa), if clarity from potential applicants are sought.

In order to ensure a coherent approach in respect of the SVDP, the SVDP unit will receive applications pertaining to both income tax and exchange control, via the SARS e-filing platform. The relevant specialists and committees within the SVDP unit will adjudicate the applications, provide relief where applicable (as described in more detail below) and impose the relevant taxes and levies in respect of the undisclosed foreign assets. The SVDP will therefor consist of two elements, but for all practical purposes, will be combined into one application.

Although the tax SVDP is more rigid in its approach, the exchange control SVDP provides for two options in respect of regularisation – the first option being the so-called 'full SVDP' and the second option which relates to 'lesser misdemeanours' (both discussed below). Applications can be made through a representative with the necessary power of attorney, which, given the complexity of the tax and exchange control processes, is highly recommended. It is important that a client chooses the correct representative that is able to provide the necessary client privilege.

Limited window of opportunity

As stated above, the SVDP (for both exchange control and income tax) runs from **1 October 2016 up to 31 March 2017** and no applications may be made prior to or after the aforementioned period. In respect of the exchange control SVDP, an applicant is required to peg the market value of the undisclosed foreign assets at **29 February 2016**, whereas the tax SVDP requires a different approach, which requires a peak value to be determined between the periods of **1 March 2010 and 28 February 2015**.

Eligibility

The SVDP Bill relating to income tax states that a 'person' (which is a defined tax term) is eligible for

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relief, whereas the exchange control circular refers to 'South African residents' and 'former South African residents'. Although the terminology is slightly different, applicants envisaged will include individuals, sole proprietorships, partnerships (although each in their separate capacity for tax purposes), deceased estates, insolvent estates, South African trusts, close corporations and companies.

Foreign discretionary trusts do not fall under the eligibility criteria of the SVDP. However, the settlor of the trust, a donor, deceased estate or beneficiary will be able to participate in the SVDP, if they elect to have the trust's assets deemed to be their own for all fiscal purposes. The aforementioned election should not be made by prospective applicants without taking proper advice on the anticipated future tax and exchange control implications.

No application under the SVDP may be made where a current or pending investigation is being conducted by FinSurv. A similar approach is followed in respect of any current or pending audit or investigation for tax purposes. However, if the income tax audit is in respect of assets other than undisclosed foreign assets, the eligibility criteria under the income tax SVDP will still be met.

Method of application under SVDP

As stated above, where an applicant is eligible for relief, the income tax and exchange control application must be submitted through SARS' e-filing portal. In the case of a 'lesser misdemeanour' for exchange control purposes, the application must be submitted through the applicant's Authorised Dealer.

Calculation of taxes and levies payable

The SVDP provides for certain taxes and levies to become payable upon successful application. Although the exchange control levies remained consistent throughout the consultation process, the income tax consequences were simplified significantly, compared to previous versions of the SVDP Bill.

Exchange control

In general, the following unauthorised foreign assets must be disclosed to Finsurv under the SVDP –

- Sale, cession or assignment of intellectual property by a South African resident, without approval from Finsurv;
- Foreign liabilities that were used to acquire foreign assets, but guaranteed by South African assets; and
- Direct or indirect acquisitions in a foreign asset (including cash), using foreign funds which should have been repatriated, or funds remitted from South Africa, without FinSurv approval.

Applicants with loop structures will have 180 days to unwind the relevant structure and dispose of the South African asset at its historical cost to another South African resident. Again, prospective applicants with loop structures need to take proper advice before any unwinding steps are undertaken, as there may be tax implications to disposing the asset merely at its historical cost. Where a full application is made (as referred to above) and the relevant documentation is submitted, the following levies will apply –

- **5%** of the market value of unauthorised foreign assets held on 29 February 2016, if those

assets are repatriated to South Africa and the levy is paid from foreign funds;

- **10%** of the market value of unauthorised foreign assets held on 29 February 2016, if those assets are **not** repatriated back to South Africa and the levy is paid from foreign funds; and
- **12%** of the market value of unauthorised foreign assets held on 29 February 2016, if those assets are **not** repatriated back to South Africa and the levy is **not** paid from foreign funds.

No allowances, fees or commissions may be deducted from the levy. The applicant is allowed three months to pay from the date of the relevant FinSurv notification. The levy is calculated in the relevant foreign currency and converted into ZAR. Finsurv will only confirm the administrative and criminal prosecution relief once the applicable levy has been paid to the Corporation for Public Deposits and, where applicable, the necessary conditions have been met. Unsuccessful applicants will have 30 days from receiving the notice to object against the decision by Finsurv. Finsurv has also made it clear that any contraventions outside of the SVDP period will be dealt with harshly, resulting in levies of up to 40% including criminal prosecution.

In respect of 'lesser misdemeanours', a levy will generally not be imposed, but the applicant would need to place the relevant information on record with an Authorised Dealer. The scenarios envisaged for 'lesser misdemeanours' are as follows –

- Immigrants who have yet to declare their foreign assets;
- South African residents with foreign inheritances (prior to 17 March 1998);
- Foreign inheritances from a South African resident. Where a loop or contravention was inherited, it must be terminated, further, no levy is payable if the inheritance is repatriated, otherwise a 10% levy will apply. Any loop structures created after inheritance, must be dealt with as a full SVDP application;
- Foreign earned income (earned prior to 1 July 1997), not previously repatriated; and
- In respect of corporate entities, with approved financial investments, that have not (prior to 29 February 2016) kept up to date in their ongoing reporting and disclosures of changes, can submit all outstanding documentation to become fully compliant with their obligations.

Income tax

As stated above, the relevant income tax SVDP underwent some changes recently through a public consultation process. The result is a much simpler process to administer and calculate.

In essence, 50% of the highest market value of the aggregate of all foreign assets between **1 March 2010 and 28 February 2015** will be included in the taxable income of the applicant in the 2015 year of assessment and will be subject to normal tax, at the relevant marginal rate of the applicant. The market value is calculated in the relevant foreign currency and then converted to ZAR at the spot rate at the end of the relevant year of assessment. Where foreign assets were disposed of prior to 1 March 2010, SARS may agree to accept a reasonable estimate of the market value of the foreign assets.

The aforementioned requires only one amount to be ultimately determined and not the 'seed capital' and 'investment return' approach under the previous version of the SVDP Bill. Although the income that originally gave rise to the foreign assets will be exempt from normal tax, donations tax and estate duty, any future income arising from the assets will remain fully liable to any applicable taxes. The income tax SVDP does not apply to value-added tax, employees' tax, skills development levies or unemployment insurance fund contributions.

In respect of foreign discretionary trusts, a donor, deceased estate or beneficiary will be able to participate in the SVDP, if they elect to have the trust's assets deemed to be their own for all fiscal purposes. As stated above, the aforementioned election should not be made by prospective applicants without taking proper advice on the anticipated future tax and exchange control implications.

Upon successful application, the applicant will obtain 100% relief from understatement penalties and criminal prosecution.

How can Geneva Management Group be of service?

The highly skilled and experienced team within Geneva Management Group is perfectly positioned to guide any prospective applicant through the complete income tax and exchange control SVDP process.

Prospective applicants under the SVDP will be provided with relevant and objective advice, review of supporting information, completion and submission of applications, tracking of progress including finalisation of the SVDP adjudication process. Geneva Management Group will further be able to provide crucial ongoing support and advice for regularised structures, post the SVDP process, to ensure ongoing compliance with the various fiscal regulations, both locally and internationally.

For more details, please contact

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