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TAX & EXCHANGE CONTROL ALERT

IN THIS ISSUE >

Exchange control and emigration: The new dispensation

On 28 February 2021, the previous exchange control (Excon) regime pertaining to South Africans emigrating from South Africa came to an end. As of 1 March 2021, South Africa's Excon regime no longer recognises the concept of "emigrant" or "emigration". On 26 February 2021, the Financial Surveillance Department of the South African Reserve Bank (FinSurv) issued Exchange Control Circular 6/2021 entitled "Emigration – phasing out the concept of emigration as recognised by the South African Reserve Bank" (Circular).

In this article, we discuss some of the changes announced in the Circular.

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Exchange control and emigration: The new dispensation

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Background

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Transition period

To ensure a smooth transition, FinSurv and SARS have agreed that the previous Excon policy pertaining to emigration will apply to all forms MP336(b) that have been attested, that is, stamped and signed by an authorised dealer on or before 28 February 2021. SARS has confirmed that applicants who have had their Form MP336(b) attested by an authorised dealer before this date will still be able to apply for a tax compliance status (TCS) in respect of "emigration" in the ensuing months after 28 February 2021, in terms of the previous procedure dealing with emigration for Excon purposes. Once the TCS has been finalised, an application incorporating the form MP336(b) and supporting documents should be submitted to FinSurv.

All new emigration related applications from 1 March 2021 onwards will be processed by SARS in terms of a new dispensation confirming that the taxpayer has ceased to be a resident for tax purposes.

2021 RESULTS

CHAMBERS GLOBAL 2018 - 2021 ranked our Tax & Exchange Control practice in Band 1: Tax.

Emil Brincker ranked by CHAMBERS GLOBAL 2003 - 2021 in Band 1: Tax.

Gerhard Badenhorst ranked by CHAMBERS GLOBAL 2009 - 2021 in Band 1: Tax: Indirect Tax.

Mark Linington ranked by CHAMBERS GLOBAL 2017 - 2021 in Band 1: Tax: Consultants.

Ludwig Smith ranked by CHAMBERS GLOBAL 2017 - 2021 in Band 3: Tax.

Stephan Spamer ranked by CHAMBERS GLOBAL 2019-2021 in Band 3: Tax.



Cliffe Dekker Hofmeyr

Exchange control and emigration: The new dispensation...continued

Authorised dealers may, on confirmation that a private individual has cleared his/her tax residency status with SARS, allow the transfer of assets abroad, subject to tax compliance.

Amendments to the Currency and Exchanges Manual for Authorised Dealers

To give effect to the changes announced, FinSurv has amended the Currency and Exchanges Manual for Authorised Dealers (AD Manual). The most important changes and amendments are set out below.

Section B.2(J) – Private individuals ceasing to be South African tax residents

The previous section B.2(J) has been deleted and will now state the following:

- The concept of emigration as recognised by FinSurv has now been phased out with effect from 2021-03-01.
- The distinction between South African resident assets and non-resident assets remains extant.
- Natural person emigrants and natural person residents are treated identically.
- Authorised dealers may, on confirmation that a private individual has cleared his/her tax residency status with SARS, allow the transfer of assets abroad, subject to tax compliance.
- For transfers up to R1 million per individual per calendar year, authorised dealers may transfer funds offshore without the requirement to obtain a TCS PIN letter.
- In addition to the transfers mentioned in the bullet point above, authorised dealers may allow the transfer of up to a total amount of R10 million per calendar year per private individual who ceases to be a resident for tax purposes in South Africa and is 18 years and older, provided that the individual is tax compliant and submits the applicable TCS PIN for verification.
- South African non-tax residents who transfer more than R10 million offshore are initially subject to a more stringent verification process by SARS; as well as a subsequent approval process from FinSurv. Such transfers will trigger a risk management test that will, *inter alia*, include verification of the tax status and the source of funds, as well as risk assess the private individual in terms of the anti-money laundering and countering terror financing requirements, as prescribed in the Financial Intelligence Centre Act 38 of 2001.
- With regard to the previous bullet point, it is imperative that the application to FinSurv is accompanied by, *inter alia*, a TCS PIN letter that will contain the tax number and TCS PIN to verify the taxpayer's tax compliance.
- All transfer of assets by private individuals that have ceased to be South African tax residents can take place subject to tax compliance.
- The tax residency status will determine how FinSurv treats the residents' domestic assets, taking into account that sale proceeds and assets of non-residents are freely transferable offshore. In this regard, the externalisation of listed and unlisted domestic securities will be treated similarly to cash and will form part of the foreign capital allowance.

Persons who have emigrated from South Africa or intend to emigrate in future, should ensure that they are familiar with the new Excon rules that will apply to persons who have emigrated.

- In respect of the withdrawal of retirement funds when South African residents cease to be residents for tax purposes in South Africa, payment of lump sum benefits to individuals who are no longer South African tax residents per SARS' definition, shall only be allowed by authorised dealers if the individual member has remained a non-tax resident for at least three consecutive years. The verification process by SARS alluded to above will apply here.
- All assets that were previously blocked as per a specific directive that was given by FinSurv in terms of the provisions of Exchange Control Regulation 4(2), may be dealt with as follows:
 - In respect of income and capital distributions from *inter vivos* trusts, such distributions may be transferred abroad, subject to tax compliance. For any transfers above R10 million, the SARS verification process and subsequent FinSurv approval, as referred to in previous bullet points, will apply.
 - With regard to pre-inheritance gifts, such funds may be transferred abroad, subject to tax compliance. For any transfers above R10 million, the SARS verification process and subsequent FinSurv approval, as referred to in previous bullet points, will apply.
- In the interim, the existing FinSurv Reporting System categories to report emigration outflows to FinSurv remain extant, as outlined in section J of the AD Manual.

Other sections in the AD Manual

The following sections in the AD Manual, amongst others, which all dealt with emigration have been deleted:

- The section dealing with income due to emigrants (B.3(B));
- The specific rules pertaining to emigrants' use of travel allowances (B.4(B));
- The rules regarding long-term insurance by non-residents, to the extent that they applied to emigrants (B.10(I)); and
- The rules regarding pension commutations that were applicable to emigrants (B.10(J)).

Securities Control

The Circular states that in the context of the rules regarding securities control in section G of the AD Manual, any reference to "emigrants" and/or any specific sub-sections dealing specifically with emigrants has been temporarily retained until discussions with the relevant stakeholders have been finalised.

Comment

Persons who have emigrated from South Africa or intend to emigrate in future, should ensure that they are familiar with the new Excon rules that will apply to persons who have emigrated. It appears that SARS will play a more active role in enforcing the rules where a person seeks to transfer funds abroad pursuant to their emigration. In the same vein, such persons must also keep an eye on the proposed changes to the tax rules applicable to emigrants, including those announced in the 2021 Budget.

Louis Botha

OUR TEAM

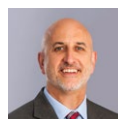
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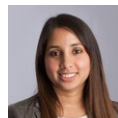
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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

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