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TAX & EXCHANGE CONTROL ALERT

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Not all donations are equal: SARS issues ruling regarding donations to a foreign trust

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Not all donations are equal: SARS issues ruling regarding donations to a foreign trust

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Historically, South African resident individuals have made use of trusts, both local and offshore, as part of their estate planning. In practice and in the context of a local trust, South African residents can transfer assets to such a trust in different ways.

Two of the ways in which this could potentially be done are the following::

- The resident individual could transfer the assets to the trust by selling them to the trust on loan account. In such an instance and depending on the type of assets involved, such sale could potentially be subject to various taxes, including capital gains tax, transfer duty (if the asset is immovable property) and/or securities transfer tax (if the asset is a share). Furthermore, one would have to ensure compliance with section 7C of the Income Tax Act, 58 of 1962 (Act), which states that interest must be charged on certain loans made to trusts.
- Alternatively, the resident individual could transfer the assets to the trust by way of donation. In this instance and depending on the nature and value of the assets donated, the donation would be subject to donations tax, in addition to capital gains tax, transfer duty and/or securities transfer tax. However, section 7C of the Act would not need to be considered as no loan account is created.

In the context of transferring assets to a foreign trust, the South African resident would need to consider what is stated above but would also need to ensure compliance with South Africa's exchange control rules.

Donations of certain offshore assets not subject to donations tax

However, under the Act, there are certain donations listed in section 56(1) of the Act, which are exempt from donations tax. One of these exemptions is contained in section 56(1)(g) of the Act, which states that a donation will be exempt from donations tax if the property or the right to property donated is situated outside South Africa and was acquired by the donor –

- before the donor became a South African resident for the first time (section 56(1)(g)(i));
- by inheritance from a person who at the date of his death was not ordinarily resident in South Africa or by a donation if at the date of the donation the donor was a person (other than a company) not ordinarily resident in South Africa (section 56(1)(g)(ii)); or
- out of funds derived by him from the disposal of any property referred to in sections 56(1)(g)(i) or (ii), if the donor disposed of such last-mentioned property and replaced it successively with other properties (all situated outside South Africa and acquired by the donor out of funds derived by him from the disposal of any of the said properties), out of funds derived by him from the disposal of, or from revenue from any of those properties (section 56(1)(g)(iii)).

Not all donations are equal: SARS issues ruling regarding donations to a foreign trust...*continued*

On 15 March 2021, SARS issued Binding Private Ruling 357 (BPR 357), which dealt with whether the abovementioned exemption applied in a specific set of circumstances.

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Facts of BPR 357

- The applicant and the co-applicant are resident natural persons married to each other in community of property.
- Together with some of the applicant's siblings, who have never been residents of South Africa, the applicants entered into an agreement with a foreign seller.
- In terms of the agreement, the foreign seller would sell all of the shares of two foreign companies, each holding a number of shares in a third foreign company.
- The purchase was finalised in November 2009, with the price payable in instalments from December 2013.
- Over the years the applicants received distributions from Trust A, a foreign discretionary trust settled by the applicant. The applicants, amongst others, are beneficiaries of Trust A. The applicants used the distributions from Trust A to partially settle the applicants' share of the purchase price.
- Trust A was funded by shares donated by the applicant, which were received from the applicant's parents who have never been residents of South Africa.
- Disputes arose between some of the siblings, which disputes were related to the share transaction and as a result of which legal proceedings ensued. Following extensive negotiations, a settlement was reached between the parties that will be made an order of the relevant foreign court.
- The settlement includes what is termed a "*partial liquidation*" of the two foreign companies acquired in November 2009. As a result, the applicants will receive cash as well as shares in the third foreign company, with the cash being deposited into the foreign bank account(s) of the applicants.
- The applicants will dispose of the cash as well as the shares in the third foreign company to a fourth foreign company on loan account, and then donate their loan accounts to Trust B.
- Trust B is a foreign discretionary trust settled by the applicant of which the applicants and their three children are the beneficiaries.

Not all donations are equal: SARS issues ruling regarding donations to a foreign trust...*continued*

SARS ruled that the donation by the applicant and the co-applicant, jointly, to Trust B will be exempt from donations tax under section 56(1)(g)(iii).

Ruling in BPR 357

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Comment

The application of section 56(1)(g) has been considered by SARS on a number of occasions, including in Binding Private Ruling 157 (issued on 18 November 2013) and Binding Private Ruling 197 (issued on 1 July 2015). Whereas these two rulings dealt with the application of section 56(1)(g)(ii) of the Act, BPR 357 deals with section 56(1)(g)(iii) of the Act.

In our [2021 Budget Speech Alert](#), we briefly discussed the announcement in the 2021 Budget that SARS would set up a dedicated unit to improve compliance of individuals with wealth and complex financial arrangements. It is mostly high net worth individuals that make use of

complex financial structures, including trust structures that may be located locally and abroad.

Considering the announcement in the 2021 Budget, taxpayers with offshore structures would be well advised to ensure that any transactions that they conclude in respect of such structures, are concluded pursuant to professional advice received from their tax advisors. Where a taxpayer is uncertain of the tax consequences that may arise from a transaction related to his offshore structure, the taxpayer can apply to SARS for an advance tax ruling under chapter 7 of the Tax Administration Act 28 of 2011. If SARS finds that the application meets all the requirements in section 79 of the Tax Administration Act and should not be rejected in terms of section 80 thereof, it will consider the merits of the application and issue a binding private ruling.

Louis Botha

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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.



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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.

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