



Estate planning in the dynamic offshore environment, including offshore trusts & investment strategies.

*Anton Maskowitz*

# AGENDA

- **Foreign Estate Planning**
  - Foreign Estate Planning vehicles
  - Foreign Wills, probate and forced Heir-ship considerations
  - The Concept joint ownership under English Law
- **Foreign Investment strategies**
  - Foreign Dividends S. 10B (new Div tax exemption)
  - Interest Free loans S.31 (new transfer pricing rules) and attribution rules
  - Foreign Inheritances/ Donations S. 56(1)(g)(ii)&(iii) ITA & S. 4(1)(e) EDA (Donations Tax /Estate Duty exemptions)
  - Market related Interest bearing loans S. 25B2A & para 80(3)
  - Foreign Earned Income - S 10(1) (o)
- **Exchange Control**



# FOREIGN ESTATE PLANNING VEHICLES

- **Common Law Jurisdictions**

## Trusts

Founded on English Law

Trusteeship predominantly corporate licensed Fiduciary providers

Protector

Generally not bound by Forced heir-ship rules

## Private Trust Companies

- **Civil Law Jurisdictions**

## Foundations

Civil Law Concept with legal personality

Foundation owns assets directly

Foundation Board controls assets and generally mandated by the Founder

Foundations are generally bound by Forced heir-ship rules

SA Tax treatment unsure but will largely depend on control exercised by Founder (By laws)



# FOREIGN WILLS, PROBATE AND FORCED HEIR-SHIP CONSIDERATIONS

---

- **Foreign Wills**
  - Foreign Will provides ease of administration
  - Sealed copies SA Wills required if no foreign Will
  - Care : Revocation clause
- **Probate**
  - A Requirement in most foreign jurisdictions
  - Similar to Letters of Executorship
  - Proof that Executor may deal with the administration of the estate
- **Forced Heir-ship Considerations**
  - Most Civil Law Countries (Similar to intestate succession)
  - General rule:
    - Lex domicilii – moveables / Lex situs - immovables





# THE CONCEPT JOINT OWNERSHIP UNDER ENGLISH LAW

---

- **Tenancy in Common**

- As tenants in common, each co-owner owns a definite and separate share in the property. A co-owner can assign, sell, transfer or Will his or her share to someone else.

- **Joint Tenancy**

- As joint tenants, the co-owners own the property together as a whole. They do not have a particular, defined or separate share (so it can't be said that one owns half and the other owns half). If one of the co-owners dies, the surviving owner automatically becomes the sole owner of the entire property. This is called "right of survivorship" and applies even when the deceased owner has willed his or her "share" to someone other than the co-owner.

- **Joint Tenancy – is an effective estate planning tool between spouses, prevents probate from applying on death of the first dying.**

- **Common misperceptions (SA)**

- Estate Duty - generally remains payable if joint owner is not spouse - s 3 property)
- Only Executors fees avoided - not part of calculation for Executors fees
- Generally if CGT and donation tax implications, then only not subject to Estate Duty



# FOREIGN INVESTMENT STRATEGIES (SA RESIDENTS)

- **Foreign Dividends S. 10B (new Div tax exemption)**
  - Reduced from 40% (max) to 15% (max)
  - Dividends from Foreign CIS's qualify as foreign dividends
- **Interest Free loans S.31 (new transfer pricing rules) & 7(8), para 72**
  - Commonly used to fund offshore trusts
  - New provisions impute interest as from 1 March 2013 for individuals
  - Likely double taxation i.t.o. s. 7(8) and para 72 of 8<sup>th</sup> Sch.
- **Foreign Inheritances/ Donations S. 56 ITA & S. 4 EDA (Donations Tax /Estate Duty exemptions)**
  - Donate foreign inheritances to offshore trust
  - S. 7(8) and para 72 will apply
  - Offshore donations – care : Exchange Control provisions.



## FOREIGN INVESTMENT STRATEGIES (CONT...)

- Market related Interest bearing loans to offshore trusts S. 25B2A & para 80(3)
- What is market related rate?
- Interest included in lenders gross income whether paid or not S. 7(8) and para 72 no longer applies – no attribution
- Income or gains in trust not subject to SA tax, but
  - Distribution taxable if consists of income or gains (previous years)
- Important for trustees to keep records of income or gains
- Use of offshore company owned by trust (S.10B exemption - BPR 116), but potential CFC rules and re introduction of FFIHC rules.



# FOREIGN EARNED INCOME

- Exempt in terms of S.10(1)(o)
- 183 days (60 consecutive) over 12 month period, BUT
  - Must be employment income
  - Income of independent contactors do not qualify, e.g.
    - *Doctors providing locum services abroad*
    - *Consultancy fees for services rendered while abroad*
    - *Contractual services rendered abroad*

**Maximise foreign pension contributions from foreign source income**

**Foreign pensions exempt i.t.o. 10(1)gC and new source provisions S.9**





# EXCHANGE CONTROL

- **Individuals**

- R4mil annual Foreign Investment allowance (tax clearance required)
- R1mil discretionary allowance, foreign investment option (no tax clearance required)
- Applications for amounts above R4m will be considered
  - Man of means test, Tax clearance prerequisite and then application at SARB

- **Corporates**

- FDI (500mil pa) Companies can apply at authorised dealer level
- Same line of business
- No passive investments
- FDI (above R500mil pa) Finsurv approval required

- **Trusts**

- **No dispensation currently available (only asset swaps)**



Thank you

*Anton Maskowitz*

