

Offshore trusts



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Trusts have been used effectively as an estate planning tool since the Middle Ages and still play an important role in both permissible and impermissible tax planning. The benefits include asset protection, avoidance of probate, succession planning, confidentiality and possible tax benefits, although the latter two motivating factors are becoming less compelling in the rising tide of global fiscal transparency.

Before deciding to settle an offshore trust, South African residents should understand the differences between local and offshore structures and the complexities which may arise from these differences, relating in particular to tax and exchange control issues. There are a number of jurisdictions that may be considered as so-called tax havens, whether onshore or offshore, with the general characteristic being a low or no tax environment. The motivation for

settling a trust should never be solely to seek tax relief and a holistic understanding of all benefits available and how they translate to the settlor and beneficiaries should be sought.

Residence and governing law

Unlike South African trusts, offshore trusts are not registered with a regulatory body. In order to qualify as a non-resident trust, an offshore trust must be established outside South Africa and have its place of effective management outside South Africa. The place where the trust is established will be the place where the founding document is signed and the place of effective management will be where the trust is managed on a regular daily basis irrespective of where the overriding control is exercised or where the trustees meet intermittently.

The definition of "resident" in the Income Tax Act will always be subject to the relevant double taxation agreement that South Africa has

in place with the trust's country of residence, and care must be taken to ensure that the offshore trust meets the requirements therein so as not to jeopardise its offshore status. It is therefore important that a reputable offshore trust management company is appointed to attend to the management of the trust to ensure that nothing is left to chance and the settlor and beneficiaries are not placed at risk.

Other aspects

Offshore trusts are invariably accompanied by a letter of wishes, a document separate from the trust deed in which the settlor expresses wishes as to whom should benefit, particularly with regard to distributions after his or her death. Although not legally binding, it has become an accepted part of offshore trust practice and the trustees endeavour to effect the wishes contained therein. Such a document is however not common practice in South Africa.

Similarly, a protector is often appointed to oversee the administration of the offshore trust by the trustees in order to provide a degree of comfort to the settlor who grapples with relinquishing control of his assets. The role of protector is a recent but entrenched development in offshore trust law although the concept is not recognised in South African trust law. While South African trusts may continue interminably, most offshore jurisdictions have a rule against perpetuity written into

their trust laws. As a rule of thumb this limit is 100 years, however in some jurisdictions it is 80 years, while in others 150 and recently both Jersey and the Bahamas have in fact abandoned this rule. When selecting a jurisdiction for an offshore trust this is something to bear in mind.

Settling a trust

Donations tax would apply to South African residents settling both South African and offshore trusts. The most common way to fund a trust is by way of a loan from the settlor. While the anti-avoidance provisions of Section 7 of the Income Tax Act would be applicable to an interest free loan to both South African and offshore trusts, the transfer pricing provisions contained in Section 31 provide an extra ingredient to the choice of funding of an offshore trust. Settlor of offshore trusts are often advised to provide funds on an interest-bearing loan account to ensure compliance with Section 7(8) on the one hand and compliance with the transfer pricing provisions of both Section 31 of the Income Tax Act and the South African Reserve Bank on the other hand.

When deciding on a jurisdiction in which to settle an offshore trust you should focus on the reputation, political and economic stability, availability of local professional services, legal and banking systems, regulatory and telecommunication infrastructures and existing international taxation treaties. Expert advice is essential.

This article was written by Anthea Stephens, a FISA member and Fiduciary Manager at Standard Bank Private Clients. FISA is a non-profit organisation that represents practitioners in the fiduciary industry and sets high minimum standards to protect the public's interests. Activities of FISA members include but are not restricted to the drafting of wills, administration of trusts, beneficiary funds and estates, tax and financial advice and the management of client funds. FISA has over 700 individual members who collectively manage in excess of R250 billion. Membership is open to any professional who meets the membership criteria.