legal and tax consequences of emigration

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introduction

- before leaving SA permanently, need to be aware of the following:
  - tax implications of ceasing to be SA tax resident; and
  - exchange control consequences of formal emigration
- must ensure SA tax and exchange control obligations are fulfilled
- possible tax liability often missed – incorrect disclosures or late payment of tax which could attract penalties and interest

tax implications

- ceasing to be SA tax resident
  - capital gains tax "*exit charge*"
    - deemed disposal of worldwide assets on date immediately before day on which person ceases to be resident for amount equal to market value of assets
    - deemed acquisition of worldwide assets on day on which so ceases to be resident at expenditure equal to market value of asset
    - year of assessment deemed to end on date immediately before day on which person ceases to be resident and succeeding tax year commences on day on which person so ceases to be resident

tax implications (continued)

- ceasing to be SA tax resident (continued)
  - capital gains/losses included in annual tax return for tax year ending on date immediately before person ceases to be resident – subsequent tax years will only disclose SA sourced income and capital gains
  - exclusions
    - immovable property situated in SA held by person
    - asset attributable to permanent establishment in SA

tax implications (continued)

- SA tax residency tests
  - in relation to natural person:
    - ordinarily resident, or
    - not at any time during tax year ordinarily resident, if physically present for certain defined periods ("**physical presence test**")
  - not regarded as SA tax resident if exclusively resident of another country for purposes of double taxation agreement entered into between SA and country of which individual resident

tax implications (continued)

- SA tax residency tests (continued)
  - ordinary residence
    - whether ceased to be ordinarily resident in SA is factual enquiry based on all relevant facts and circumstances
    - two requirements:
      - intention to become ordinarily resident in another country; and
      - steps indicating that intention has been or is being carried out
    - remaining SA exchange control resident or undertaking regular visits to SA are not, by themselves, determining factors but are relevant to enquiry

tax implications (continued)

- SA tax residency tests (continued)
  - physically present in SA for –
    - more than 91 days in aggregate in tax year in which determination is made; and
    - more than 91 days in aggregate in each of five preceding tax years; and
    - more than 915 days in aggregate during such five preceding tax years
  - restrict days spent in SA in year following departure to 91 days or less if uncertainty regarding tax residency in other country or if SA not have DTA with such other country

tax implications (continued)

- taxation of non-residents
  - taxed on SA sourced income and capital gains only, subject to relief in terms of applicable DTA
  - SA sourced income includes:
    - SA interest
    - dividends paid by SA resident companies
    - rental income from fixed property in SA
  - certain exemptions, for example, interest, unless –
    - physically present in SA for more than 183 days

tax implications (continued)

- taxation of non-residents (continued)
  - capital gains tax
    - immovable property or any interest or right of whatever nature in immovable property situated in SA
    - primary residence exclusion

exchange control consequences

- may continue to be SA exchange control resident even if ceases to be tax resident here
- Exchange Control Rulings and Manual replaced by two Currency and Exchanges Manuals and two guideline documents with effect from 1 August 2016
- emigration for exchange control purposes requires formal emigration
  - application made to Financial Surveillance Department (FinSurv) of the SARB
  - requires SARS tax clearance certificate

exchange control consequences (continued)

- qualify for certain allowances at time of emigration and after all assets have been brought under administration of Authorised Dealer (SA commercial bank)
  - R10 million - single persons
  - R20 million - family units
  - travel allowance applicable to each family member
- foreign assets held at time of departure need not be deducted from foreign capital allowance

exchange control consequences (continued)

- foreign capital allowance reduced by the following received within 3 years prior to date of emigration:
  - any donations or gifts in excess of R100,000
  - capital distributions from *inter vivos* trusts
- securities (quoted/unquoted) may be exported as part of foreign capital allowance based on market value (must be restrictively endorsed "*non-resident*")
- household/personal effects and motor vehicles, etc. to overall insured value of R2 million may be exported provided customs declaration completed

exchange control consequences (continued)

- life policies (other than single-premium policies) with surrender value of less than R2,000 may be transferred to register offshore, subject to certain requirements
- procedures for remaining assets
  - remaining SA assets and any other assets accruing after emigration , must be placed under control of Authorised Dealer
  - cash balances, subsequent capital payments and proceeds of any assets sold must be credited to emigrant’s blocked capital account with Authorised Dealer and may be utilised locally for any purpose, subject to certain limitations

exchange control consequences (continued)

- procedures for remaining assets (continued)
  - specific rules applicable to trust distributions
    - testamentary trust
      - income may be transferred to emigrant on application
      - capital distributions may be remitted abroad, provided:
        - Authorised Dealer has viewed trustees resolution and Last Will and Testament

exchange control consequences (continued)

- procedures for remaining assets (continued)
  - Authorised Dealer must ensure emigrant has been formally designated as a non-resident (or must refer to FinSurv)
- *inter vivos* trusts
  - all initial requests to transfer income must be approved by FinSurv – may effect payment of such income and future annual/interim income to Authorised Dealer controlling remaining assets
  - requests to transfer income derived from donations, gifts or capital distributions from trust within 3 years prior to emigration, must be approved by FinSurv

other considerations

- SA citizenship
  - may retain citizenship if formally emigrate and obtain permanent residence in another country – certain steps need to be taken
  - automatically lose SA citizenship if obtain citizenship in another country by way of voluntary and formal act, for example, British citizen by naturalisation
  - apply to Department of Home Affairs for permission to retain SA citizenship, provided other country permit dual citizenship – application have to be made before obtaining citizenship in other country

conclusion

- be aware of consequences and obtain professional legal and tax advice to ensure SA obligations fulfilled
- disclosures in tax returns in year of emigration and following years – intention to relocate must be properly recorded
- critical should tax residence or ability to exit funds be questioned by authorities

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