

A vintage globe on a wooden desk with a window in the background. The globe is the central focus, showing a map of the world. The text is overlaid on the globe.

# LOCAL AND INTERNATIONAL BENEFICIARIES: ESTATE PLANNING CONSIDERATIONS

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**CITADEL**  
WEALTH MANAGEMENT



# INTRODUCTION

**In recent times people have become exceedingly “mobile”**

- Everybody knows someone who has relocated abroad
- This trend is increasing even further with the current “sentiment” on SA’s future

**All of us are dealing with Estate Planning, Estate Administration or Trust Administration where some of the beneficiaries are resident in another jurisdiction**

- More often than not, children and clients relocated but did not emigrate

**Purpose:**

- To highlight some of the considerations and restrictions
- To distinguish between the different scenarios and discuss the implications for beneficiaries
- Meant to be practical

# TAX RESIDENCY V FINSERV RESIDENCY



## **Important to distinguish for purposes of this discussion**

- Estate Duty: Only applicable to SA Tax Residents and SA Situs property
- Trust distributions: Foreign tax residents – significant concerns
- Estate Distributions: Foreign resident/emigrant – may export inheritance

## **Tax Resident?**

- Natural Person who is ordinarily resident in the Republic
- Physical presence test – if not ordinarily resident
- Not if exclusively resident in other country in terms of treaty

## **FinServ**

- SARB process through Authorised Dealer
  - MP 336 (b)
  - Note: the fact that MP 336 (b) is presented to SARS does not automatically terminate tax residency...

# FOREIGN RESIDENT BENEFICIARY: SA ESTATE



## **Beneficiary Emigrated (or non-resident)– Inheritance may now be transferred abroad.**

- Not to Foreign Trusts with direct or indirect SA Interest – including emigrants
- Authorised Dealer must ensure that Formal Emigration has been done
- Foreign Assets may be transferred
- Same applies to Capital distributions from Testamentary Trusts

## **If she did not emigrate – Considered to be “SA Resident Temporarily Abroad”**

- Need to use normal channels to transfer assets
- R1m p.a. Discretionary allowance
- R10m p.a. Investment allowance
- Need Tax Clearance from SARS for R10m
- Will probably have to apply from SA



# ESTATE BENEFICIARIES

## **SA Resident Beneficiary – SA Resident Estate: Offshore Assets**

- Must repatriate to SA
- Alternatively: Apply for exemption of Regs. 6&7 – FinServ – usually granted

## **Foreign Estate of SA Resident: Probate**

- Similar, but less complicated than our Estate Administration process
- Appoint agent in jurisdiction and provide Sealed Letters of Executorship and Will
- Quite Expensive and time consuming
- Not required for all Offshore assets – check with administrator
  - E.g. preference shares in Citadel Offshore Structure
  - Certain Investments – some administrators will accept SA LOE

## **SA Beneficiary – Non-resident’s Estate**

- 17 March 1998 – May retain offshore
- No need to report to SARB
- Free from Estate Duty



# FOREIGN WILL CONSIDERATIONS

## **Common Law Legal Systems: Often possible to probate estate with South African will**

- Recommend: Fixed property – rather execute foreign Will

## **Civil Law Legal Systems: forced succession in most cases**

- Always execute foreign Will

## **Get jurisdictional specific advice**

- There may be specific validity requirements for Will
- E.g. Mauritius – Will needs to be registered to be valid (Amongst others)
- Testamentary Trusts?

## **Work with foreign advisor to ensure SA Will is not revoked...**

# INTER VIVOS TRUST DISTRIBUTIONS: FINSERV



## **Emigrant/Non residents**

- Authorised dealer will allow transfer of Income
- Capital distributions – Credited to Capital Account (Blocked Account)

## **SA Resident Temporarily Abroad (SARTA)**

- Note: This is a FinServ designation and not necessarily Tax residency
- Therefore, may be tax resident abroad but still SARTA for FinServ
- Distribution must be paid in SA then exported through normal channels

## **Distribution from Foreign Trust to SA Resident**

- Trust distributions (and Donations) not the same as Inheritance
- Must be repatriated
- May apply for exemption to FinServ
- **However: Recent Legal Opinion – If trust was funded with Authorised Offshore Funds distributions to funder need not be repatriated**

# FOREIGN RESIDENT TRUST BENEFICIARIES -TAX



**Many (if not most...) families have children who are residents abroad**

**Critical: Foreign resident beneficiary must obtain jurisdictional specific advice**

**Some examples taken from foreign legal advice**

## **USA Resident Taxpayer**

- It often happens that the tax payable by beneficiaries of a foreign trust may exceed the value of the distribution (Peter Rosenberg)
- Grantor v Non-Grantor Trusts
- Grantor Trust: Grantor retains sufficient control of the trust – E.g. may revoke trust
- Regarded that assets are owned directly by Grantor – thus not separate entity
- Taxed in Grantor's hands - if foreign grantor, only US source income subject to US income tax
- Distribution from foreign grantor trust – regarded as gift from grantor and not taxable to beneficiary



# FOREIGN RESIDENT: TRUST BENEFICIARIES -TAX



## **Non-Grantor Trust (Typically our Discretionary Trust)**

- Distribution to US resident beneficiary fully taxable
- Income from current year as well as accumulated income from previous years (“Undistributed Net Income”) is taxed in the hands of the beneficiary – similar to our sec 25B(2A) and para 80(3)
- BUT: Tax is computed and interest and penalties are imposed – May possibly exceed the distribution
- Distribution deemed to be made from
  1. Current Income
  2. Accumulated Income
  3. Capital
- Therefore no discretion as to from which “Pot” distribution is made
- Be careful of Grantor Trust as it may powers may fall within sec 3(3)(d)

# FOREIGN RESIDENT: TRUST BENEFICIARIES -TAX



## **Australia**

- Trustee is Australian Tax resident – Trust regarded as Australian Tax Payer
- Settlor becomes Australian Taxpayer: Taxed on accumulated income and capital gains of trust since inception with penalties and interest. (Client obtained aforesaid opinion)
- Distribution of income taxed in beneficiaries hands
  - If distribution from income accumulated in previous tax years – Penalties apply
  - Taxed at marginal rate
  - BUT: If distribution to anyone under 18 (including payment of school fees etc) taxed to top marginal rate for individuals – 49%

**Neither the US or Australia tax distributions from deceased estates.**

# FOREIGN RESIDENT: TRUST BENEFICIARIES



## **Possible Solution (Alternative to Trust distribution)**

- Remove foreign resident as beneficiary of trust
- Create additional legacy in terms of the Will
  - Value of legacy to be calculated based on a percentage of the net value of the trust
- We have administered a number of estates successfully by employing this technique
- Planning: Ensure that there are sufficient assets in the estate to provide for the said legacy.

## **Citadel Offshore Structure may also provide solution**

- Before taking up foreign tax residency
- Father lends money to his son to purchase preference shares in structure
- Father bequeaths loan to son
- Son may now redeem shares – this is not a trust distribution
- Jurisdictional advice is still a must
- Loan may be an issue on Financial Emigration – consult Authorised Dealer

# UK: RELEVANT PROPERTY REGIME (10-YEAR CHARGE)



## UK Inheritance Tax Applicable to UK and Foreign Trusts

### Operation

- On Every 10<sup>th</sup> anniversary of a trust
- Whenever relevant property ceases to be held in trust
  - E.g. Relevant property distributed to beneficiary – exit charge

**6% of value of relevant property on 10<sup>th</sup> anniversary of trust.**

### Excluded Property

- Foreign Situs property
- Units in Authorised Unit Trusts (AUT's) and shares in UK OEIC's
- UK Gilts – All beneficiaries UK non-residents

**Nil-Rate applies: £325 000**

# UK: RELEVANT PROPERTY REGIME AND SA TRUSTS?



## **“Asset Swap”: Often used by SA Trusts to gain offshore exposure**

- Fin Serv mechanism whereby SA Management Co (Manco) provides SA Investor with Offshore capacity
- Must be repaid in Rand - FinServ
- Manco treats assets as third party assets and therefore not on their balance sheet
- No doubt who the beneficial owner is = trust
- Therefore Situs asset and will be subject to Charge

## **NB: SA Trust will have to register as taxpayer in UK!!**

### **To avoid IHT and Compliance Cost**

- No charge if there are no relevant property on 10<sup>th</sup> anniversary
- No charge if relevant property is switched to excluded property
- Consider Tax (CGT) implications of switching.



# CLOSING REMARKS

## **Always: Obtain or refer client to obtain jurisdictional specific advice**

- Work with them to ensure that holistic solution makes sense in both jurisdictions
- Keep in mind that they seldom understand current SA Tax
- Example: Donations Tax – UK, US (More opportunities to donate tax free)
- Example: Estate Duty: Australia (None)

## **Emigration: Consult Specialist – especially on Tax**

- Advisor who understands the specific Double Tax Treaty (E.g. Tax Residency)
- Someone with the required global footprint/connection to utilize opportunities in foreign jurisdiction
- Do not underestimate the complexities



Questions?