

Hugo van Zyl

CA(SA) TEP MTP(SA)

Cross-Border & Tax Specialist

Mobile +27 (0) 82 55 44 831

Cape Town +27 (0) 21 813 9775

London +44 (0) 20 813 33417

USA +1 818 924 5001

Email tax@wegkaner.com

Web www.wegkaner.com

PO Box 51139 . Waterfront
8002 . South Africa



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by Hugo van Zyl



**EXCON 2021–ESTATE PLANNING
FOR THE DISPERSED FAMILY**

**@Wegkaner by
Hugo van Zyl CA(SA) TEP MTP(SA)**

Acronyms 1

CMA – Common Monetary Area,

BLS Countries included and

Botswana, Zimbabwe, Mozambique excluded

Excon – Exchange Control –

Currency & Exchanges Act, 1933

FIC Act - Financial Intelligence Centre Act,

Act No. 38 of 2001

FinSurv – Financial Surveillance Dept

Loop – SARB Concept see slide

investing back into CMA

SARB – Reserve Bank

FinSurv, Excon

SARS – Revenue Service

TAA, ITA, VAT, ED,

AD – Authorised Deal

Big banks or their agencies

BOP – Balance of Payment Inward and Outward Codes

FinSurv Reporting System categories to report

Blocked funds – Reg 4(2) restrictions

placed on FE transferring SARB emigrant funds to non-resident account

CFC – controlled foreign company

Different rules in SA, UK, USA

FDI- foreign direct investment

SA company investing in foreign shares

Could not hold passive invest co

Gifts – received from a foreign national

Pre- inheritance gifts – Resident donating to tax non-resident

3rd Party Funded trust sending money to non-resident

Acronyms 2

USA - IRS

DNI - Distributable current year income

UNI - Undistributed prior year accumulation of net income

FET – Federal Estate & Gift Tax

40% Lifetime exemption +\$10

FIT – Federal Income Tax

NRA – Non-resident alien

Different for FIT than for FET

UK - HMRC

IHT – UK Inheritance Tax

DWT – Dividend Withholding Tax

ED – Estate Duty Duty

FE – Formal Emigration

ITA – South African Income Tax Act

TAA – Tax Administration Act

TCR01 – SARS Online Emigration Form / Application

TCS - Tax Compliance Status subject to a pin

TEC – now TCR01 SARS “Emigration” application form .

VAT – Valued Added Tax Act

WTI- Withholding Tax on Interest

SARB Circulars in 2021

- 1 of 2021 – Loop rules and inherited foreign assets
- 7 of 2021 – Dual and foreign listed companies
- 6 of 2021 – Emigration
 - Phasing out the concept of emigration as recognized by the SARB
 - Ceasing to be a tax resident (aka tax emigration) is no longer an obligatory SARS process – TEC then TCS
 - Formal emigration (aka Financial Emigration (sic) or FE) was an optional, often incorrectly promoted SARB process subject to TEC

Executors and Trustees to focus on

- 1 of 2021 - loop rules and inherited foreign assets
 - Individuals, companies and funds – not trusts
 - Inheritance rules updated – trust can retain foreign assets
 - Inheritance can now loop but may not be made available to other resident
- 6 of 2021 – emigration – phasing out the concept of emigration as recognised by SARB. A tax act process
 - #RIPFinancialEmigration
 - “A further reform, the term emigration as recognized by SARB is being phased out”
 - “all new emigration applications from 2021-03-01 onwards will be processed by SARS based on the new dispensation of confirming that the taxpayer has ceased to be a resident for tax purposes”
 - “emigrants and residents will be treated identically”

External sources - SARB

- The amended Manual and the ADLA Manual as well as guideline documents for both individuals and business entities may be accessed on the **South African Reserve Bank website**:

www.resbank.co.za

by following the links:

Home>What we do>Financial Surveillance>Financial Surveillance Documents

Circular 1 of 2021 – January 2021

Effective 1 January 2021

- "it is advised that the full 'loop structure' restriction has been lifted
- to encourage inward investments into South Africa;
 - subject to the normal criteria applying to inward investments into South Africa **AND**
 - the reporting to the Financial Surveillance Department"
- Note: NT Treasury amended the ITA Act
 - The amendments will come into operation on 1 March 2021 and apply in respect of dividends received or accrued to any controlled foreign company and in respect of the disposal of shares in controlled foreign companies on or after that date.

Emigration – SARB instruction

- 2021- 03- 01 onwards all new emigration applications will be processed by SARS
 - based on a new dispensation of confirming
 - that the **taxpayer has ceased to be a resident for tax** purposes
 - Webpage reset and implemented 3 May 2021
- All private individuals that cease to be residents would have to request a TCS in respect of “emigration” from SARS before AD may be permitted to transfer any funds in this regard.
 - TEC in place before you approach fund – as per SARS new emigration guide
- This procedure will apply **regardless of whether such a private individual would be transferring any funds abroad at the time he/she ceases to be a resident for tax purposes.**
- TEC or TCR01 compulsory as of 2022 tax year
- Only application to transfer cash or assets in excess of R10m annual allowance, need to go to SARB for FIC Act assessment
- R20m family allowance no longer applicable – despite having done formal or financial emigration
 - FE was a waste of money if done for tax certainty?

Loop Structure

“a loop structure will be created when”:

- a South African-resident individual, **trust**, or corporate entity
 - **transfers** authorised or unauthorised funds from South Africa (or uses existing offshore funds or a combination thereof),
 - to **set up**, for example, a foreign trust or entity.
- This foreign trust or entity would directly or indirectly (via another offshore entity) **reinvest** its **authorised or unauthorised** funds in South Africa, thereby creating a “**loop structure**”.

The perceived loop mischief

OLD Mischief

- The reinvestment could be in the form of South African shares, assets or loan accounts being acquired or “created.”
- Such a loop structure would mean the investment of funds from the offshore structure into South Africa; and
- The payment of dividends, profits or interest offshore
- Which would then result in the accumulation of value over and above the nominal foreign investment that was initially made.

Tax Mischief in 2021 – following Feb 2020 budget

- Tax schemes to reduce the DWT and to avail to CGT exemption on CFC and CFC-held shares

The CFC rules and loop structure

- The non-resident CFC include in “net-income” an amount equal to the ratio of the number 20 to 28 of the dividend that is received or accrued from a resident company.
 - Done to overcome participation exemption?
 - CFC rules
 - assumes the majority of voting shares and equities
 - owned by SA tax resident
 - If HoldCo is not owned by tax non-resident/Excon resident
 - NO ANTI-AVOIDANCE?
 - Anti-Avoidance aimed at SA tax residents?

The DWT rules dealing with loops

- Foreign dividends - participation exemption removed for loop structures
- This aggregate of [TAXABLE FOREIGN] dividends received or accrued to the CFC in a loop structure will be reduced by
 - 100% of dividends where dividends tax has been paid at 20%;
 - 50% of dividends where dividends tax has been paid at 10%;
 - 40% of dividends where dividends tax has been paid at 8%;
 - 37.5% of dividends where dividends tax has been paid at 7.5%; or
 - 25% of dividends where dividends tax has been paid at 5%

Inward – Gifts received from abroad

- Any foreign asset received by a resident from a non-resident as a gift or donation
- **is not exempted** from the provisions of Reg 6 and 7; and
- Must be **declared** and repatriated to South Africa.
- Alt: a fully motivated application to
 - retain the assets abroad
 - submitted to the Financial Surveillance Department.

Pre-inheritance gifts

- such funds may be transferred abroad to the tax non-resident or from local or blocked funds
- subject to TCS tax compliance as tax non-resident 18+ years
 - R10 million per calendar year per private individual
- For any transfers above R10 million to tax non-resident
 - South African non-tax residents who transfer more than R10 million offshore,
 - initially subject to a more stringent verification process by SARS ;
 - FIC Act based assessment for approval process by FinSurv.
 - Such transfers will trigger a risk management test that will, *inter alia*,
 - include verification of the tax status and the source of funds,
 - as well as risk assess the private individual in terms of the anti- money laundering
 - and countering terror financing requirements, as prescribed by FICA

Inheritance – *Bona Fide* Foreign Estates

RESIDENTS

who inherited foreign assets from a non-resident / foreign after **1998-03-17** are exempted from the provisions of Reg 6 and 7.

Residents **need not declare** to their Authorised Dealer

- inheritances or legacies from *bona fide* foreign estates
- may retain the capital and any income generated thereon abroad.

HOWEVER

- The retention of such assets abroad is subject to the condition that
- the assets will not be placed at the disposal of other residents.

Inheritance from Resident Estate

- Residents who became entitled to a foreign inheritance from the estate of a resident, are required to declare such foreign assets inherited via an Authorised Dealer to the Financial Surveillance Department
 - for exemption from the provisions of Regulation 6 and/or 7.
- The foreign assets inherited may, on application, to the Financial Surveillance Department
 - **normally be retained abroad** provided that the assets were held abroad by the deceased in compliance with the provisions of the Regulations.

*“HOWEVER,”

FinSurv approval to retain such foreign assets abroad will be granted

- subject to the condition that the foreign assets may not be placed at the disposal of other residents.

If held by the deceased in a manner contrary to the provisions of the Regulations, an application for regularisation of such assets must be submitted to FinSurv via AD (authorised dealer).

However, the approval to retain abroad,

- Is subject to the conditions that the foreign assets will not be placed at the disposal of other residents.

Why always, “however”?

- Circ 1 of 21 speaks to investing
 - Resident individuals, corporates and private equity funds (**no permission to SA trusts**) with authorised foreign assets may
 - **invest** in South Africa,
 - provided that where South African assets are acquired through an offshore structure (loop structure),
 - the investment is reported to an Authorised Dealer as and when the transaction(s) is finalised; **as well as**
 - the submission of an annual progress report to the Financial Surveillance Department via an Authorised Dealer.
 - **all inward loans from South African affiliated foreign investors must comply with the directives**
 - issued in section 1.3(B) of the Authorised Dealer Manual.
 - Interest rate, repayment terms

*"However": no foreign currency loans

- Loans by SA residents of foreign assets or foreign currency to another resident
 - Is not an investment – not even if inherited (see foreign estates bequeathed to a resident)
 - Thus, prohibited if in foreign currency or outside SA
 - Presumable legal if a ZA Rand loan or SA *situs* loan
- Direct investment by individuals not via or not through an offshore vehicle?

Take-home rules 1

- No permission for SA trust
 - To invest into foreign assets
 - To avail to FCA
 - Yet the inheritance-rule speaks to residents, not private individuals
- SA Trust may not enter into a direct loop
 - A corporate below a trust may hold regulated foreign assets
 - Said corporate may enter into a loop
- Loop no longer on approval only
 - But all loops to be placed on record
- Irregular loops not automatically regulated/permissible loops

Take-home rules 2

- Inward Gifts treated differently to inheritance
- Foreign asset can't be gifted to Excon resident **unless** donor has ceased tax residence
 - Treated as contravention – making regulated funds available to another resident – see “however” slides
- Foreign estate – assets inherited not reportable whereas Foreign assets in local estate subject to approval
- Loop structures not a tax tool
 - Only create for correct reason – dispersed family

Circular 6 of 2021 #RIPFinancialEmigration

- **Emigration -**

- phasing out the SARB concept of emigration
- deleting the FinSurv definition of “emigrant” and “emigration”

- **Post Formal Emigration - the new VERIFICATION ERA**

- *natural person emigrants and natural person residents will be treated identically.*

- The control over or blocking remaining assets in a special ‘blocked funds account’ fall away; and
- All blocked-account transfers will be handled as normal fund transfers in line with any other foreign capital allowance transfer (**FCA**)

- **All FCA’s subject to TCS**

- SDA R1m not subject to TCS

Verification Era

Capital Flow Management

Risk Management Test

Formal emigration

- To be replaced
- by a **verification process** based on the new requirements which does not distinguish between resident and non-resident or emigrant
- **FCA applications** by individuals
- in excess of the SDA (Single Discretionary Allowance) threshold
- require a Tax Compliance Status (TCS) from the South African Revenue Service (SARS) .

Verification Process +R10m

- R10m now a glass ceiling?
- SCA in excess of R10m subject to FIC Act
- Private individuals doing FCA in excess of R10m
 - Be it non-resident or resident
 - will be subjected to a more stringent verification process as prescribed in
 - Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001) .
- Trigger a risk management test
 - verification of the tax status
 - the source of funds,
 - FICA Act risk assessment of the private individual in terms of the anti- money laundering and countering terror financing requirement,

Ceasing to be a tax resident

- The concept of emigration as recognised by the Financial Surveillance Department has now **been phased out with effect from 2021-03-01** .
- The distinction between South African resident assets and non-resident assets remains extant.
- Natural person emigrants and natural person residents are treated identically.
- For transfers up to R1 million per individual per calendar year AD may transfer funds offshore without the requirement to obtain a TCS PIN letter (SDA-like transfers) – **note we expect changes removing reference to individual, changing to tax resident**
- In addition, the AD may allow the transfer of assets abroad
 - ❖ All transfer of assets by private individuals that have ceased to be South African tax residents , **will be transferable subject to tax compliance**
- The externalization of listed and unlisted domestic securities will be treated similar to cash and will form part of the foreign capital allowance .
- The tax residency status will determine how the Financial Surveillance Department treats the residents' domestic assets, taking into account that sale proceeds and assets of nonresidents are freely transferable offshore.
- Authorised Dealers may allow the transfer of up to a total amount of R10 million per calendar year per private individual who ceases to be a resident for tax purposes in South Africa and is 18 years and older, provided that the individual is tax compliant and submits the applicable TCS PIN for verification

SARB: Ceasing to a tax resident

- All new [tax] emigration related applications **from 2021- 03- 01 onwards** will be processed by SARS based on a new dispensation of confirming that the taxpayer has ceased to be a resident for tax purposes.
- SARS **will not require a Form MP 336(b)** as part of the TCS application process, however, all the assets and liabilities of the taxpayer must still be completed per SARS TCR01 “Emigration” application form.
- All private individuals that cease to be residents would have to request a TCS in respect of “emigration” from SARS before the AD may be permitted to transfer any funds in this regard.
- This procedure will apply regardless of whether such a private individual would be transferring any funds abroad at the time he/she ceases to be a resident for tax purposes.

Take home:

- **Formal Emigration MP336(b) blocked funds was optional, SARS TCR01 process now obligatory?**
- **First time we can present expats proof of being tax non-resident and so confirmed by SARS**
- **For RA encashment do ASAP**

Verification Era: non-residents

South African non-tax residents who transfer more than R10 million offshore are:

- ❖ initially subject to a more stringent verification process by SARS;
- ❖ as well as a subsequent approval process from the Financial Surveillance Department.

Such transfers will trigger a risk management test that will, *inter alia*, include verification of the tax status and the source of funds, as well as risk assessment of the private individual in terms of the anti- money laundering and countering terror financing requirements, as prescribed in the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).

SARS verification: new non-residents

Must contain

- a TCS PIN letter that will contain the tax number and TCS PIN to verify the taxpayer's tax compliance.
- The tax residency status will determine how the Financial Surveillance Department treats the residents' domestic assets , taking into account that sale proceeds and assets of non- residents are freely transferable offshore.
- With regard to the assets and liabilities declared by South African residents who cease to be residents for tax purposes, the Financial Surveillance Department will rely on information collected by SARS via the SARS TCR01 form.

SARB - past formal emigrants

Existing blocked Assets

- All assets that were previously blocked i.t.o. Exchange Control Regulation 4(2), may be dealt with as follows:
 - (a) In respect of income and capital distributions from *inter vivo* trusts, such distributions may be transferred abroad, subject to tax compliance.
 - For any transfers above R10 million, the requirements as per previous slide applies;
 - No more automatic approval of FCA R20m per couple.
 - (b) With regard to pre-inheritance gifts, such funds may be transferred abroad, subject to tax compliance.
 - For any transfers above R10 million, the requirements as per previous slide applies.

“The new financial emigration announced by SARB”

- “The new financial emigration announced by SARB”
 - BusinessTech Staff writer 1 March 2021 quoting Jonty Leon, legal manager Tax Consulting South Africa
- “The new financial emigration process will include”
 - Focus on tax residency – **it has always been ONLY SARS focus**
 - TEC with supporting docs – **no changes, now at fund level**
 - Section 9H exit tax - **no changes**
 - Stringent audit - **no changes, upload changed from AD to fund**
 - SARS approval before AD transfers cash - **no changes**
- Really? **What is new?** What is make believe and fear mongering?
- **#RIPFinancialEmigration**

RA Resignation based on emigration

- From 2021- 03- 01 onwards, [non-resident] taxpayers will be able to access their applicable retirement benefits; if
 - Taxpayer can prove to the Retirement Fund (the fund) that taxpayer have been non-resident for tax purposes for an uninterrupted period of three years,
 - The proof provided to the fund may include proof of being a tax resident in another jurisdiction
 - Would this include a 3 year old TCR01? and
- SARS issued an applicable Tax Directive (TD).
- It will be required that a taxpayer provide AD with
 - the applicable TCS from SARS; as well as
 - documentation from the fund indicating/confirming the final amount paid out to the taxpayer.
- **TAKE HOME:**
 - Require a +3 year old TCR01 approval, current TCS and proof of departure
 - SARS updated their emigration guide – dated 26 April 2021

DISCLAIMER

- The following slides represent suggested solutions to **be customized on an individual client per client basis – do not apply broadly and blindly.**
- Do not implement without speaking to an AD **AND** tax practitioner skilled in cross-border issues.
- Always have the proposal stress-tested by the foreign country's tax consequences.
- Remember Reportable Arrangements – do not design the foreign structure from South Africa!
 - Guide the future advisers in the foreign country as to what is possible from a South African perspective; and
 - **STOP** selling SA solutions and hold back on SA investment products - they could be so-called “PFIC”

Suggested structure – dispersed family 1

1. Create HoldCo below SA trust – assume NAV R40m
 - Trust deed: add HoldCo and subsidiaries as class beneficiary
2. Take 3 x FCA R10m abroad, USA, UK and Oz
 - Circ 1/2021 – loop at market value is a condition
3. Create HoldCo in each of USA, UK and Oz = foreign HoldCo's
4. Decide on shareholder for foreign HoldCo's – no death duty in Oz, huge FET threshold for USA residents. UK in-between
 - Consider impact of vote control should SA Fam Trust lose voting control
 - More than tax and Excon issues – moving towards family office rules
 - Costly but less costly than a mirror structure for each child's jurisdiction
5. Advance R10m to each foreign HoldCo to acquire 25% each in HoldCo
 - CGT on disposal = fact. Vest to SA residents (parents, minor or SA HoldCo)
 - Softens 36% yet triggers earlier – consider pros and cons

Suggested structure – dispersed family 2

1. Create HoldCo below SA trust – assume NAV R40m
 - Trust deed: add any Co held directly or indirectly for benefit of family member as class beneficiary
2. Create HoldCo in each of USA, UK and Oz = foreign HoldCo's
3. Foreign HoldCo equally own Realization Co (RealCo) – could be CFC in terms of UK, USA or Oz rules – **get foreign tax sign-off**
 - Ensure full compliance with loop structure reporting and inward loans if not full subscription price
 - Market value low, can do at lower than R30m FIA – add CGT cost in 4 below to share subscription price
4. SA family trust vests $\frac{3}{4}$ or 75% of HoldCo shares *in speci* to RealCo
 - CGT at 22,4% but DWT switch off from HoldCo to RealCo
 - RealCo applies treaty DWT rate when sending dividends out to foreign HoldCo's

Benefits – various jurisdictions 1

- Collapse mirror structures as Channel Island / IoM trusts are not FET efficient – cost saving
- No longer using blacklisted jurisdiction without treaty benefit
- Non-resident child can pre-inherit or own say 25% in SA Co held below US HoldCo
 - Legally funded by SA parent i.e. NAV acquisition price affordable
- No third party paid trustees - family can be trustees

USA benefits

- Avoid throwback-tax following from foreign grantor and non-grantor
- Consider USA trust non-grantor trust (taxpaying trust) owning a US HoldCo investing into SA Trade or SA InvestCo
 - Why: DTA DWT rate probably lower for US company than USA trust or individual
 - **US trust is CFC blocker**
 - How: FIA R10m or more – advanced to US entities
 - Upon death bequeath loan to USA based children or US entity
 - **NO THROWBACK TAX**
- DRD options – but do **obtain tax advice as CFC rules may sting**

Benefits – various jurisdictions 2

- Clearly, no implementation without addressing tax issues in 3 jurisdictions
- Can't be tax efficient in every country i.e. structure must be succession planning driven, not tax planning
 - Yet be tax sensitive for USA vs Australia (Oz) where there is no death duty

Oz benefits

- ITAA 36 – Oz HoldCo enjoy participation exemption for as long as Oz HoldCo re-invests within Oz structure
- Defer tax to cash extraction date
- SA Family Trust no longer reportable in Oz, no ATO tax event on foreign trust vesting
- No SA estate duty on 25% of parents' assets – 20-25% saving in SA, 40% FET saving on USA assets held in CI Trust

Questions?

THANK YOU

Please e-mail comments to

hugovanzyl@wegkaner.blog

Hugo van Zyl

CA(SA) TEP MTP(SA)

Cross-Border & Tax Specialist

Mobile +27 (0) 82 55 44 831

Cape Town +27 (0) 21 813 9775

London +44 (0) 20 813 33417

USA +1 818 924 5001

Email tax@wegkaner.com

Web www.wegkaner.com

PO Box 51139 . Waterfront
8002 . South Africa



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