

Cross-border Estate Planning

FISA Gauteng Regional Meeting 4/21

1 December 2021

A solid blue vertical rectangle is positioned on the left side of the slide, overlapping the background image. It contains the text "Keep it. Simple." in a white, sans-serif font.

Keep it. Simple.

The logo for AlphaWealth, featuring the word "ALPHAWEALTH" in a bold, uppercase, sans-serif font, followed by a stylized blue triangle icon pointing upwards and to the right.

ALPHAWEALTH 

Cross-border Estate Planning

Introduction

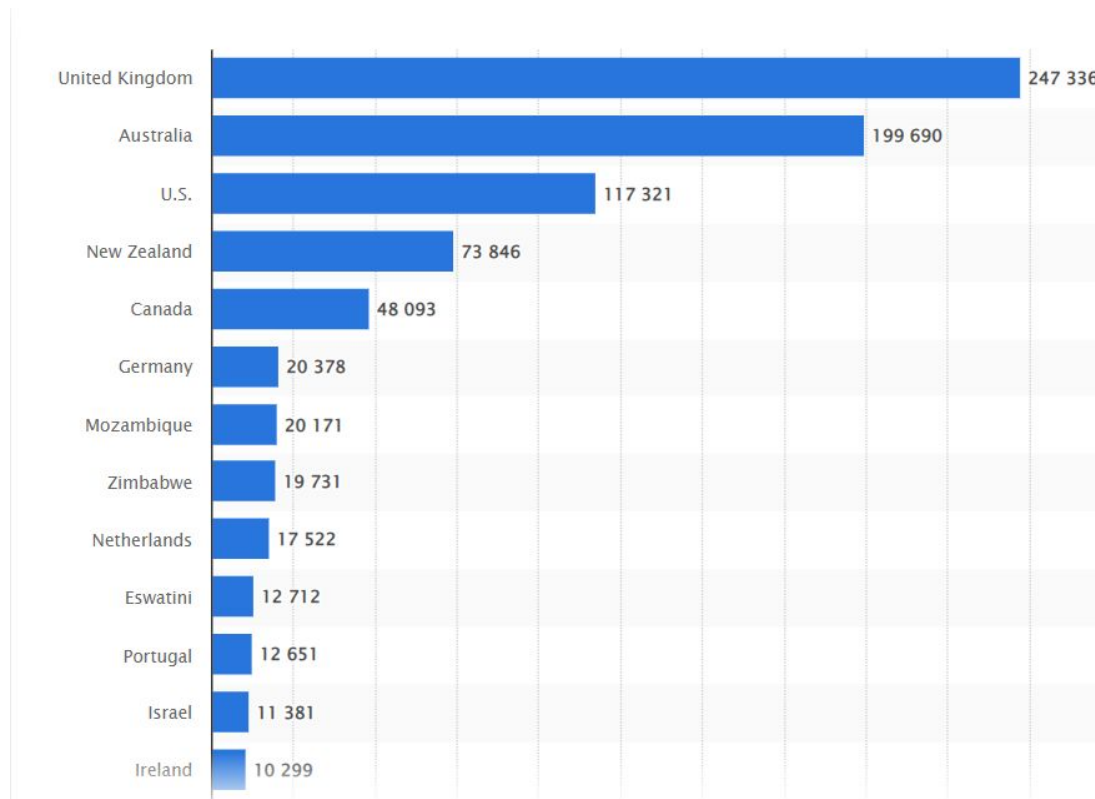
- Changing landscape for estate planners
 - Emigration
 - Multi-jurisdictional families
 - Asset externalisation
 - The changing legal framework
 - Tax laws
 - CRS
 - Exchange Control
- Important estate planning considerations
- Foreign Wills

Cross-border Estate Planning

Changing landscape for estate planners

- Emigration:

Cumulative South African emigrants (2020) (source: statista.com)



Keep it. Simple.

Cross-border Estate Planning

Changing landscape for estate planners

- Multi-jurisdictional families
 - Wealth creators/parents remaining in SA
 - Children/second generation emigrates/temporarily abroad/studies abroad
 - Grandchildren settle abroad
 - Implications of family members in multiple foreign countries on the estate plan
- Asset externalisation
 - Asset diversification
 - R1m annual single discretionary allowance
 - R10m annual foreign investment allowance
 - >R10m – enhanced due diligence by SARS & thereafter approval by FinSurv with a specific focus on source of funds (anti-money laundering & counter terror financing)
 - Consider impact of foreign assets on estate plan
- Golden Visa programs
 - Foreign immovable property
 - Foreign residency

Keep it. Simple.

Cross-border Estate Planning

Changing landscape for estate planners

- The legal framework
 - Tax laws
 - South Africa has a residency basis of taxation, including for Estate Duty
 - Estate Duty DTA's (6 countries: UK, USA, Zimbabwe, Botswana, Lesotho, Eswatini)
 - Funding of offshore structures
 - Section 31 (transfer pricing): interest on loans to offshore structures must be at arm's length
 - Section 7(8) (anti-avoidance rules): loans to offshore trusts must carry a market related interest
 - Section 7C: loans to trusts must carry interest at repo/base rate plus 1%
 - Tax changes resulting from changes to exchange control
 - Access to retirement funds on emigration delayed until 3 years after emigration (non-res for uninterrupted period of 3 years)
 - Relaxation of the prohibition on loop structures: resultant tax changes relating to the treatment of dividends and capital gains on the sale of shares in a foreign company

Cross-border Estate Planning

Changing landscape for estate planners

- The legal framework
 - CRS
 - Nowhere left to hide
 - Regularisation of unauthorised foreign assets
 - SVDP
 - Standing VDP process (SARS) and applications to SARB
 - Exchange control
 - General relaxation over the last few years
 - Significant changes in 2021: restructure of exchange control system to a new capital flow management framework
 - Doing away with the concept of a resident for exchange control purposes and the concept of a formal SARB emigration
 - Replaced with a stringent tax verification process, with focus on cessation of tax residency
 - All emigrations (post 1 March 2021) now processed by SARS
 - Relaxation of the prohibition against loop structures
 - Opportunity to externalise assets (albeit not the intention of the changes)
 - Potential DWT arbitrage

Keep it. Simple.

Cross-border Estate Planning

Changing landscape for estate planners

- The legal framework
 - Exchange control (cont.)
 - Relaxation of the prohibition against loop structures
 - A loop structure is an arrangement whereby a South African resident invests in an offshore vehicle which, in turn, invests in South African assets
 - Intention is to attract foreign investment
 - Does, however, create an opportunity to externalise assets
 - Potential DWT arbitrage if offshore structure is set up in jurisdiction with a favourable DWT rate (e.g. Mauritius)

Cross-border Estate Planning

Important estate planning considerations

- Balance sheet & situs of assets
 - What assets does the estate planner own?
 - Where are the assets situated?
 - Country-specific rules (e.g. forced heirship – Continental Europe, Channel Islands, Mauritius)
 - Estate duty/Inheritance tax implications
 - Foreign life policies
- Residency
 - Where do the relevant family members/parties live?
 - Where are they tax resident?
- Structures
 - South African trusts & companies
 - Foreign assets: SA trusts prohibited from owning foreign assets (no change under new exchange control regime – silent on local trusts)
 - Non-resident beneficiaries: SA trusts cannot pay non-resident beneficiaries directly – needs SARB approval to make a foreign payment
 - No change under the new exchange control regime

Cross-border Estate Planning

Important estate planning considerations

- Structures (cont.)
 - Offshore trusts & companies
 - Parties
 - Settlor
 - Trustee
 - Beneficiaries
 - Protector?
 - Private Trust Company?
 - Funding an offshore structure
 - Beneficiary of a foreign life policy?
 - So called “freezer trusts”
 - Implications of structures in countries of residency
 - “Problem” countries include: USA, Canada, Australia

Keep it. Simple.

Cross-border Estate Planning

Foreign Wills

- When do you need a foreign will?
 - Situs
 - Immovable property
 - Forced heirship
 - Single foreign bank account?
 - Cooperation from foreign financial service provider
- EU Succession Regulation (Regulation 650/2021)
- Foreign assets inherited from a local estate: may now be retained abroad on application to FinSurv