

CHANGES IN TAX
RESIDENCY:
IMPACT ON TRUSTS,
COMPANIES AND ESTATES
FROM A SOUTH AFRICAN
PERSPECTIVE.



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AGENDA

Changes in Tax Residency:

1. Trusts
2. Companies
3. Estates and wills



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CHANGES IN TAX RESIDENCY –

IMPACT ON A TRUST



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CHANGES IN TAX RESIDENCY –

CAN LEAD TO:

Redomicile the
trust

Beneficiaries in
different
jurisdiction

Locked into trust
structure

Punitive tax
implications



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REDOMICILE A TRUST



Majority of the Trustees.



Does the Trust Deed allow for Trustees abroad.



Requirement to inform the Master of trustees address change.



Master may request security.



Implications when redomicile (also known as restate) a SA trust.



Does the new jurisdiction acknowledge the trust structure.



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BENEFICIARIES IN DIFFERENT JURISDICTIONS



Does the Trust Deed allow for distributions to offshore beneficiaries.



Possible adverse tax consequences on trust- e.g. USA/ AUS



Possible additional tax consequences for beneficiaries receiving trust distributions.



Possibility to remove beneficiaries from Trust Deed



Conduit principal VS tax in trust



Exchange control rules



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LOCKED IN TRUST STRUCTURE



- Testamentary trust
- Special trust
- Trust established on court order



Last will and testament or court order can't be amended by Trustees.



Need to apply for a High Court application.



Risk assets not distributable



Change in Trust tax implications



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CHANGES IN TAX RESIDENCY –

COMPANIES



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COMPANY RESIDENT OF RSA

“Resident”

incorporated,
established or
formed in the
Republic; or

has its place of
effective
management in
the Republic.



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PLACE OF EFFECTIVE MANAGEMENT

- PLACE WHERE KEY MANAGEMENT AND COMMERCIAL DECISIONS THAT ARE NECESSARY FOR THE CONDUCT OF ITS BUSINESS
- THE PLACE OF EFFECTIVE MANAGEMENT IS USED IN PARAGRAPH 3 OF ARTICLE 4 OF THE OECD'S MODEL TAX CONVENTION ON INCOME AND ON CAPITAL AS A TIE-BREAKER
- APPLICATION OF THE TIE-BREAKER RESULTS IN THE PERSON BEING DEEMED TO BE A RESIDENT ONLY OF THE STATE WHERE ITS PLACE OF EFFECTIVE MANAGEMENT IS LOCATED.

TREVOR SMALLWOOD TRUST V REVENUE AND
CUSTOMS [2008] UKSPC SPC00669

THE COURT HELD THAT DETERMINING THE PLACE OF
EFFECTIVE MANAGEMENT REQUIRED THE COURT TO
DETERMINE WHERE, THE REAL **TOP LEVEL OF
MANAGEMENT OR REALISTIC, POSITIVE MANAGEMENT**
OF THE TAXPAYER, A TRUST, WAS EXERCISED.

ALTHOUGH THIS CASE DEALT WITH THE
DETERMINATION OF THE PLACE OF EFFECTIVE
MANAGEMENT IN THE CONTEXT OF A TRUST, THE
COURT'S DECISION IS CONSIDERED USEFUL BECAUSE
THE PRINCIPLES AND THE TYPE OF FACTS THAT WERE
CONSIDERED ARE EQUALLY RELEVANT IN THE CONTEXT
OF COMPANIES.



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DETERMINING FACTORS:

Time period

Head office

Delegation of Authority

Board

Shareholders

Company place of incorporation



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PLACE OF EFFECTIVE MANAGEMENT



Operational management vs top level management



Modernisation and global travel

SUMMARY



A company may have more than one place of management but it can only have one place of effective management at any one time.



The facts and circumstances must be examined on a case-by-case basis.



The place of effective management test is one of *substance over form*.



It therefore requires a determination of those persons in a company who actually “call the shots” and exercise “realistic positive management”.



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IMPLICATIONS FOR CHANGE



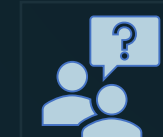
Depending on the effective management the tax liability of the company may shift, or additional tax applicable.



Changes in legislative requirements for new jurisdiction.



Changes in the reporting requirements of the company.



Possible changes in additional compliance requirements – and cross border shareholders.

ALL OF THE ABOVE WOULD REQUIRE FURTHER COMPLIANCE/ADMINISTRATIVE STEPS



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REDOMICILE THE COMPANY

The best is yet to be... Keep moving forward!

- A company can be redomiciled from SA
- Or Domesticating Foreign Company
- NB- endorsement of Non-resident shareholding through authorised dealer.
- Foreign Shareholders tax implications

CHANGES IN TAX RESIDENCY –

ESTATE'S AND WILLS



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*Do I need a
will and
when?*



WHERE DO I NEED A WILL?

- WHERE ARE YOU DOMICILED ?
- WHERE ARE YOUR ASSETS LOCATED?
- LAWS APPLICABLE IN RELEVANT JURISDICTION (INCLUDING FORCED HEIRSHIP)
- PROBATE REQUIREMENTS
- MULTIPLE WILLS REQUIRED- GET EXPERT ADVICE
- WHERE ARE THE GUARDIANS

BOTH RESIDENTS AND NON-RESIDENTS
PAY ESTATE DUTY IN RSA AT THE SAME
RATE. THE MAIN DIFFERENCE IS THAT
RESIDENTS PAY ESTATE DUTY ON THEIR
WORLDWIDE ASSETS, WHEREAS NON-
RESIDENTS ONLY PAY ESTATE DUTY IN
SOUTH AFRICA ON PROPERTY AND
ASSETS LOCATED IN THE COUNTRY.

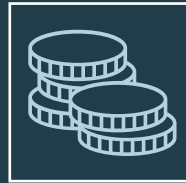


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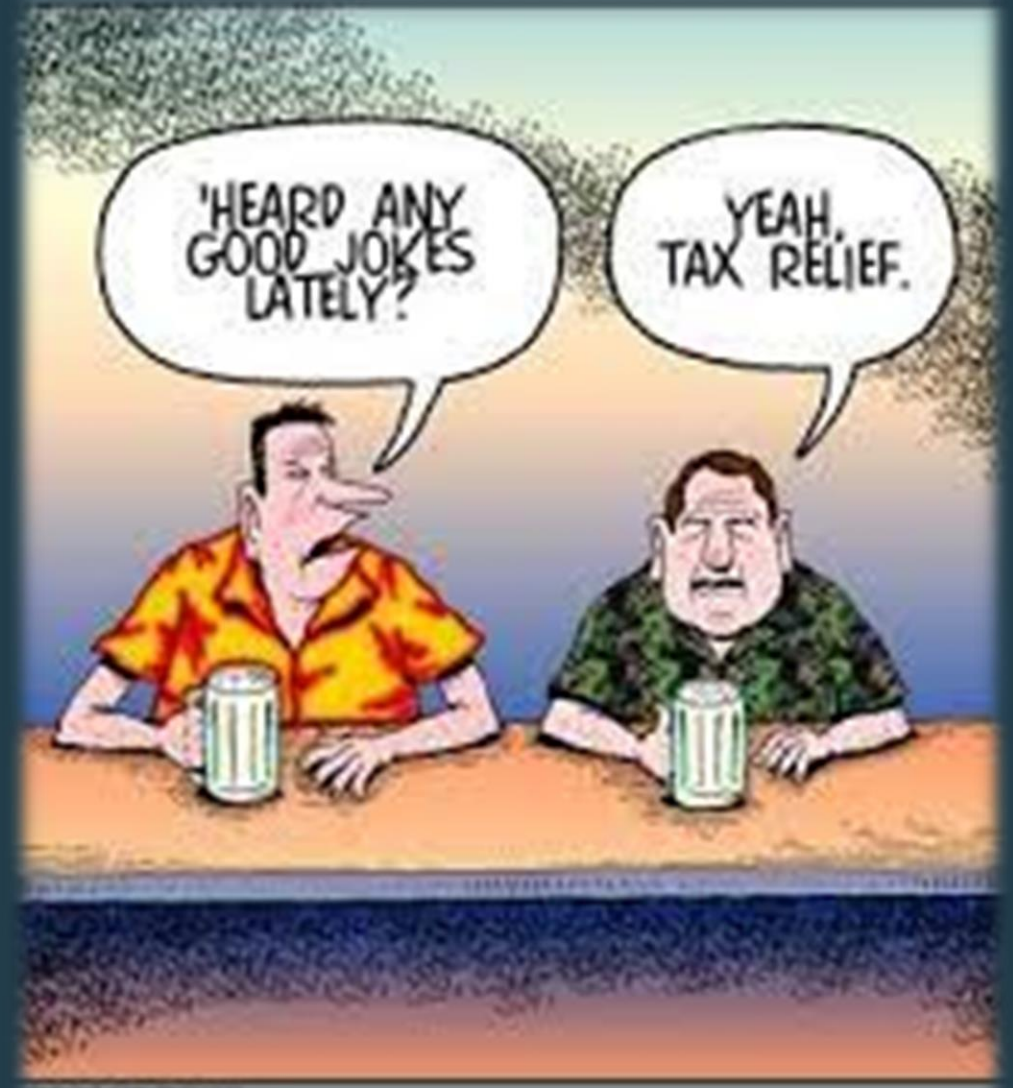
ESTATE DUTY: NON-RESIDENTS



When will estate duty be applicable?



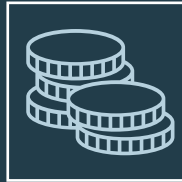
Estate Duty rate and pre-death tax



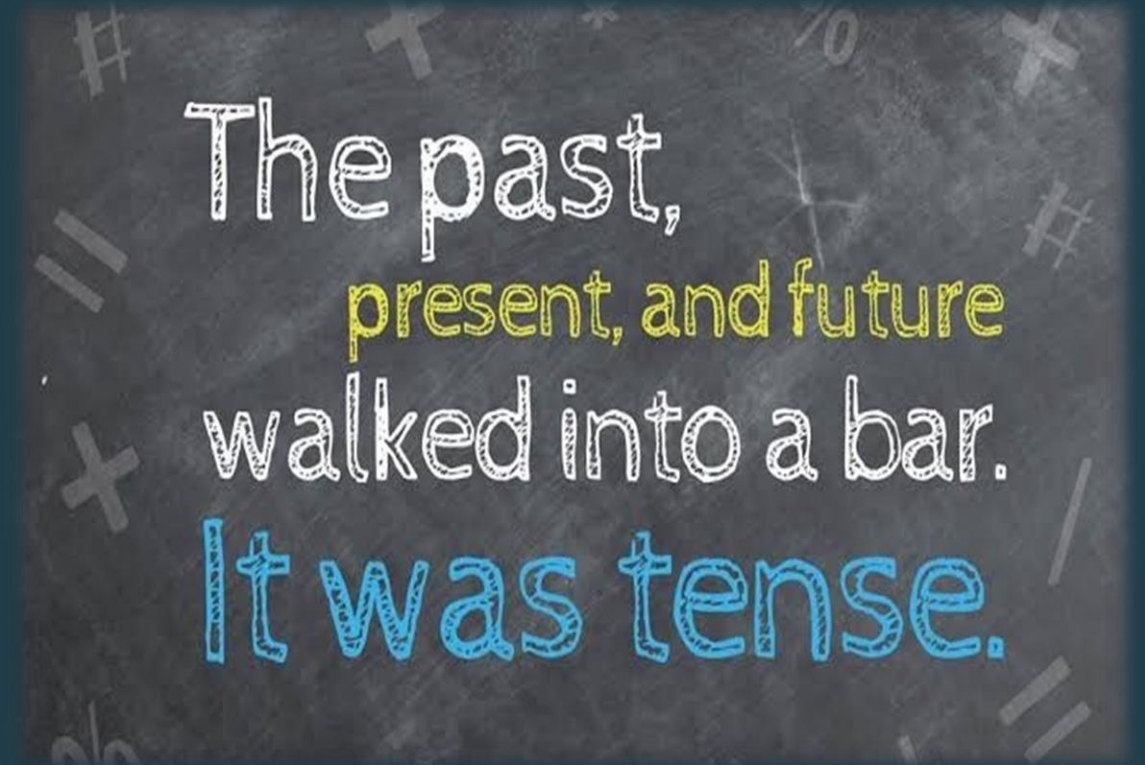
BEQUEST FROM NON-RES TO A SA RES



What is the implications of making bequests in your will to South African Tax beneficiaries, after you have become a non- tax resident and your estate now being administer in another jurisdiction.



For offshore assets (assets outside RSA), Reserve Bank approval may be required when a South African Tax resident receive inheritance from Non-resident beneficiaries.



BENEFICIARY HAS NOT CEASED TAX RESIDENCY BUT RESIDES ABROAD

- Beneficiaries residing abroad
- Already a tax resident in another jurisdiction
- Have not formally ceased to be tax resident in South Africa
- Implications of bequeathing offshore assets to them
- Challenges of transferring inheritance to such beneficiaries
- SARS challenges



HOW TO TRANSFER INHERITANCES FROM SOUTH AFRICA

WHO QUALIFIES?



WHAT DO YOU NEED TO DO?

Inheritance must be paid to the **beneficiary's South African bank account**.

< R1 million

Remit forex offshore using SDA.

OR

> R1 million

Apply for a **AIT TCS PIN** from SARS to remit forex offshore using FCA.

OR

> R10 million

Apply for a **AIT TCS PIN** from SARS and obtain approval from SARS to remit forex offshore using FCA.

Remit forex offshore. No ZAR limit.

KEY

SARB:

South African Reserve Bank

SARS:

South African Revenue Service

TCS:

Tax Compliance Status

SDA:

Single Discretionary Allowance

FCA:

Foreign Capital Allowance
(previously Foreign Investment Allowance)

AIT:

Approval of International Transfer



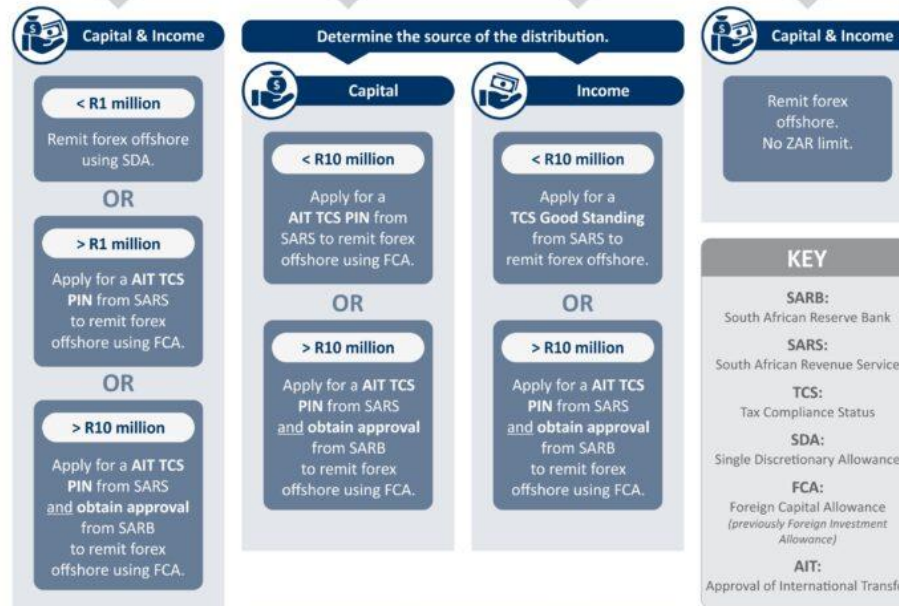
HOW TO TRANSFER MONEY FROM A SOUTH AFRICAN INTER VIVOS TRUST TO BENEFICIARIES OFFSHORE

WHO QUALIFIES?



WHAT DO YOU NEED TO DO?

Distributions must be paid to the **beneficiary's South African bank account.**



CHANGES IN TAX RESIDENCY

CONCLUSION

- THE IS NO ONCE SIZE FIT ALL SOLUTION
- PLAN AHEAD AND STAY INFORMED
- SEEK PROFESSIONAL ADVICE



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QUESTIONS?

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THANK YOU

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