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Changes in tax residency: Impact on trusts – a South African perspective

By Chanel Schoeman

The cessation of tax residency by trustees and beneficiaries of South African trusts introduces a multitude of intricate challenges that require meticulous consideration and strategic planning. This article will aim to assist in identifying complexities and potential punitive tax implications associated with these changes, emphasising the importance of understanding and addressing the multifaceted issues at play.

Identifying the complexity

Trustees often encounter costly challenges due to inadequate recognition of issues arising from non-resident trustees and beneficiaries across multiple jurisdictions. Let us look at some key questions to assist trustees in identifying the complexity:

- Implications of foreign trustees: What are the compliance requirements for having foreign trustees?
- Trust deed provisions: Does the trust deed/governing document permit non-resident trustees and beneficiaries?
- Distributions to non-residents: What are the tax and legal implications of making distributions to non-resident beneficiaries?
- Exchange control implications: Will distributing to non-residents involve exchange control complications?
- Tax implications for the trust: Will the trust face punitive tax consequences?

Foreign trustees

According to s 5 of the Trust Property Control Act 57 of 1988, trustees must notify the Master of the High Court of any change in their address within 14 days via registered post. Section 8 of the Act allows for the appointment of foreign trustees, with the Master of the High Court potentially requiring security before authorising their roles.

Redomiciling the trust

A trust typically requires at least one independent trustee and several other trustees for its management. When the majority of trustees reside outside South Africa, the trust's effective management shifts to the new jurisdiction. Redomiciling the trust necessitates understanding the support for trust structures in the new jurisdiction, along with its reporting and compliance requirements, and assessing the tax implications.

Steps to redomicile a trust:

- Deregister the trust with the Master of the High Court.
- Settle any outstanding tax liabilities and deregister with the South African Revenue Service (SARS) to exit the South African tax net.
- Execute a Deed of Retirement and Appointment (DORA).

Locked into trust structures

Discretionary trusts offer flexibility in planning, while testamentary trusts, trusts established by court order, and special trusts have constrained powers and planning options when there is a change in residency. Testamentary trusts are governed by the founder's last will and testament, and trusts established by court order are bound by judicial decisions. Modifications to these trusts require High Court applications, which are costly, time-consuming, and not guaranteed to be approved. If the court denies the amendments, assets may become