

2003-09-30

**EXCHANGE CONTROL CIRCULAR NO. D.405**

**EXCHANGE CONTROL AMNESTY AND AMENDMENT OF TAXATION LAWS ACT, 2003 (ACT NO. 12 OF 2003) – ("THE ACT")**

Flowing from representations made, Authorised Dealers are advised of the following administrative concessions –

**IMMIGRANTS**

In terms of Section C.2(F) of the Exchange Control Rulings, immigrants are required to declare to an Authorised Dealer whether they are possessed of any foreign assets and if so, are required to give an undertaking to the effect that they will not place such foreign assets at the disposal of any third party normally resident in the Republic.

All immigrants who have not as yet made this formal declaration to an Authorised Dealer must do so before 2003-12-01. Such a declaration would regularise their possession of foreign assets and would obviate the need to apply for exchange control relief in terms of the Act. This concession, however, does not absolve such immigrants from having to apply for tax relief in terms of the Act, if applicable.

**FOREIGN INHERITANCES/LEGACIES**

South African residents who became entitled to a foreign inheritance, prior to 1998-03-17,

were required to declare such foreign assets via an Authorised Dealer to the Exchange Control Department of the South African Reserve Bank for exemption from the provisions of Exchange Control Regulation 6 and/or 7.

Persons, who have not as yet made such declarations via an Authorised Dealer, must do so before 2003-12-01. Such a declaration would regularise their possession of foreign assets and would obviate the need to apply for exchange control relief in terms of the Act. This concession, however, does not absolve such persons from having to apply for tax relief in terms of the Act, if applicable.

It should of course be noted that foreign inheritances received on or after 1998-03-17 while being automatically exempt from the provisions of Exchange Control Regulations 6 and/or 7, still need to be regularised from a South African Revenue Service point of view, if applicable.

### **FOREIGN EARNED INCOME**

Private individuals (natural persons) resident in South Africa who earned income abroad prior to 1997-07-01 were, in terms of Exchange Control Regulation 6, required to repatriate such foreign earned income to South Africa. Persons who have not repatriated foreign income earned prior to 1997-07-01 to South Africa are required to declare such income via an Authorised Dealer to the Exchange Control Department of the South African Reserve Bank, before 2003-12-01. Such a declaration would regularise their possession and retention abroad of foreign assets and would obviate the need to apply for exchange control relief in terms of the Act. This concession, however, does not absolve such persons from having to apply for tax relief in terms of the Act, if applicable.

### **UNAUTHORISED FOREIGN LOANS**

Private individuals (natural persons) resident in South Africa who raised foreign loans abroad prior to 2003-02-28 to finance the acquisition of foreign assets in contravention of the Exchange Control Regulations must declare such foreign loans before 2003-12-01 via an Authorised Dealer to the Exchange Control Department of the South African Reserve Bank. Such a declaration would regularise such foreign loans. Persons applying for exchange control relief in terms of the Act may reduce the leviable amount to the extent

that such person can prove that such reduction is equal to the amount of such foreign loan declared in terms of this dispensation, which was utilised to acquire the foreign asset.

## **RE-INVESTMENT OF FOREIGN ASSETS OR THE PROCEEDS THEREOF INTO THE REPUBLIC**

- 1 It has come to the attention of the Exchange Control Department of the South African Reserve Bank that certain private individuals, resident in South Africa, have entered into a transaction or a series of transactions ("Transactions"), the purpose, and/or effect of which is to export capital, directly or indirectly from the Republic. These Transactions, which contravene the Exchange Control Regulations, including, inter alia, Regulation 10(1)(c), invariably entail the formation by (or at the instance of) a resident of an offshore structure ("Offshore Structure") which, by a re-investment into South Africa, acquires shares or some other interest in a South African resident company or a South African asset.
- 2 The most prevalent Transaction(s) utilised in this regard usually result(s) in the so-called 74/26 Structure in terms of which (subject to deviations from case to case which do not alter the impact thereof on the Exchange Control Regulations) –
  - 2.1 the South African resident, either directly or indirectly, procures a non-resident company or entity in which the resident or a non-resident trust, also procured at the direct or indirect instance of the resident, acquires a substantial or total shareholding;
  - 2.2 the non-resident company or the non-resident trust would acquire 74% or some lesser substantial shareholding in a South African resident company in which the resident referred to in 2.1 above, (or his family) holds the remaining shareholding; and
  - 2.3 the South African resident would thereafter dispose of certain carefully selected South African growth assets to the resident company in 2.2, on the basis that the consideration for such disposal would be discharged by means of raising a loan account in the resident company. Alternatively a loan would be advanced to the

resident company by the South African resident for purposes of acquiring such assets.

- 3 The Exchange Control Department of the South African Reserve Bank regards the above-mentioned Transactions (and various derivatives thereof) as a contravention of the Exchange Control Regulations, in that these Transactions result in and/or have the potential to result in the direct or indirect export of capital abroad (by the resident company to the non-resident company or other relevant non-resident trust or entity for the ultimate benefit of a South African resident, of dividends including dividends arising from increased profits, revenue reserves and/or capital reserves accruing from the introduction of the assets in 2.3 above, to the resident company).
- 4 Exchange Control investigations in connection with these Transactions have revealed that –
  - 4.1 certain South African residents have transferred, from the Republic or have accumulated abroad, funds (irrespective of whether or not such transfer or accumulation has taken place in contravention of the Exchange Control Regulations) which have been utilised to establish an Offshore Structure ("Transaction Establishment Funds");
  - 4.2 after the establishment of the Offshore Structure and the Offshore Structure's investment into South Africa has taken place, (including the shareholding in the South African resident company contemplated in 2.2 above) funds (including dividends, profits and/or loans) would have been exported from the Republic to the Offshore Structure ("Transaction Funds"); and
  - 4.3 the Transaction Funds may, as a consequence of their investment or other economic application offshore, have resulted in an accretion value over and above the nominal value of those Transaction Funds ("Transaction Growth Funds").
- 5 South African residents who have entered into these Transactions may –
  - 5.1 in terms of the Act and in respect of the Transaction Establishment Funds originally transferred from the Republic or accumulated abroad in contravention of the Exchange Control Regulations, for the purpose of entering into such Transactions

and/or setting up the Offshore Structures in consequence of such Transactions, apply for amnesty in respect of these Transaction Establishment Funds;

5.2 be assured that provided –

5.2.1 the South African resident, through an Authorised Dealer submits to the Exchange Control Department of the South African Reserve Bank before 2003-12-01 ("Dispensation Expiry Date") satisfactory evidence to the effect that the shares or other interest in the South African resident company (see 2.2 above) held by a non-resident within any of the foregoing structures have been disposed of at historic cost (original Rand amount introduced) to a South African resident; and

5.2.2 within a period of ninety days reckoned from the Dispensation Expiry Date –

5.2.2.1 the Transaction Funds have been repatriated to the Republic for the benefit of a South African resident and satisfactory evidence to this effect has been submitted to the Exchange Control Department of the South African Reserve Bank via an Authorised Dealer and an amount equal to 5% (five per centum) of the Rand value of the Transaction Funds so repatriated to the Republic shall have been paid to the Exchange Control Department of the South African Reserve Bank via an Authorised Dealer to be held by the Exchange Control Department of the South African Reserve Bank subject to the provisions of 6 below;

5.2.2.2 the Transaction Growth Funds have been repatriated to the Republic for the benefit of a South African resident and satisfactory evidence to that effect has been submitted to the Exchange Control Department of the South African Reserve Bank via an Authorised Dealer and an amount equal to 5% (five per centum) of the Rand value of the Transaction Growth Funds so repatriated to the Republic shall have been paid to the Exchange Control Department of the South African Reserve Bank via an Authorised Dealer to be held by the Exchange Control Department of the South African Reserve Bank subject to the provisions of 6 below, alternatively to 5.2.2.2;

5.2.2.3 the identity and value of the Transaction Growth Funds have been disclosed to the Exchange Control Department of the South African Reserve Bank via an Authorised Dealer and an amount equal to 10% (ten per centum) of the value of the Transaction Growth Funds has been repatriated to the Republic and shall have been paid to the Exchange Control Department of the South African Reserve Bank via an Authorised Dealer to be held by the Exchange Control Department of the South African Reserve Bank subject to the provisions of 6 below,

the Exchange Control Department of the South African Reserve Bank shall take no further actions against the South African residents involved in such Transactions.

6 Amounts paid to the Exchange Control Department of the South African Reserve Bank in terms of 5.2.2.1 and 5.2.2.2 or 5.2.2.3 ("Transaction Recoupment") shall be held and dealt with by the the Exchange Control Department of the South African Reserve Bank subject to the following terms and conditions –

6.1 the South African resident involved in the Transaction ("Affected Resident") shall be entitled at any time within a period ending on the third (3rd) anniversary of the Dispensation Expiry Date ("Recoupment Period") to submit to the Exchange Control Department of the South African Reserve Bank via an Authorised Dealer, satisfactory documentary evidence –

6.1.1 to the effect that the Affected Resident and/or any other person (resident or non-resident) who or which has been a party to the Transaction or the Offshore Structure has paid tax or duty levied in terms of the Income Tax Act, 1962 (Act No. 58 of 1962), the Stamp Duties Act, 1968 (Act No. 77 of 1968) and/or the Transfer Duty Act, 1949 (Act No. 40 of 1949) with respect to –

6.1.1.1 disposals undertaken in order to comply with the terms of 5.2.1 (see 2.2 above);  
and

6.1.1.2 the repatriation of the Transaction Funds and the Transaction Growth Funds in order to comply with the terms of 5.2.2.1 and 5.2.2.2; and

- 6.1.2 reflecting the precise amount of the taxes and duties so paid in terms of 6.1.1 ("Transaction Taxes/Duties");
- 6.2 The Exchange Control Department of the South African Reserve Bank shall, upon receipt of the satisfactory evidence in 6.1, refund to the Affected Resident the lesser of the aggregate amount of the Transaction Taxes/Duties or the Transaction Recoupment;
- 6.3 The Exchange Control Department of the South African Reserve Bank shall not be obliged to, and shall not pay, any interest or other like compensation on or in respect of the Transaction Recoupment paid to it in terms hereof and in determining the amount of the Transaction Recoupment for purposes of 6.2 above, no interest or other such consideration shall be added thereto; and
- 6.4 If, on the expiry of the Recoupment Period –
- 6.4.1 the Affected Resident has failed or refused or been unable to submit to the Exchange Control Department of the South African Reserve Bank the satisfactory documentary evidence contemplated in 6.1; or
- 6.4.2 the aggregate amount of the Transaction Taxes/Duties has been less than the Transaction Recoupment,
- the Transaction Recoupment or the amount thereof remaining, as the case may be, shall be forfeited and shall by virtue of the implementation of these provisions be agreed to be forfeited for the benefit of the National Revenue Fund and no person including the Affected Resident, shall have any claim in respect thereof, whatsoever.
- 7 The provisions of this section of the circular are intended to afford South African residents the opportunity to avail themselves of the dispensation granted by the Exchange Control Department of the South African Reserve Bank and which dispensation is recorded in 5 and 6 above and which shall not be construed as giving legal effect in the context of the Exchange Control Regulations to the

ostensible form of any Offshore Structure resulting from any of the foregoing transactions.

The foregoing Exchange Control dispensations are only valid until 2003-11-30 and should be viewed as a further measure in order to ensure that the objectives of the amnesty are achieved.

Authorised Dealers are therefore requested to encourage those affected clients to take the necessary steps to ensure compliance before 2003-12-01. Exchange Control is prepared to clarify any aspect of these dispensations on inquiry by any Authorised Dealer on behalf of any of its affected clients.

Failure to comply will expose those in contravention to the full force of the law after 2003-11-30.

This Circular will also be published on the South African Reserve Bank web site.

**GENERAL MANAGER**

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