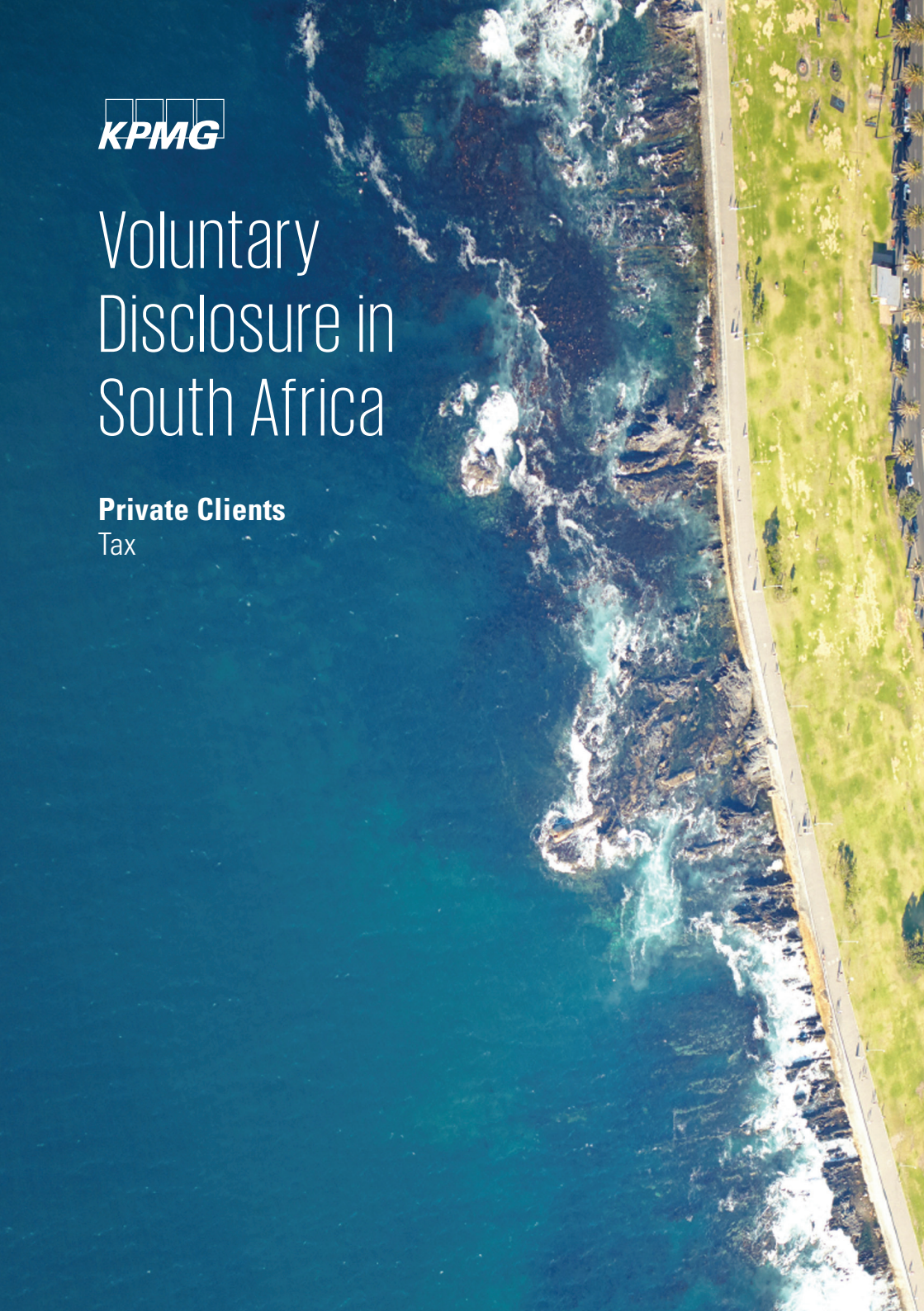




Voluntary Disclosure in South Africa

Private Clients
Tax



Voluntary disclosure in the South African context often involves two processes that go hand-in-hand, namely 1) the voluntary disclosure of tax defaults; and 2) the regularization of Exchange Control ("Excon") contraventions.

It is important to distinguish between said processes insofar as they serve different purposes, require distinct and separate application processes and are respectively administered by the South African Revenue Service ("SARS") and the South African Reserve Bank's Financial Surveillance Dept. ("SARB FinSurv").

Special Voluntary Disclosure Programme

On Wednesday 24 February 2016, the Finance Minister, announced a Special Voluntary Disclosure Programme ("SVDP") for taxpayers to regularize their offshore assets and the related income (hitherto undeclared to SARS).

The SVDP applies both to income tax defaults and Excon contraventions. South Africans holding unauthorised assets off-shore would be given a six month window to regularise past tax defaults and / or Excon defaults. The application window is from 1 October 2016 until 31 March 2017.

Trusts do not qualify to apply for the SVDP. Settlers, donors, deceased estates or beneficiaries of foreign discretionary trusts may, however, participate in the SVDP if they elect to have the trust's offshore assets and income deemed to be held by them.

Regardless of the SVDP proposed, taxpayers still have access to the VDP process as legislated (discussed in this document).

Why now?

It is stated in the Budget Speech that "With a new global standard for the automatic exchange of information between tax authorities providing SARS with additional information from 2017, time is now running out for taxpayers who still have undisclosed assets abroad."

The OECD's Automatic Exchange of Information initiative accompanied by the Common Reporting Standards ("CRS"), sets the framework for sharing information between tax jurisdictions.

The reality is that detailed information about

South Africans' unauthorised assets held abroad, as well as the undeclared income generated by such assets, will soon become available to the South African authorities.

The timing of the Budget announcement of the SVDP therefore gives South Africans a once-off six month window to regularise historical tax defaults and / or Excon contraventions, i.e. prior to the information exchange taking place.

Voluntary disclosure of tax defaults (SARS)

The tax regularisation process became a permanent feature with the introduction of the Tax Administration Act in 2012. This afforded taxpayers an unlimited period of time to approach SARS for regularisation. The statutory mechanism of the Voluntary Disclosure Program (VDP) allows a taxpayer to approach the SARS to disclose a historical tax “default” which resulted in an understatement. This enables regularisation of the tax default(s) under a statutorily defined dispensation which is predictable and not subject to discretion.

The requirements for a valid VDP has been expanded and the said disclosure must –

- a) Be voluntary;
- b) Involve a “default” which has not occurred within five years of the disclosure of a similar “default” by the applicant;
- c) Be full and complete in all material aspects;
- d) Involve a behavior which gives rise to the SARS being able to levy an understatement penalty percentage;
- e) Not result in a refund due by SARS; and
- f) Be made in the prescribed form and manner.

A person cannot apply for VDP relief if the potential applicant is aware of a pending SARS audit or SARS investigation which is related to the default which the potential applicant wishes to disclose or where the SARS audit or SARS investigation (which relates to the “default”) has commenced but has not been concluded by SARS.

What taxes qualify for relief?

VDP relief is available for all taxes administered by SARS (excluding Customs and Excise Duties).

Penalties

Understatement Penalties (“USP”) and administrative non-compliance penalties will be waived. Penalties relating to the late submission of a return may not be waived. Over and above this, interest at prevailing rates will be due and will be calculated from the date on which payment was due to the date payment is made by the taxpayer.

Procedure and timeline

SARS is currently dealing with VDP applications in real time and there is no backlog. The average resolution period is approximately two months for a standard application that does not involve huge complexity.

Since the taxpayer’s disclosure is voluntary, it is incumbent on the taxpayer to fully disclose all “defaults” across all tax types impacted, to calculate by how much the tax liability has been understated, which USP and administrative penalties apply and potentially qualify for relief and what the amount of interest imposed will be.

When the VDP applicant approaches SARS, it is prudent to have done all the necessary quantifications already. This also helps the applicant to manage/budget for anticipated tax liabilities.

Upon finalization of the SARS evaluation of the VDP application, the applicant and SARS are required to conclude and sign a “VDP agreement”. Said Agreement details the applicant’s tax default disclosure(s), the penalty relief given, the post-VDP capital tax

liability payable by the applicant, etc. The VDP Agreement is binding on both SARS and applicant once agreed to, and signed.

The requirements for a valid VDP application are statutorily prescribed (i.e. SARS has no discretion in relation to allowing access to the VDP). Failure to meet all the qualifying criteria for a valid VDP application, may result in the VDP application being declined.

One of the requirements for a valid VDP application is that the applicant should make “full and complete disclosure”. The VDP Agreement could be cancelled or withdrawn at a later stage, i.e. where SARS subsequently finds that incomplete or incorrect information had been submitted as part of the application.

No-name (anonymous) application

Anonymous applications cannot be submitted, however a no-name query can be submitted to obtain SARS’

opinion regarding the applicant’s potential eligibility for VDP relief (said opinion is however not binding on SARS).

Once the prospective applicant has decided to proceed with an application to SARS, the applicant would need to apply and submit the online VDP application form (i.e. as if the no-name application was not submitted).

Comparison of benefits, obstacles and challenges between the VDP and SVDP (1 October 2016 – 31 March 2017) as relates to tax defaults

Like the VDP legislation which is already statutorily defined, the proposed SVDP legislation will also be legislated. The procedures and outcomes will be highly predictable. Provided the requirements for a valid VDP application have been met, SARS has no discretion to disallow an applicant access to the VDP or SVDP.

VDP

- Investment income (interest, dividends and capital gains) must be declared. Presently applications need to make declarations from the 2002 tax year (1 March 2001).
- To the extent that capital tax is due, the capital tax is payable.
- Seed money is not taxable to the extent that the seed money (capital) was transferred offshore with after-tax monies.
- Interest remains payable from the first year of reported defaults.
- No understatement penalties will be levied
- Relief from administration penalties (excl penalties on the late submission of returns)

SVDP

- Only investment income (interest, dividends and capital gains) from 1 March 2010 need be declared. Any investment income prior to 1 March 2010 is exempt.
- SARS will seek to tax 50% of the total amount used to fund the acquisition of unauthorized offshore assets (acquired before 1 March 2015) in taxable income which will be subject to normal tax.
- Interest remains payable on tax debts from 1 March 2010.
- No understatement penalties will be levied
- Relief from administration penalties (excl penalties on the late submission of returns)



Regularization of Excon contraventions (SARB Finsurv.)

The VDP process outlined above is aimed at regularizing a taxpayer's tax affairs.

The Excon regularization process, on the other hand, is aimed at addressing any contraventions of the Exchange Control Regulations ("the Regulations") that might have been committed.

The Regulations effectively limit a South African Excon resident's ability to expatriate funds from South Africa. Despite the above the SARB Finsurv dept. (responsible to administer the Regulations), does entertain approaches to regularize Excon contraventions. The application process is on a case-by-case basis, i.e. there is no formal publicized regularization process.

The applicable statutes allow for the exchange of information between the SARS and the SARB Finsurv dept. In light of the above a person who needs to disclose tax defaults (e.g. non-declaration of off-shore income and capital gains) often has to undertake a parallel regulation process in respect of Excon contraventions committed (e.g. funds / investments expatriated and held off-shore in contravention of the Regulations).

Procedure and timeline

As indicated above, there is no formal prescribed procedure at the moment.

The SARB Finsurv dept. does require, however, that the person applying for Excon regularization should make a "full, frank and verifiable" affidavit with regard to the Excon contraventions committed (accompanied by relevant supporting documentation).

Due to the lack of a formal procedure, the SARB Finsurv dept. deals with approaches on a case-by-case basis and the timeline will depend on the complexity and magnitude of the application.

No-name (anonymous) application

It is possible to approach the SARB Finsurv dept. on an anonymous basis to gauge its views regarding an Excon regularization application (i.e. prior to making the actual application).

Comparison of benefits, obstacles and challenges between the VDP and SVDP (1 October 2016 – 31 March 2017) as relates to Exchange Control contraventions

The below applies where the person is not already under investigation by SARB Finsurv.

THE REGULARISATION PROCESS

- No time limitation to which contraventions apply.
- 20% levy should the funds / investments be repatriated to SA.
- 25% levy should the holder elect to retain the funds / investment off-shore.
- Where there are mitigating factors the levy could possibly be reduced.

SVDP

- Applicable to contraventions which occurred prior to 29 February 2016.
- A 5% levy will apply where the regularised assets are repatriated to South Africa.
- A 10% levy will apply where the regularised assets remain offshore.
- An additional 2% levy will apply where local assets are utilised to settle the levy.
- The R10 million foreign investment allowance cannot be used to reduce the amount on which the levy is calculated.

Why KPMG South Africa

KPMG South Africa has assisted numerous clients with VDP applications relating to all qualifying taxes (income tax, employees' tax, unemployment insurance fund liabilities, skills development levies, value-added tax).

who is familiar with the client's individual situation and who coordinates the process with the utmost discretion.

KPMG is well placed to deal with regularization given

- Our global reach and collaboration with other KPMG offices (esp KPMG Switzerland);
- Established relationships with foreign banks e.g. Swiss banks, asset managers, etc;
- Registered as the preferred service provider for certain Swiss banks'
- Relationships with the SARS VDP unit and SARB Financial Surveillance Dept;
- Deep experience with relation to earlier VDP programmes and how SARS and SARB approach such applications;
- Collaborative relationships with other key service providers working in the same space;
- Depth of understanding in how SARS will interpret and apply the Common Reporting Standard ("CRS");
- Established and well-staffed VDP team with strong Tax VDP and Excon regularisation expertise.

Cross border advice with utmost discretion

KPMG's network enables us to provide international solutions, calling on our in-house specialists in South Africa, with knowledge of the local tax legislation as well as in respect of the Exchange Control Regulations. We have well established relationships with the offshore banks and work closely with KPMG Switzerland. Our practice is to have a single point of contact

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