



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").

A 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 eleven month window to regularise past tax defaults and / or Excon defaults. The application window is from 1 October 2016 until 31 August 2017.

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

The journey so far...

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 eleven month window to regularise historical tax defaults and / or Excon contraventions, i.e. prior to the information exchange taking place. Draft legislation was issued in February 2016 and April 2016. The latest draft bills as relates to the SVDP were published on 20 July 2016. The finalised bills were issued on 15 December 2016.

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 potential applicant cannot apply for VDP relief in circumstances where a 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).

SVDP relief is available for Income Tax, Estate Duty and Donations in relation to all receipts and accruals prior to 1 March 2015.

Employees’ tax, VAT and Customs and Excise Duties are excluded for SVDP purposes.

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.

Tax VDP and Tax SVDP applications must be electronically submitted on the SARS e-filing system. SARS will enhance the current VDP form (form VDP001) to cater for tax SVDP applications.

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 August 2017) as relates to tax defaults

The SVDP legislation will form part of Chapter 16 of Tax Administration Act No 28 of 2011 (the TAA) as amended. Chapter 16 contains the parameters for regularisation in terms of the permanent tax VDP. Effectively the tax SVDP provides another avenue for income tax regularisation over and above the VDP already in place.

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)
- Relief from criminal prosecution.

SVDP(T)

- Receipts and accruals prior to 1 March 2015 are exempt
- SARS will seek to tax 40% of the highest value of the ZAR value of the aggregate of all assets situated outside South Africa between 1 March 2010 to 28 February 2015 that were derived from undeclared receipts and accruals
- Interest is due and payable
- No understatement penalties will be levied
- Relief from administration penalties (excl penalties on the late submission of returns)
- Relief from criminal prosecution.



Regularisation 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. Regularisation in relation to the SVDP(e) will be done in terms of Regulation 24 (per the latest SARB circular 6/2016).

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).

National Treasury has issued circular 6/2016 on 13 July 2016 which sets out who can apply for the SVDP. It also provides for administrative relief outside of the SVDP.

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.

Procedure and timeline

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).

Exchange control SVDP applications must be electronically submitted on the SARS e-filing system. A new VDP form (SVDP001) must be completed for SVDP exchange control regularisation.

No-name (anonymous) application

The SARB FinSurv depart. is able to answer queries regarding the SVDP (exchange control elements) but anonymous applications will not be accepted under the SVDP.

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

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

SVDP(E)

- 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.

Administrative relief outside of the SVDP

Certain disclosures should have been made by certain exchange control residents to the South African Reserve Bank. The following disclosures fall beyond the ambit of the SVDP but regularisation with or notification to the South African Reserve Bank is still required by 31 August 2017:

- Placing on record that a person (immigrant) has foreign assets and that they will not place such assets at the disposal of an exchange control resident
- Foreign inheritances and legacies from non-resident estates:
 - Prior to 17 March 1998, exchange control residents were required to declare such foreign assets
- Foreign inheritances and legacies from resident estates with foreign assets:
 - South African exchange control residents who became entitled to a foreign inheritance from the estate of another South African resident, may declare such assets
- Foreign earned income. South African residents who earned foreign remuneration income prior to 1 July 1997 were required to repatriate such foreign earnings to South Africa. Those exchange residents who have not repatriated foreign earned income are required to declare same to the South African Reserve Bank.

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).

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 SARF Financial Surveillance Dept
- Deep experience with relation to earlier VDP programmes and how SARS and SARF 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 who is familiar with the client's individual situation and who coordinates the process with the utmost discretion.

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