

South African Reserve Bank
Financial Surveillance Department

2016-07-13

Exchange control Circular No. 6/2016

Proposed joint tax and exchange control Special Voluntary Disclosure Programme

The attention of Authorised Dealers is drawn to the announcement by the Minister of Finance in the 2016 Budget Speech regarding the proposed joint tax and exchange control Special Voluntary Disclosure Programme (SVDP), which will run from 2016-10-01 to 2017-03-31.

In terms thereof, the Financial Surveillance Department (FinSurv) releases the attached document, which contains the details applicable to the regularisation of contraventions of the Exchange Control Regulations, 1961 (Regulations). This circular and attachment may be accessed at www.resbank.co.za by following the links: Regulation and supervision>Financial surveillance and exchange controls>Special Voluntary Disclosure Programme.

Applicants should note that all applications to be submitted for exchange control relief under the SVDP are to be made pursuant to the provisions of Regulation 24. South African residents (individuals, sole proprietorships, partnerships, deceased estates, insolvent estates, South African trusts, close corporations and companies) and former South African residents will be allowed to disclose their foreign assets held in contravention of the Regulations as at 2016-02-29.

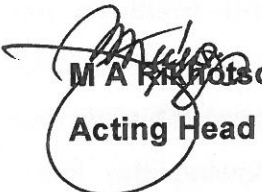
Applications and the relevant supporting documents must be submitted electronically to the SVDP unit via the South African Revenue Service (SARS) eFiling system or at any of the SARS branches countrywide. Separate electronic application forms for the tax and exchange control administrative relief has been created. Further information on

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the exchange control SVDP, the application submission process and supporting documentation requirements will be made available in due course on the website of the South African Reserve Bank (SARB).

Any party involved in a matter currently under investigation by FinSurv may not apply for administrative relief and no applications for exchange control relief under the SVDP will be accommodated prior to the official commencement date of the SVDP. Authorised Dealers are required to advise their clients of the SVDP, details of which are published on the websites of SARB and SARS. Authorised Dealers and their clients who may have questions about the exchange control SVDP are welcome to submit their queries to the following e-mail address: SARB-SVDP@resbank.co.za.

Details on the Tax SVDP can be accessed at:
www.sars.gov.za/Legal/VDP/Pages/default.aspx



M A Rikhotso

Acting Head of Department: Financial Surveillance



South African Reserve Bank

Special Voluntary Disclosure Programme**(A) Introduction of exchange control relief under the Special Voluntary Disclosure Programme**

- (i) Pursuant to the announcement by the Minister of Finance in the 2016 Budget Speech, the Financial Surveillance Department (FinSurv) of the South African Reserve Bank (SARB) is offering an opportunity to South African residents (individuals, sole proprietorships, partnerships, deceased estates, insolvent estates, South African trusts, close corporations and companies) and former South African residents to regularise their unauthorised foreign assets (excluding bearer instruments), as at 2016-02-29, in terms of Regulation 24 of the Exchange Control Regulations, 1961 (Regulations). The Special Voluntary Disclosure Programme (SVDP) will commence on 2016-10-01 and terminate on 2017-03-31.
- (ii) South African residents who are the subject of any current and/or pending investigation by FinSurv into their contraventions of the Regulations will not qualify for Exchange Control relief under the SVDP.

(B) Administrative relief under the Special Voluntary Disclosure Programme

- (i) Applications for administrative relief must be made, using the SARS eFiling platform, to the SVDP unit, which is jointly operated by FinSurv and the South African Revenue Service (SARS).
- (ii) Applications may be made in a personal or representative capacity. Persons applying in a representative capacity must ensure that the necessary proof of authority to act in such capacity is furnished together with the SVDP application.

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(iii) FinSurv may grant administrative relief to a South Africa resident in terms of Regulation 24, provided that:

- (a) the unauthorised foreign assets for which administrative relief is sought was held by the applicant on or before 2016-02-29;
- (b) applications are made within the SVDP period;
- (c) the declaration made by the applicant is made voluntarily;
- (d) the applicant makes a full disclosure of all unauthorised foreign assets (of whatever nature, excluding bearer instruments) in which the applicant stipulates the source of all unauthorised foreign assets and includes details of the manner in which such assets were transferred and retained abroad; and
- (e) the applicant furnishes all documentation and information as stipulated in the SVDP application form, which information and documentation includes, but is not limited to:
 - (aa) the market value at 2016-02-29 of the unauthorised foreign asset in the foreign currency of the country in which such asset is situated;
 - (bb) a description of the identifying characteristics and location of such foreign asset,
 - (cc) a valuation certificate by a valuator of the country where the unauthorised foreign asset is located, or a valuation by a sphere of government of the country where such asset is located, or an original or certified statement of account indicating the balance or market value, or any other form of proof of value of that foreign asset as the Treasury may on good cause shown allow to be submitted; and



(dd) a sworn affidavit or solemn declaration of the contravention.

(f) the applicant furnishes any additional information relating to unauthorised foreign assets, as may be required in terms of the SVDP.

(iv) In order to be granted administrative relief as outlined above, applicants will have to pay a levy based on the market value of such assets as at 2016-02-29, subject to the following conditions:

(a) a levy of 5 per cent is payable on the value of the unauthorised foreign assets or the sale proceeds thereof if such assets are repatriated to the Republic of South Africa (South Africa). The 5 per cent levy must be paid from foreign-sourced funds;

(b) a levy of 10 per cent is payable on the value of the unauthorised foreign assets if such assets are retained abroad. The 10 per cent levy must be paid from foreign-sourced funds;

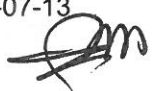
(c) a levy of 12 per cent is payable on the value of the unauthorised foreign assets, in circumstances where the 10 per cent levy is not paid from foreign-sourced funds;

(d) applicants will not be allowed to deduct any exchange control allowance or any remaining portion thereof from any leviable amount;

(e) the applicable levy may not be reduced by any fees or commissions;

(f) the applicable levy must be paid by the applicant within three months from the date of receipt of notification from FinSurv;

(g) in cases where the 5 or 10 per cent levy is payable, such levy must be repatriated to South Africa to an account held at a local Authorised Dealer and must be converted in South Africa at the ruling spot exchange rate; and



- (h) the Rand proceeds of the foreign currency introduced in terms of paragraphs (a) and (b) above and the Rand value described in (c) above must be paid by an Authorised Dealer, into an account held at the Corporation for Public Deposits, established in terms of section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984).
- (v) Where the unauthorised foreign assets declared are denominated in multiple foreign currencies, applicants are permitted to convert those foreign currency amounts to United States Dollar for purposes of the levy using the rate of exchange as at 2016-02-29. The conversion rate of the major foreign currencies to United States Dollar as at 2016-02-29, will be published on the SARB website in due course.
- (vi) Confirmation of administrative relief will only be furnished once the applicable levy is paid to the Corporation for Public Deposits and if applicable, conditions imposed have been met.
- (vii) Foreign assets held in contravention of the Regulations
 - (a) General
 - (aa) Unauthorised foreign assets in respect of which applicants can apply for regularisation in terms of this SVDP include, but will not be limited to:
 - (1) The sale, cession or assignment by residents of intellectual property, owned or developed by South African residents, without having obtained FinSurv approval. In this regard, full disclosure of the sale or assignment will be required including the identity of the parties involved and royalties paid by residents pursuant to any disposal;
 - (2) foreign liabilities incurred by residents to acquire foreign assets with recourse to South Africa without having obtained FinSurv approval. In this regard, full disclosure of the

underlying transaction relating to the liability will be required, including details of the liability itself and the parties involved; and

- (3) the acquisition of a direct or indirect interest in a foreign asset (including foreign cash balances) as a result of the retention of funds abroad which should have been repatriated to South Africa or by having remitted funds abroad without having obtained FinSurv approval. Such transactions include, but are not limited to, the acquisition of foreign securities (including unauthorised share swaps), the retention abroad of export proceeds, unauthorised spending on credit cards resulting in foreign assets and inheritances from South African deceased estates with unauthorised foreign assets. In this regard, full disclosure of the transaction, including any underlying transactions will be required and details of all the parties involved therein are to be provided.

- (b) Re-investment of foreign assets or the proceeds thereof into South Africa (loop structures/ 74/26 structures)

- (aa) South African residents (both natural persons and corporate entities) who have, prior to 2016-02-29, entered into a transaction or a series of transactions (Transactions), the purpose, and/or effect of which was to export capital, directly or indirectly from South Africa. These Transactions, 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.

- (bb) 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 Regulations):

- (1) the 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) the non-resident company or the non-resident trust would acquire 74 per cent or some lesser substantial shareholding in a resident company in which the resident referred to in (1) above (or his/her family) holds the remaining shareholding; and
 - (3) the resident would thereafter dispose of certain carefully selected South African growth assets to the resident company in (2) above, 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 resident for purposes of acquiring such assets.
- (cc) FinSurv regards the above-mentioned Transactions (and various derivatives thereof) as a contravention of the 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 resident, of dividends including dividends arising from increased profits, revenue reserves and/or capital reserves accruing from the introduction of the assets in paragraph (bb)(3) above, to the resident company).

(dd) FinSurv investigations in connection with these types of Transactions have revealed that:

- (1) certain residents have transferred, from South Africa or have accumulated abroad, funds (irrespective of whether or not such transfer or accumulation has taken place in contravention of the Regulations) which have been utilised to establish an Offshore Structure (Transaction Establishment Funds);
 - (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 resident company contemplated in paragraph (bb)(2) above) funds (including dividends, profits and/or loans) would have been exported from South Africa to the Offshore Structure (Transaction Funds); and
 - (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).
- (ee) South African residents who have entered into these Transactions and apply, before 2017-03-31, for regularisation of those transactions enumerated under points (dd)(1) to (3) above must within a period of one hundred and eighty (180) days reckoned from the date of submission of the SARS eFiling application, provide suitable documentary evidence to FinSurv to the effect that the shares or other interests in the South African company (see (bb)(2) above) held by a non-resident within any of the foregoing structures had been disposed of at historic cost (original Rand amount introduced) to a resident. A levy of an amount equal to 5 or 10 per cent (dependent on whether unauthorised assets are repatriated) will be charged on the transaction establishment

funds, transaction funds and the transaction growth funds, where applicable. With regard to the payment of the levy, the provisions of section (iv) above will apply.

(c) Special rules for donors to discretionary trusts

(aa) A South African resident who is a donor (or the deceased estate of a donor) in relation to a discretionary trust which is not a resident, may elect that any foreign asset contemplated in paragraph (bb) below which was held by that discretionary trust on 2016-02-29, be deemed to be held by that resident.

(bb) Paragraph (aa) above applies in respect of a foreign asset of a discretionary trust which:

- (1) was acquired by that discretionary trust by way of a donation made by a South African resident contemplated in subsection (dd)(1) above;
- (2) has been wholly or partly derived from any unauthorised asset or from any amount not declared by the donor to the Commissioner for SARS as required by the Estate Duty Act, 1955 (Act No. 45 of 1955) or Income Tax Act, 1962 (Act No. 58 of 1962); and
- (3) has not at the time of that election vested in any beneficiary of that discretionary trust.

(cc) Where a South African resident has made an election as contemplated in subsection (aa) above in relation to a foreign asset that resident is deemed to have held the foreign asset for purposes of this administrative relief, from the date that the discretionary trust acquired that foreign asset until that foreign asset is disposed of by that discretionary trust to any other person, in which case that person shall be deemed to have



disposed of that foreign asset for consideration equal to its market value on the date of disposal.

(dd) In order to make the election contemplated in paragraph (aa) above, the resident must submit the founding document (including any amendments, codicils and addendums) of the discretionary trust as at 2016-02-29 together with the application.

(ee) A levy equal to 5 or 10 per cent (dependent on whether unauthorised assets are to be repatriated) of the value of the foreign asset(s) disclosed will be payable. The market value, in the foreign currency of the foreign asset, shall be that on 2016-02-29.

(viii) Notice of objection

- (a) An applicant who is aggrieved by a decision of FinSurv to refuse an application for regularisation or to declare void, in terms of Regulation 24(9) of the Regulations, any application previously approved may lodge a written objection with the Head of FinSurv and must deliver a notice of such objection within 30 days of the date of delivery of a notice from FinSurv refusing administrative relief or withdrawing or declaring void relief previously granted.
- (b) The Head of FinSurv must refer the matter to a review panel consisting of not less than three members, two of whom must be in a senior management position within FinSurv.
- (c) The review panel shall, deliver a notice of its decision to the applicant and in such notice shall provide the reasons for its decision.
- (d) Should the review panel overturn the original decision of FinSurv, then the review panel shall issue the notice contemplated in Regulation 24(8) of the Regulations. FinSurv will not take any further action against successful applicants.



- (e) Further exchange control conditions may be applicable with regard to regularised foreign assets.

(C) Administrative relief outside of the Special Voluntary Disclosure Programme

- (i) Disclosures in terms of this section must be made to FinSurv via an Authorised Dealer in foreign exchange. Applicants should not complete the prescribed SVDP application form on the SARS eFiling platform.
- (ii) Disclosures made in terms of this section will in most instances not attract any levy in terms of Regulation 24, but merely require a full disclosure declaration to an Authorised Dealer. The disclosure must include, but is not limited to, confirmation of the source of all unauthorised foreign assets, details of the manner in which such assets were transferred and retained abroad as well as proof of the market value of the unauthorised foreign assets as at 2016-02-29.

(a) Natural persons

(aa) Immigrants

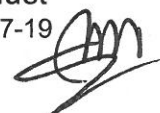
- (1) In terms of section B.2(F) of the Exchange Control Rulings, immigrants are required to declare to an Authorised Dealer whether they are in possession of any foreign assets and if so, are required to give an undertaking to the effect that they will not place such foreign assets at the disposal of any third party normally resident in South Africa. All immigrants who have not as yet made this formal declaration to an Authorised Dealer must do so before 2017-03-31. Such a declaration would regularise the qualifying resident's possession and retention abroad of such foreign assets.

(bb) Foreign inheritances and legacies from non-resident estates

- (1) Residents, who became entitled to a foreign inheritance from a bona fide non-resident estate (excluding South African estates with foreign assets), prior to 1998-03-17, were required to declare such foreign assets via an Authorised Dealer to FinSurv for exemption from the provisions of Regulation 6 and/or 7.
- (2) Residents, who have not as yet made such declarations via an Authorised Dealer, may do so before 2017-03-31. Such a declaration would regularise the qualifying resident's possession and retention abroad of such foreign assets.

(cc) Foreign inheritances and legacies from resident estates with foreign assets

- (1) South African residents, who became entitled to a foreign inheritance from the estate of another South African resident, previously held in compliance with the Regulations, may declare such foreign assets and apply for exemption from the provisions of Regulation 6 and/or 7. The FinSurv approval to retain such foreign assets abroad will be granted subject to the condition that the foreign assets may not be placed at the disposal of other residents or used to create 'loop structures' and no levy will be payable by the resident beneficiary.
- (2) Where it is disclosed to FinSurv that the foreign assets inherited were held by the deceased in a manner contrary to the provisions of the Regulations, including 'loop structures', such assets must via an Authorised Dealer be reported to FinSurv who would require the assets to be repatriated and no levy would be payable. If such assets are, however, to be retained abroad a levy of 10 per cent will be payable to FinSurv and where applicable existing 'loop structures' must



be terminated. The retention abroad of such assets is subject to the condition that the assets may not be placed at the disposal of other South African residents or used to create any 'loop structure'.

Note: Foreign assets inherited and which were held abroad by the resident beneficiary not in compliance with the provisions of the Regulations, for example the resident beneficiary created a 'loop structure' after receiving the inheritance from the deceased's estate, are not exempt from paying a levy and must apply for administrative relief under the SVDP.

- (3) Residents, who have not as yet made the relevant declarations (as discussed under paragraphs (bb) and (cc) above) via an Authorised Dealer, may do so before 2017-03-31. Such a declaration would regularise the qualifying resident's possession and retention abroad of such foreign assets.

(dd) Foreign earned income

South African residents who earned income abroad prior to 1997-07-01 were, in terms of Regulation 6 of the Regulations, required to repatriate such foreign earned income to the Republic. Those residents who have not repatriated foreign income earned prior to 1997-07-01 to the Republic may declare such income via an Authorised Dealer to FinSurv, before 2017-03-31. Such a declaration would regularise the qualifying resident's possession and retention abroad of such foreign assets.

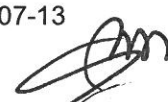
(b) Corporate entities and approved foreign investments

(aa) South African residents with approved foreign investments which have been approved by FinSurv and/or an Authorised Dealer, but who have not, prior to 2016-02-29 and not in compliance with the approval granted:

- (1) submitted to FinSurv on an annual basis, financial statements and progress reports with regard to such approved foreign investment(s);
- (2) lodged share certificates in respect of such approved foreign investments with Authorised Dealers (unless exempted from so doing);
- (3) placed on record, with FinSurv, the expansion of their approved foreign investment(s);
- (4) declared dividends and repatriated such dividends to South Africa prior to 2004-10-26; and
- (5) placed on record, with FinSurv, the disposal of all and/or part of an approved foreign investment (which would include the dilution of the residents interest in such foreign investment by the issue of new shares to a non-resident or other South African resident) and/or where the proceeds of such disposal have not been repatriated to South Africa, may prior to 2017-03-31 disclose, to FinSurv through an Authorised Dealer, such non-compliance.

(bb) Such disclosure must also:

- (1) in respect of financial statements and progress reports, contain all outstanding statements and reports;



- (2) in respect of share certificates, offer for lodgement such share certificates with an Authorised Dealer or motivate to FinSurv to be exempted from such requirement;
 - (3) in respect of an expansion of a foreign investment, disclose full details of such expansion, the source of funding relating thereto and any recourse to South Africa in respect thereof;
 - (4) in respect of dividends, disclose the value of such dividends and what the dividends, not repatriated to South Africa, have been used for; and
 - (5) in respect of a dilution/disposal of interest, contain full details in respect thereof, including the use of the proceeds, if any, regarding such dilution/disposal.
- (cc) The disclosure and compliance with any condition imposed by FinSurv would regularise such contravention(s). No levy will be payable in respect of such declaration and regularisation, save and unless the act results in another contravention of the Regulations not specifically referred to above. A declaration relating to the failure to declare dividends and which have not been repatriated to South Africa and where such dividends were not used for purposes of the business operations of the approved foreign investment and/or the dilution/disposal of an interest in an approved foreign investment the proceeds of which were not repatriated to South Africa, will be dealt with in terms of section B above and may attract the payment of the levy contemplated therein.
- (iii) South African residents who do not apply for administrative relief under sections (A) and (C) above and who subsequent to the SVDP period make a full, frank and verifiable disclosure directly to FinSurv will be required, at the discretion of FinSurv, to pay a settlement amount ranging from 10 per cent to 40 per cent on the current market value of the unauthorised foreign assets.

The determination of the final settlement amount will, inter alia, depend on whether the applicant elects to retain or repatriate the foreign assets.

- (iv) South African residents who neither applied for exchange control relief in terms of this SVDP nor voluntarily approached the FinSurv for assistance may face the full force of the law. In this regard, the FinSurv is mandated to, where appropriate, recover the full amount of the contravention.

(D) Conclusion

- (i) Authorised Dealers are requested to encourage their clients to avail of the SVDP prior to 2017-03-31, if applicable. FinSurv will clarify any aspect of the SVDP on enquiry by any Authorised Dealer on behalf of its affected clients.
- (ii) This document will also be published on the website of SARB.



M A Rikhotso

Acting Head of Department: Financial Surveillance

2016-07-13

Date