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Submission File

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Mr Mark Kingon
Head: Stakeholder Relations
South African Revenue Service
Private Bag X923
Pretoria
0001

Mr Charles Nevhutanda
Divisional Head - Financial Operations
Financial Surveillance Department
South African Reserve Bank
PO Box X427
Pretoria
0001

BY E-MAIL: mkingon@sars.gov.za
charles.nevhutanda@resbank.co.za

Dear Mr Kingon and Mr Nevhutanda

RELEASE OF FUNDS: RESIDENT TRUST DISTRIBUTIONS TO NON-RESIDENT TRUSTS

1. The South African Institute of Chartered Accountants' (SAICA) Exchange Control Sub-Committee hereby takes the opportunity to make a submission to the South African Revenue Service (SARS) and the Financial Surveillance department (FinSurv) of the South African Reserve Bank (SARB) on the information released by SARS on its website regarding the release of funds when resident trusts make distributions to non-resident trusts.

Background

2. On 8 April 2022 SARS placed the following on its website:

   "It has been the practice of SARS not to approve the release of funds when resident Trusts make distributions to non-resident Trusts. Following numerous queries in this regard, SARS herewith re-iterates its stance on the matter and herewith confirms that it will not approve the release of funds vested and distributed to non-resident Trusts.

SARS is currently investigating other options related to the distribution of funds/amounts to non-residents and is in discussions in this regard. SARS takes note of the fact that the SARB has relaxed certain exchange control requirements but has decided, based on the risks involved, <u>not to approve the release of funds to non-resident Trusts</u>.

This does, however, not preclude a resident Trust from vesting amounts in non-resident individuals and to apply for the relevant approvals, as per the current approved practice."

3. We set out below our comments in this regard and have assumed that when SARS refers to resident trusts they mean South African inter vivos trusts with South African resident settlors and funders.

Specific comments

4. We note the above view by SARS, but we express our sincere doubt that SARS has the legal authority to decide to not approve <u>*the release of funds*</u> vested and distributed by resident trusts to non-resident trusts.

5. In the first instance, we question in terms of what legislation SARS obtained the legal authority to *'approve a release of funds'* as it is the trustees' function to decide whether to make a distribution and to whom. We are not aware of any sections in the Income Tax Act or the Tax Administration Act or the SARS Act that contain this authority.

6. If by this it means that SARS will not issue a positive tax compliance status for the trust in these circumstances to enable it to remit funds to a non-resident trust, then we point out that section 256 of the TAA sets out the requirements for tax compliance. If the local trust is tax compliant on what legal or rational basis can SARS refuse to indicate the compliant status of the trust?

7. SARS states that the approval for these transfers are being denied due to the risks involved.

8. We are uncertain as to what risks SARS is referring to and what prejudice there is to SARS or the fiscus with the distribution of funds to non-resident trusts. The tax treatment of these distributions is clear from an income tax perspective: If the individual beneficiaries of the non-resident trust are non-residents, any distribution to them will result in the funds falling outside of South Africa's taxing rights. If the funds are transferred to a non-resident trust, the funds could possibly remain within South Africa’s tax rights in that the settlor of the South African trust might continue to have the income attributed to him or her under section 7(5) of the Income Tax Act. And if none of the beneficiaries in the non-resident trust are South African residents, we are not sure how it can possibly be more acceptable to distribute the funds directly to the beneficiaries of the non-resident trust rather than to the non-resident trust itself.

9. <u>Submission</u>: We would appreciate SARS and FinSurv's views on the above, clearly indicating what legislation empowers SARS to exercise powers of approval that legally would prevent such transfers.

10. We also request that SARS provides further details about the risks involved in allowing such transfers considering the income tax implications that would normally apply in relation to such transfers so that we can better understand the concerns and collaborate in seeking solutions.

11. If there are such risks and if SARS indeed has the power to refuse to approve such a distribution, then we would enquire why such a narrow approach is taken and why transfers cannot be allowed where there cannot be any risk to South Africa, such as allowing a transfer to a non-resident beneficiary but not to 'his' offshore trust where none of the beneficiaries are SA residents.

Yours sincerely

Ernest Mazansky
Chairperson: Exchange Control Committee

Dr Sharon Smulders
Project Director: Tax Advocacy

The South African Institute of Chartered Accountants