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DAVEY'S Locker

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Offshore trust as your heir?

Using the integrated excon investment & discretionary allowance

by Tony Davey

The recently implemented increase and merger of the foreign investment allowance and discretionary allowance, aggregating R5 m a year for each major person (104 *TSH* 2011), has sparked renewed interest in international tax and estate planning. Some are wondering whether an offshore trust, usually established in a tax haven, could be the nominated heir under a will of offshore (and onshore) assets.

Aside from political, social and economic risk factors, there are forex, tax and estate planning ramifications to such an arrangement.

I see no impediment to the nomination of an offshore trust as heir, given that para 5.5 of the *Exchange Control Manual* permits a 'nonresident' to hold (and remit) an inheritance. From informal discussions with people close to Excon, I understand that in practice such a nomination is in order.

It is always worth while to establish Excon's interpretation of the regulations, although it can be challenging, given that Excon circulars are provided to authorized forex dealers (such as banks) only and are not readily available to the public.

Although there are no estate duty benefits to the testator or testatrix who is dutiable on worldwide assets, assets held in a trust will not form part of the next generation's estate, thus enabling what is known as 'generation-stepping'.

Prima facie, a nonresident trust enjoys a favourable tax dispensation compared with resident heirs.

First, the tax regime in the trust's own jurisdiction is zero or a low rate on the investment return of inherited offshore assets. Secondly, there is no CGT on inherited South African assets, barring immovable property and permanent-establishment assets, and an exemption for interest income under s 10(1)(*h*) of the Income Tax Act.

Tax neutrality as between residents and nonresidents pertains to both RSA-sourced other income (such as rentals) and dividends, which are subject to the same 10% withholding tax.

An important caveat is that if the RSA-resident beneficiaries of an offshore trust ever require moneys to be remitted, the vested-rights triggers of s 25(B)(2A) and para 80 of the Eighth Schedule to the Income Tax Act kick in so as to tax previously untaxed income and capital gains in the hands of the recipient residents.

In such an instance the only tax advantage of an offshore trust is the deferral of tax. *tsh*