# INTERNATIONAL TAX PLANNING CONSIDERATIONS FOR SOUTH AFRICAN EMIGRANTS

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## PROLOGUE

"Never give in, never give in, never, never, never, never
- in nothing, great or small, large or petty
- never give in except to convictions of honour and
good sense."

- Winston Churchill, *His Complete Speeches*,
Edited by Robert Rhodes James

# INTERNATIONAL TAX PLANNING CONSIDERATIONS FOR SOUTH AFRICAN EMIGRANTS

## 1. *INTRODUCTION*

The purpose of this paper is to outline the international income tax implications facing a South African emigrant. The discussion that follows is based on an individual or family emigrating from South Africa to Australia. The reason why I have chosen Australia is because I have a detailed knowledge of the domestic tax laws in Australia. The thought process that I have followed applies equally to most other western countries. The reason for this is because Australia's income tax system is based on residence principles which are similar to most other western countries. On the other hand, South Africa's tax laws are based primarily on source principles, a feature which is applicable mainly to tax havens (but for the high rate in South Africa).

I will commence firstly by giving a brief overview of the income tax system in Australia. I will then proceed to discuss the income tax consequences of a flow of dividends and interest out of South Africa, and into Australia. I will then attempt to raise alternative structures which will provide a more effective after-tax return to the individual or family who settles in Australia.

## 2. *AUSTRALIAN INCOME TAX*

### 2.1 *Overview*

Section 25(1) of the Income Tax Assessment Act *("ITAA")* provides that the assessable income of a taxpayer shall include, in the case of a resident, the gross income derived directly or indirectly from all sources whether in our out of Australia and which is not exempt income. The first thing that you will note from this section is that each individual is a tax paying entity and not the husband and wife jointly as was the case in South Africa up to 28 February 1990 (investment income remains jointly taxed in South Africa after this date). "Gross income" or "income" is not defined in the ITAA. Rather, it has been left to large volumes of case law which have attempted to provide the general principles in deriving at what is "income" for the purposes of this section.

Whereas in South Africa the greater portion of case law on income versus capital arises out of fixed property and marketable security transactions, in Australia the case law covers all types of transactions. This is generally due to the extended defintion of "gross income" in South Africa.

The landmark case in Australia on the meaning of the word "income" was given by Jordan CJ in Scott v Commissioner of Taxation (NSW), (1935) 35SR (NSW) where he stated (emphasis added):

> "The word *income* is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind, except insofar as the statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income, or that special rules are to be applied for arriving at the taxable income of such receipts."

Since this landmark decision, there have been numerous cases that have dealt with non-taxable receipts in the form of capital, gifts, lottery, winnings, windfalls, gains, financial transactions etc. For those that are interested in a detailed dissertation on the issue of "income", reference may be had to Parsons' "Taxation in Australia, Volume 1". The ordinary concepts and usages of mankind would include in the term "income" generally three types of receipts:

a) Income by way of remuneration from personal services,
b) Income from property (like interest and dividends), and
c) Income from carrying on a business

The next aspect of section 25(1) of the ITAA is the question of source. As will be seen from the working of section 25(1) in the case of a resident, source is not critical because income form both sources in and out of Australia are included in income. It is only in the case of a non-resident that the question of source for Australian income tax purposes that it becomes important.

However, for the sake of completeness, I will provide one leading Australian case that deals with the concept of source. In Nathan v the Federal Commissioner of Taxation (1918), Isaacs J stated:

> "The legislature, in using the word *source* meant, not a legal concept, but something which a practical man would regard as a real source of income. Legal concepts must, of course, enter into the question when we have to consider to whom a given source belongs. But the ascertainment of the actual source of a given income is a practical, hard matter of fact."

The next important aspect in relation to section 25(1) of the ITAA is the concept of residence. Section 6(1) of the definitions to the ITAA defines a "resident" or a "resident" of Australia to mean:

a) a person, other than a company who resides in Australia and includes a person:

   (i) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside of Australia,
   (ii) who has actually been in Australia, continuously or intermittently during more than one half of the year of income, unless the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia, or
   (iii) who is an eligible employee for the purposes of the Superannuation Act 1976 or is the spouse or child under 16 years of age of such a person.

The above definition in fact has four separate tests. The first test is whether a person "resides" in Australia and that is determined by common law.

The leading cases in this regard are Levene v IRC (1928) AC217 and IRC v Lysacht (1928 AC234). Where a person is not considered to be resident under common law, he may however still be resident where he fulfils either of the tests in sections 6(i), (ii) or (iii) of the ITAA. In the case of a South African emigrant he will generally fulfil the first test of common law and be considered to be a resident of Australia.

## 2.2 *Credits in respect to foreign tax*

2.2.1 Because a resident of Australia is subject to tax on foreign sourced income, relief is provided in Division 18 of the ITAA in order to avoid double taxation on the same income. If the foreign country is catered for in one of the extensive double tax treaty network (refer Appendix A) then there is commentary that the provisions of Division 18 of the ITAA may be overridden where they are at variance with the provisions in the relevant double tax treaty. However, for the purposes of a South African emigrant, no such issue will arise. South Africa does not have a double tax treaty with Australia and accordingly the provisions of Division 18 of the ITAA will not be varied.

The main operating provision of Division 18 is section 160AF(1) of the ITAA. Section 160AF(1) of the ITAA provides that where:

a) the assessable income of the year of income of a resident taxpayer includes foreign income, and

b) the taxpayer has paid foreign tax in respect of the foreign income, being taxed for which the taxpayer was personally liable, the taxpayer is subject to the provisions in the ITAA, entitled to a credit of

   - the amount of that foreign tax, reduced in accordance with any relief available to the taxpayer under the law relating to that tax, or
   - the amount of Australian tax payable in respect of the foreign income, whichever is the less.

Aspects that become apparent from the above provisions, are -

- the foreign tax must have been actually paid before it is creditable in Australia,
- the foreign tax credit is based on a worldwide pool of income,

- excess foreign tax credits may not be carried forward to the following year of tax, and

- there are special anti-avoidance provisions which are aimed at preventing taxpayers avoiding or reducing excess foreign tax credits arising.

The principles and consequences of the two types of foreign tax credit *('FTC')* systems (i.e. country by country basis versus worldwide basis) can be simply illustrated by comparing examples A and B below. Australia has adopted the worldwide basis FTC system as detailed in example B.

*Example A*

Country by country basis

| | South Africa | Hong Kong | Total |
|---|---|---|---|
| | A$ | A$ | A$ |
| Net income (interest) | 100 | 100 | 200 |
| Foreign tax paid<br>- (maximum individual marginal rate) | (45) | (17) | (61) |
| | == | == | == |

*Example A (continued)*

Country by country basis (not adopted in Australia)

| | South Africa | Hong Kong | Total |
|---|---|---|---|
| | A$ | A$ | A$ |
| Australian tax liability | | | |
| at 39% | (39) | (39) | |
| less | | | |
| FTC i.t.o. sec 160AF(1) | 39 | 17 | |
| Australian liability | NIL | 22 | 22 |
| | == | == | == |
| Excess FTC | 5 | - | _ |
| Total tax liability | 4 | 39 | 83 |
| | == | == | == |

Example B

Worldwide basis (as in Australia)

| | South Africa & Hong Kong |
|---|---|
| | A$ |
| Net income (interest) | 200 |
| Foreign taxes paid | (67) |
| | == |
| Australian tax liability | |
| @ 39% | 78 |
| less | |
| FTC i.t.o. sec 160AF(1) | (61) |
| Australian tax liability | 17 |
| Total tax liability | 78 |
| | == |

What is apparent from the above examples is that Australian tax is saved by merging countries of high tax rates with those of low tax rates. This reduces the consequences of excess foreign tax credit arising which is reflected in a lower total tax liability.. In the above example, excess foreign tax credits of A$5 is clearly reflected in a lower total tax liability on the worldwide basis i.e. A$78 per example B as compared to A$83 per example A.

### 2.2.2 *Anti-avoidance provisions*

The anti-avoidance mechanism as provided for in Division 18 of the ITAA in relation to the mis-use of excess foreign tax credits is as follows. Firstly the foreign tax credit shall be applied separately as in relation to a class of interest income and then also as in relation to a class of other income. Section 160AF(7) of the ITAA provides as follows - notwithstanding the preceding provisions of this section, where the foreign income derived by a taxpayer in any year of income consists of income that is interest income and of other income, this section does not apply in relation to the taxpayer in relation to the foreign income as a whole but, instead, applies in relation to the taxpayer separately in relation to the interest income and in relation to the other income, and, for the purposes of this section as so applying in relation to the interest income or in relation to the other income, the interest income, or the other income, as the case may be, shall be treated as the whole of the foreign income.

Were this section not included in the legislation, the following mischief could be perpetrated. An Australian resident would receive A$100 South African income which is subject to foreign tax of A$44. However in order to avoid the excess foreign tax credit of A$5 arising, the Australian resident would invest a further A$100 on the Hong Kong market and then be liable to foreign tax of A$17 on that amount.

Because the foreign tax credit system in Australia operates on a worldwide basis as illustrated in example B above, the excess foreign tax credit would be utilised, but for section 160AF(7) of the ITAA, through the derivation of interest income subject to a significantly lower rate of tax.

This concept separating a class of interest and a class of other income has been extended in relation to certain dividends. Were the anti-avoidance provisions not extended to certain dividend income the investment in low tax countries could have been done via shareholding, and the dividend received in truth would purely be in the guise of interest returns. Accordingly, section 160AFA(3) provides that where:

a) in the year of income commencing of 1 July 1987 and for a subsequent year of income, a dividend is paid by the foreign company to a taxpayer, and

b) at any time in that year of income, the foreign income is related to the taxpayer or would be related to the taxpayer if the taxpayer were an Australian company,

then for the purposes of this division, so much of that dividend as does not exceed the amount then standing in the interest pool of the foreign company shall be deemed to be interest income derived by the taxpayer in that year of income and not to be a dividend.

### 2.2.3 *Indirect credit*

Another aspect of the foreign tax credit provisions in Division 18 of the ITAA is that a credit is not only provided in relation to foreign tax paid but also to what the ITAA terms as the foreign underlying tax. This is illustrated by example C below:

Example C

| Indirect credit | South Africa |
|---|---|
| | A$ |
| Profit before tax | 200 |
| RSA tax (50%) | (100) |
| | |
| Div - W/tax 15% | (15) |
| - balance | (85) |
| Retained income | NIL |
| | == |

| Australian Resident | |
|---|---|
| Dividend | 85 |
| Gross up - indirect | 15 |
| - direct | 100 |
| | 200 |
| | == |
| Australian tax liability | |
| @ 39% | 78 |
| less | |
| FTC i.t.o. sec 160AF(1) | (15) |
| less | |
| Underlying FTC i.t.o. sec 160AF(4)* | (63) |
| Australian tax liability | NIL |
| | == |

* $\frac{A(B+C)}{D}$

$= \frac{100(100+0)}{100}$

$= 100$

but limited to the Australian tax equivalent of A$78 i.t.o. sec 160AF(1).

*Example C (continued)*

In the above formula, the symbols mean:

A is the amount of the dividend;
B is the amount (if any) of the underlying tax paid by the paying company out of the profits out of which the dividend has been paid;
C is the amount (if any) of underlying tax deemed to have been paid by the paying or by any other application or applications of this subsection in relation to the dividend series;
D is the number of whole dollars in the amount by which the profit out of which the dividend has been paid exceeds B.

It will be seen from the above example that were it not for the right to receive the underlying foreign tax credit, further tax of A$24 would have to have been paid in respect of the dividend of A$85 received in Australia.

## 3. *INCOME TAX CONSEQUENCES IN SOUTH AFRICA*

### 3.1 *Overview*

Section 5(1)(c) of the Income Tax Act *('Act')* provides that subject to the provisions of the Fourth Schedule there shall be paid annually for the benefit of the State Revenue Fund, an income tax (in this Act referred to as the normal tax) in respect of the taxable income received by or accrued to or in favour of any person (other than a company) in respect of the year of assessment ended the last day of February 1964, and each succeeding year of assessment. Section 1 of the Act defines "taxable income" to mean the amount remaining after deducting from the income of any person all the amounts allowed under Part 1 of Chapter 2 (sections 5 to 37C of the Act) to be deducted from or set off against such income. "Income" is defined in section 1 of the Act to mean the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax under Part 1 of Chapter 2. Finally, section 1 of the

Act defines "gross income" to mean in relation to any year or period of assessment, the total amount, in cash or otherwise, received by or accrued to or in favour of such person during such year of assessment from a source within or deemed to be within the Republic, excluding receipts or accruals of a capital nature, but including certain specific receipts.

As noted earlier the two main sources of income flowing out of South Africa to an emigrant are normally interest an dividends. In relation to interest the true source of interest on a loan in terms of the CIR v Lever Bros & Unilever Ltd (14 SATC 1) is the provision of credit, so that if the supply of credit is situated in the Republic, the source of the interest is in the Republic. Accordingly, the emigrant will fall fairly and squarely within the provisions of the Act in relation to interest emanating from South Africa. In the case of dividends, the leading case is Boyd v the CIR (17 SATC 366) which provided that the source of income from dividends are the shares and that the shares are situated where they are registered, i.e. where they can be effectively dealt with, irrespective of the source from which the company derives its income.

Again, but for the withholding provisions in the Act, dividends emanating from companies registered in South Africa payable to emigrants will be sourced in South Africa for normal tax purposes.

*3.2 Non-resident's shareholders tax*

Section 41 of the Act provides that there shall be paid for the benefit of the state revenue fund a tax (in this Act referred to as *non-resident's shareholders tax*) in respect of amounts specified in section 42. Section 42(1) of the Act provides that the non-resident's shareholders tax *('NRST')* shall be paid in respect of the amount of -

a) any dividend which has been declared by any company after the 30th day of June, 1962, and
b) any interim dividend, the payment of which has been approved after that date by the directors of any company or by some other person under authority conferred by the Memorandum and Articles of Association of that company,

if the shareholder to whom the dividend or interim dividend has been paid or is payable is -

(i) a person, other than a company not ordinarily resident nor carrying on a business in the Republic, ...

and was shareholder as at the date of declaration of the dividend, or if some date other than the date of declaration of the dividend is specified as the date at which a shareholder is required to be registered to be entitled to the dividend, as at such other date. Section 45 of the Act provides that the rate of tax shall be -

c) 15% of the amount of -

(i) any dividends referred to in sections 42(1)(a) which has been declared on after the 22 March 1967.

The Act does not define what s meant by ordinarily resident. However, it would generally not be difficult to prove the fact that in the case of a South African emigrant that he is not ordinarily resident in the Republic.

So at this stage in the case of a dividend stream from South Africa an emigrant will be liable to both normal tax and non resident's shareholders tax.

However, relief is provided to the emigrant by way of section 10(1)(k)(iA)(ii) of the Act. This section provides that an emigrant shall be exempt from normal tax in the case of dividends received by or accrued to in favour of any person (other than a company) not ordinarily resident nor carrying on business in the Republic.

The Income Tax Act 1990 introduced amendments to remove the classical double tax system in South Africa viz. firstly the company pays tax on its profits and when the profits (after tax) are subsequently distributed to individuals they are taxed again in their hands. Now the Act provides that dividends received by individuals on or after 1 March 1990 will be totally exempt in their hands.

However, it is interesting and curious to note that the NRST provisions have not been amended. Thus in the case of non-resident individual shareholders, they will remain liable to NRST. In the various double tax treaties that South Africa has concluded with foreign nations, there exists a non-discrimination clause. This non-discrimination clause provides, in essence, that a non-resident must be accorded equal treatment under the respective domestic tax laws. It has been argued that the retention of the NRST provisions may be a violation of the non-discrimination clause in the respective double tax treaties.

However, it is considered that the retention of the NRST provisions do not amount to a violation of the non-discrimination clause. The reason for this is as follows. A South African individual which goes overseas and becomes, for the purposes of the Act, a non-resident will be accorded the same treatment as a non-resident who never had (tax) residence in South Africa.

In relation to interest income, the provisions of Part (VI) of Chapter 2 of the Act have been repealed by section 31(1) of Act No 90 of 1988 and accordingly, the whole aspect of non-resident's tax on interest is no longer applicable.

In summary an emigrant will be liable to normal tax on interest sourced in the Republic. In the case of dividends where the emigrant is both not ordinarily resident nor carrying on business in the Republic those dividends will be subject solely to non-resident's shareholders tax.
A tax planning aspect arises at this stage where an inter vivos trust is interposed between the South African emigrant and the stream of dividends emanating from South Africa. Firstly, the dividends will be exempt from normal tax in the hands of the emigrant by virtue of the provisions of section 10(1)(k)(iA)(ii). Furthermore, reading section 42 of the Act dealing with non-resident's shareholders tax together with section 1 defining the meaning of "shareholder", it is clear that the trust is the shareholder. Since the trust is deemed a South African resident for tax purposes, no non-resident's shareholders tax will be payable on the dividends from the respective company.

Furthermore, as a result of the conduit principle applicable to trusts, the dividend will also not be subject to normal tax. As a result the whole dividend flow to the emigrant will escape both normal tax and non-resident's shareholders tax.

However, caution should be exercised in this regard. In a recent unreported case, the court held that the NRST provisions did apply to the circumstances in that case. The court held that even though the trust was a discretionary trust, the nominated beneficiaries were easily identifiable as the "genuine" shareholders. In essence, the court applied the substance over form argument in order to enforce the application of the NRST provisions.

Tebbut J held in the abovementioned unreported case that:

"In the present case the Court is of the clear view that the trustees, and therefore the trust acting through Syfrets, were a mere administrative conduit pipe of the dividends to Cecil Michaelis who was the true recipient of them; their all being passed to him without any being retained in the trust is clear evidence of that. It was he who was the beneficiary of the dividends. And it matters not that he did not receive the actual dividends but the amount of them less Syfrets' charges (see Rosen's case supra p 269). This gives recognition to the substance rather than the form of the distribution and receipts of the dividends. Cecil Michaelis was therefore in our view a deemed shareholder in respect of the shares in question and so we hold.

Mr Clegg, who appeared for the appellant argued, however, that the trust with which we are concerned is a discretionary trust and that until the trustees had exercised their discretion and decided to pass on the dividends to Cecil Michaelis he was not the beneficiary of those dividends and therefore not a deemed shareholder. He referred to section 42 and to the fact that non-resident shareholders' tax is only payable if the non-resident was a 'shareholder as at the date of declaration of the dividend'. He contended that as the trust was a discretionary one the dividends were only distributed by the trust to Cecil Michaelis after the trustees had, in the exercise of their discretion, decided to distribute the dividends to him and then at some time after the date of declaration of the dividend and accordingly not liable to pay non-resident shareholder's tax.

The fallacy in Mr Clegg's argument is a two-fold one. In the first place the trustees had prior to the declaration of the dividends by the various companies in which shares were held on behalf of the trust in the years in question viz. 1981 and 1982 already in the exercise of their discretion decided that the income from the dividends should be paid to Cecil Michaelis. This was the effect of their instructions to pay all such income monthly to him - a standing instruction dating back many years prior to 1981 and 1982. That discretionary decision had never been varied or rescinded and remained a valid one in 1981 and 1982."

Tebbut J continued by stating that:

"In the second place, in the Court's view, Cecil Michaelis had a vested right to the dividends and income in question[.]

It is quite clear that [the] clause immediately vested in the children the right to receive, until he or she reached the age of 21 and was unmarried, such portion of the trust income as was necessary in the trustees' discretion for his or her maintenance, education or benefit. At that stage i.e. until the beneficiaries turned 21 and married the income had vested in them and therefore the trustees had no discretion as to whether or not any amount should be paid to them. They had to pay some amount. The only discretion that the trustees could exercise then was as to the amount of income necessary for the children's maintenance, education and benefit."

## *4. EXCHANGE CONTROL*

### *4.1 Outflow of income*

It is important at this stage to address certain aspects of the Exchange Control regulations. The normal settling-in allowance granted to persons emigrating in the case of a family unit is an amount of up to R200 000 through the Financial Rand medium and a travel allowance applicable to each member of the family through the Commercial Rand medium.

The family allowance is presently at R15 000 per adult and R7 500 per child under the age of 12. It is important to realise at this stage that the R200 000 is the maximum amount of capital that may leave South Africa in the relation to an emigrant. The rest of the RSA emigrant's assets are trapped forever in a block account. This is in contrast to a non-resident who invests in South Africa. The non-resident may repatriate both his original investment and accumulated capital gains via the Financial Rand.

As regards income transfers the general rule is that net income earned on the emigrant's South African assets after the date of emigration or after 31 December 1983 (whichever date is the later) may be transferred from the Republic through normal banking channels provided that the amount of income is limited to R300 000 per fiscal year per single emigrant person or per emigrant family

unit. Income in excess of this amount may only be credited to a Financial Rand account with an Authorised Bank. The income derived from such a Financial Rand account or from an investment made from such Financial Rand would be eligible for transfer abroad in addition to the R300 000.

4.2 *Exchange Control and inter-vivos trusts*

Since most emigration structures use inter vivos trusts it is important to address certain exchange control regulations applicable to such structures. As a result of certain malpractices it is the general policy of Exchange Control as regards the remittance of income to non-resident beneficiaries of inter-vivos trusts, that such remittances should be affected through the Financial Rand medium, with the one exception being the blocked assets trust.

In the case of the blocked assets trust, i.e. where the assets of inter vivos trusts are owned by the beneficiaries at the time of the sale or donation thereof to the trust, but before such beneficiaries' emigration, the Exchange Control usually permit the remittance of income distributed to the beneficiary via the Commercial Rand, provided such income is earned by the trust after the beneficiaries date of emigration or after 1 January 1984 (whichever date is the later).

In the case of third party trusts established within five years before the beneficiaries emigration it is likely that Exchange Control will require that income distributed to the emigrant beneficiaries be blocked, in the names of the respective beneficiaries, in terms of Exchange Control Regulation 4(2) and that income earned on the relative blocked accounts be capitalised and subjected to the same blocking restriction. This is the most severe scenario possible. In the case of the third party trusts established after five years in relation to the beneficiaries' emigration Exchange Control will consider the possibility of allowing by exception the remittance of income through Financial Rand medium in the light of a combination of factors eg. the age of the trust, the growth of the trust's assets over the years since its inception etc.

A practical point that an emigrant should bear in mind in relation to a blocked asset trust, is that prior Exchange Control approval will have to be obtained for each and every distribution made by such a trust. On the other hand, where the assets are held in the name of the emigrant, then the income can flow out by way of Commercial Rand, without prior approval of Exchange Control. Thus the use of the blocked asset trust means that significant delays and administration can be experienced.

I would like to address one further aspect in relation to inter-vivos trusts. While the deeds of many inter-vivos trusts permit the trustees to exercise their discretion as regards the distribution of income to beneficiaries, it is the practice of Exchange Control not to allow the remittance to non-resident beneficiaries of such discretionary trusts of income in excess of the amounts distributed to resident beneficiaries. Excessive amounts distributed to non-resident beneficiaries are subject to blocking in terms of Exchange Control Regulation 4(2).

## 5. EMIGRATION STRUCTURES

### 5.1 General principles

At this stage we have armed ourselves with the surrounding information which is vital and will affect decisions that we take in regard to emigration structures. The following principles are fundamental to emigration structures and international tax planning generally:

- South African income (not capital) must be paid to a non-resident for the payment to qualify for the Commercial Rand conversion rate,

- South African income (not capital) must be paid to a non-resident for the payment not be blocked in terms of Exchange Control,

- All emigration structures involve interposing an off-shore structure between South Africa and Australia (or any other major western country). In this regard it is important to choose an off-shore structure which will not subject the income stream to tax,

- Furthermore, the amount which is subsequently paid from the non-resident trust or company to the Australian resident must not be in the form of income as a result of the worldwide basis of tax that exists both in Australia and most western countries, and,

- The off-shore trust's or company's current or accumulated income must not become subject to any deeming provisions, specifically in Australia, the ultimate home of the flow of income.

## 5.2 Emigration structures under present law

### 5.2.1 Tax effects of no planning

The effects of an RSA emigrant not structuring his tax affairs is dramatically illustrated in the examples D and E below. The RSA emigrant can lose up to R84 600 (A$42 300) per annum on the interest steam of R180 000 (A$90 000).

*Example D*

| Effects of no planning | | R |
|---|---|---|
| Blocked RSA assets | | 1 000 000 |
| Interest income @ 18% | | 180 000 |
| Less: exempt i.t.o. sec 10(1)(xv) | | 1 000 |
| Taxable income | | 179 000 |
| | | ====== |
| RSA income tax @ married rates | R | |
| - on 80 000 | 25 800 | |
| - on 99 000 | 43 560 | |
| | 69 360 | |
| Less: Primary rebate | 2 100 | |
| RSA normal tax | | 67 260 |
| RSA withholding tax | | Nil |
| | | ====== |

*Example D (continued)*

| | | A$ |
|---|---|---|
| In Australia | | |
| RSA Interest income (112 740/2) | | 56 370 |
| Gross up (67 260/2) | | 33 630 |
| Taxable income | | 90 000 |
| | | ==== |
| Australian tax (at maximum marginal rates @ 47%) | | 42 300 |
| Less: FTC (67 260/2) | | 33 630 |
| Australian tax liability | | 8 670 |
| | | ==== |
| The net income remaining is | | A$42 300 |
| | | ==== |
| | or | R84 600 |

*Example E*

Effects of structured emigration planning

| | R |
|---|---|
| Blocked RSA assets (Government Stock) | 1 000 000 |
| Interest income @ 18% | 180 000 |
| Less: exempt i.t.o. sec 10(1)(h) | 180 000 |
| Taxable income | Nil |
| | ===== |
| RSA normal tax | Nil |
| RSA withholding tax | Nil |
| In Australia | |
| Receipt of loan | 180 000 |
| | ===== |
| Taxable income | Nil |
| Australian tax | Nil |
| The net receipt in the hands of the emigrant is: | A$90 000 |
| | R180 000 |

Under present Australian tax legislation it is quite easy to ensure that the stream of income that flows out of South Africa ultimately arrives as capital in Australia. Furthermore, it is easy to circumvent some of the minor deeming provisions that presently exist under the Australian tax legislation. One of the more classical emigration structures is as follows.

The emigrant liquidates his assets and acquires Eskom stocks or other related interest-bearing stocks. The purpose of this arrangement is to ultimately limit the exposure to South African normal tax. Specifically section 10(1)(h) of the Act provides that interest received by or accrued to:

"(i) any person (other than a company) not ordinarily resident nor carrying on business in the Republic, ... from stock or securities issued by the Government including South African Transport Services, any local authority within the Republic or the Electricity Supply Commission or the South African Broadcasting Corporation shall be exempt from normal tax."

The potential emigrant then sells on loan account the income stream from these assets, for say a 30 year period, to an Isle of Man trust. The agreement for the disposal of the income stream is concluded on the Isle of Man. Where the potential emigrant's assets are in a inter-vivos trust, the assets should be vested first in the beneficiaries, in order to avoid the practical distribution problems subsequently with Exchange Control.

The income stream on the gilts then flows out of South Africa via Commercial Rands to the Isle of Man and from the Isle of Man a loan is made to the emigrant in Australia. Alternatively, a double structure on the Isle of Man may be interposed in the place of a discretionary trust.

In this instance, the emigrant sells the income stream from those gilts to an Isle of Man exempt company. The shares in the Isle of Man exempt company are held by a discretionary trust. The Isle of Man exempt company then remains indebted to the emigrant to the extent of the purchase price of the income stream. Sometimes, the residual capital value (bare dominium) of the abovementioned assets are also sold to the exempt company (although it is doubtful whether Exchange Control will sanction this step). The loans due to the emigrant are then donated to the trust, after the emigrant leaves South Africa.

5.2.2 *Benefits of planning*

The benefits flowing from the above structures are as follows. Firstly, as regards the emigrant he will be able to avoid any estate duty liability in South Africa. Section 3 of the Estate Duty Act *('EDA')* provides in sub-section 1 that the estate of any person shall consist of all property of that person as at the date of his death and of all property which in accordance with the EDA is deemed to be property of that person at that date.

However, section 3(2) of the EDA provides that property does not include in relation to sub-section (e) any debt not recoverable or right of action not enforceable in the courts of the Republic if the deceased was not ordinarily resident in the Republic at the date of his death.

Secondly, the loan received by the emigrant in Australia will not be income as such and accordingly not subject to tax in Australia, irrespective of whether it comes from a discretionary trust or an exempt company on the Isle of Man. A major concern to tax planners using off-shore trusts is the effect of the provisions of section 99B of the ITAA. Section 99B(1) of the ITAA provides that where at any time during a year of income, any amount, being property of a trust estate, is paid to, or applied for the benefit of, a beneficiary of the trust estate who was resident at any time during the year of income, the assessable income of the beneficiary of the year of the income shall, subject to sub-section (2), include that amount.

Section 99B(2) of the ITAA provides that the amount required to be included in terms of sub-section (1) shall be reduced by so much of the amount, as represents -

(a) corpus of the trust estate (except to the extent to which it is attributable to amounts derived by the trust estate that, if they had been derived by a taxpayer being a resident, would have been included in the assessable income of that taxpayer of a year of income), and

(b) an amount that, if it had been derived by a taxpayer being a resident, would not have been included in the assessable income of that taxpayer of a year of income.

Basically what section 99B of the ITAA is trying to provide is that in the case where an Australian resident receives a distribution of corpus, to the extent the distribution of corpus relates to income which has been accumulated off-shore it will now become subject to tax at the time of distribution in Australia. However, the granting of a loan by the discretionary trust on the Isle of Man is not considered to be a distribution of corpus of the trust estate. Accordingly, the provisions of section 99B of the ITAA are easily circumvented.

#### *5.2.3 Weaknesses in FTC system*

Not only can income accumulated in an off-shore trust be protected but also income accumulated in an off-shore company can also be protected from Australian income tax liability. Australia has a very sophisticated foreign tax credit system as was discussed earlier.

However, what became clearly apparent subsequent to the introduction of the FTC system was that income accumulated in an off-shore entity would never become subject to those complex provisions. Rather only income that was actually repatriated would become subject to the foreign tax credit provisions. Because of this glaring weakness in the present legislation it became necessary for the Government to consider amending legislation.

### *5.3 Proposed accruals legislation*

#### *5.3.1 General*

In order to overcome the glaring weaknesses in the FTC system, the Australian Government commissioned studies on the implementation of an accruals system of taxation for certain forms of foreign income. On the 25 May 1988, the Australian Treasurer tabled the first consultative document.

In essence, the abovementioned consultative document was based to an extent on the standard principle of Controlled Foreign Corporations *('CFC')* legislation which is applied in many western countries, for example, in sub-part F legislation in the US Revenue Code.

Then in April 1989, the Australian Treasurer introduced a more detailed Information Paper on CFC or accruals legislation (as it is commonly referred to). This Information Paper contained major changes to the previously proposed consultative document.

Draft legislation was then tabled early in 1990 in the form of Taxation Laws Amendment (Foreign Income) Bill 1990. This Draft Bill essentially adopts the proposals in the Information Paper (with certain amendments) and deals with the taxation of income derived or deemed to be derived by Australian residents form foreign companies and trusts. This draft legislation is proposed to take effect from 1 July 1991 (deferred after further consultations).

### *5.3.2 Main features of Draft Bill*

In relation to companies, the Draft Bill provides that it will:-

- attribute to Australian residents, income derived by a non-resident company which is controlled by Australian residents, unless the non-resident company is subject to a tax system comparable to Australia's or is predominantly engaged in active business,

- exempt from tax, dividends received by a resident company from a company that is resident in a country with a tax system comparable to Australia's, where the resident company has a voting interest of at least 10% in the non-resident company, and

- generally exempt from tax, profits derived by a resident company from carrying on business at or through a permanent establishment in a country with a tax system comparable to Australia's.

In relation to trusts, the Draft Bill provides that it will:-

- attribute income of a non-resident trust to an Australian resident who as transferred value to the trust where, in broad terms, the trust is resident in a low tax country, or has derived certain concessionally taxed income, and the transfer was made:-

  - in the case of a discretionary trust, at any time, or
  - in the case of a non-discretionary trust, after 12 April 1989,

- generally exempt from tax, distributions made by non-resident trusts out of income that has previously been so attributed,

- provide for the attributable income of a non-resident trust to be calculated by applying a deemed rate of return to the market value of the property transferred or services provided to the trust, in circumstances where the transferor is unable to calculate the net income of the trust,

- give an incentive - in the form of a 10% final tax liability on the taxable amount of a trust distribution - to wind up non-resident discretionary trusts that were in existence on 12 April 1989, and

- provide for additional tax, in the nature of an interest charge, to be imposed on trust distributions that are included in the assessable income of a resident beneficiary where the trust income had neither been subject to tax on a current basis, nor on an attributable basis under the transferor measures.

One of the main changes introduced since the consultative document, is the emphasis on identifying the low tax countries. The consultative document specifically identified certain designated jurisdictions as being tax havens or tax haven co-ordination centres (refer Appendix B). The Draft Bill, however, takes the converse approach. It identifies comparable tax jurisdictions to Australia and these are referred to as listed countries. By default, the unlisted countries will not be classified as comparable tax jurisdictions.

I propose henceforth to restrict my discussions to non-resident trusts. The draft accrual legislation in Australia, in this regard is very sophisticated. The planner has to have a detailed knowledge of these provisions, if he wishes to use the single-tier structure. If one wished to adopt the two-tier structure, then it is vital also to be au fait with draft accruals legislation applicable to companies.

Section 50 of the Draft Bill is the main operating provision applicable to non-resident trusts *('NRT')*. It provides that where:

- an entity is an <u>attributable taxpayer</u> in relation to a trust,
- any part of a non-resident year of income of the trust occurs during the taxpayer's current income year, and
- the taxpayer is resident of Australia at any time during such year,

then

- the assessable income of the taxpayer for such current year must include the whole of the notional attributable income of the trust or the pro rata part thereof where the taxpayer was only partly resident of Australia in that income year. Notional attributable income means the income of the NRT where the income years of the NRT and taxpayer coincide. Where the income years of the NRT and the taxpayer do not coincide, then the notional attributable income means the pro rata income in the respective overlapping income years of the NRT which relate to the Australian income year viz. 1 July to 30 June.

*5.3.3 <u>Income attributable to a transferor</u>*

Section 45 of the Draft Bill provides that the attributable income of the trust in a year of income is:

- if the NRT is not in a listed country - the net income of the NRT, or
- if the NRT is in a listed country - so much of the net income of the NRT that benefits from a designated tax concession.

A list of designated tax concessions available in listed countries will be specified in forthcoming regulations. In broad terms, income which benefits from a designated tax concession is income upon which no tax is payable in that listed country (eg. section 10(1)(h) exemption in the RSA Act), or upon which a reduced amount of tax is payable.

Further examples include where the listed country does not tax capital gains (eg. "gross income" definition in the RSA Act), does not tax unremitted foreign source income or taxes certain types of income (such as royalties or interest) at concession rates.

Where the income of an NRT would be attributable to an Australian resident transferor, the amount that would be attributable will not include:

- Amounts that have been included in the assessable income of an Australian resident beneficiary;

- Amounts in respect of which the trustee of an NRT is subject to Australian tax;

- Amounts paid to beneficiaries of listed countries where those amounts are subject to tax in those countries. A beneficiary will be treated as a resident of a listed country for these purposes if the beneficiary is a resident of that country under the country's tax law;

- Franked dividends (these are dividends paid to the NRT by Australian companies where those dividends are paid out of profits of an Australian company which have been subject to Australian tax);

- Amounts received by the NRT from another NRT to the extent that the amount had been attributed to an Australian resident transferor;

- The amount of a dividend received by the NRT from a controlled foreign company (which in broad terms, is a foreign company in which five or fewer Australian residents own, or are entitled to acquire, 50% or more of the interests in that company) that has been included in the assessable income of an Australian resident under other provisions in the Draft Legislation dealing with the taxation of Australian residents holding interests in controlled foreign corporations; or

- An amount received by the NRT that is referable to the income of a controlled foreign corporation that has been included in the assessable income of an Australian resident taxpayer under other provisions in the Draft Bill dealing with the taxation of Australian residents holding interests in controlled corporations.

The attributable income of a NRT will also be reduced by the amount of foreign or Australian income tax paid by the trustee of the NRT, or a beneficiary of the NRT, in respect of the attributable income.

5.3.4 *Deemed rate of return to apply to certain transferors*

Where the Commissioner of taxation is satisfied that a transferor is unable to obtain the information required to determine the attributable income of an NRT, then an alternative basis of taxing the transferor will be adopted. Section 50(3) of the Draft Bill provides that the amount of income to be included in the transferor's assessable income will be calculated by applying a deemed rate of return to:

- In the case of property or services transferred to the NRT after 12 April 1989 - the market value of the property or services transferred; and

- In the case of property or services transferred to the NRT before 12 April 1989 - the net worth of NRT.

The deemed rate of return for a particular period is to be 5 percentage points above the rate of interest applicable for that period for the purposes of the Taxation (Interest on Overpayments) Act 1983 (which is currently 14,026% per annum).

5.3.5 *Exemptions from Division 6AAA*

There are three main exemptions from the Division 6AAA tax (under the Draft Bill) on Australian resident transferors viz:

- Where the NRT is a non-resident family trust *('NRFT')*,
- Where the transferor is the trustee of a deceased estate (Section 25), and
- Where the attributable income is de minimis (Section 50).

There is no attribution of income of an NRT to an Australian resident transferor if the NRT is an NRFT. A NRT will be a NRFT if the only persons who benefit, or are capable of benefiting, under the trust are natural persons (other than natural persons in the capacity of trustee) who are non-residents at the relevant time and who is/are:

- The spouse or former spouse of the transferor;
- A parent of the transferor or of the transferor's spouse or former spouse;
- A child of the transferor or of the transferor's spouse or former spouse;
- A grandparent of the transferor;
- A grandchild of the transferor; or
- A brother or sister of the transferor or of the transferor's spouse or former spouse.

Accordingly, the Draft Bill will not prevent Australian residents making transfers to NRT's in which the only beneficiaries (or person capable of benefiting) are non-residents who fall within one or more of the above categories.

An exemption is also provided for transfers of property to an NRT by the trustee of the estate of a deceased person where that transfer is in accordance with the terms of the deceased person's will or codicil.

The exemption will not be available, however, where the transfer was made pursuant to the exercise of a power of appointment, or of a discretion by the trustee or any other person. The Explanatory Notes give the example of the trustee of the deceased estate being provided with a discretion as to the investment of monies of the estate and, in the exercise of that discretion, transferring the monies to an NRT.

If the attributable income to an Australian resident transferor from all NRT's is equal to or less than the lesser of $20 000 or 10% of the total of the net incomes of those NRT's, then the attributable income of NRT's resident in listed countries will not be included in the transferor's assessable income. This exemption is not available in respect of the attributable income of an NRT which is resident in an unlisted country.

### 5.3.6 *Attributable taxpayer*

Section 40 of the Draft Bill defines an attributable taxpayer to arise in the following situations:

- The NRT is a discretionary trust and the person transferred property or services to the NRT at any time, and the transfer was not a transfer at arm's length in the ordinary course of business of the person; or

- The NRT is not a discretionary trust and the person transferred property or services to the NRT after 12 April 1989 (the date of release of the Information Paper describing these tax reforms) and the transfer was made for no consideration or for an amount that was less than an arm's length amount.

For the purposes of the first test above, an NRT will be treated as a discretionary trust if:

- A person (who may include the trustee) has a right to exercise any power of appointment or other discretion and the exercise or the failure to exercise the power or discretion has the effect of determining to any extent the person who may benefit under the NRT and/or how the beneficiaries are to benefit under the NRT; or

- One or more of the beneficiaries under the NRT has a contingent or defeasible interest in some or all of the corpus or income of the NRT.

A discretionary trust for these purposes is to be contrasted with a "fixed" trust in which the identity of the beneficiaries and their entitlement to income and/or corpus of the trust is fixed (usually by the terms of the trust deed).

A person will not be a transferor if that person transferred property or services to an NRT which is a discretionary trust and the Commissioner of Taxation is satisfied that neither the person, nor the associate of that person was able to control the discretionary NRT at any time between 12 April 1989, and the end of that person's current year of income. For these purposes a person will be taken to be in a position to control a discretionary NRT if that person (either acting alone or with associates):

- Had the power by whatever means, to obtain the beneficial enjoyment of the corpus or income of the trust;
- Was able to control, directly or indirectly, the application of income or corpus of the trust;
- Was in a position such that the trustee of the trust was accustomed or under obligation, or might reasonably be expected to act in accordance with the directions, instructions, or wishes of that person (or associate); or
- Had the ability to remove or appoint the trustee or any of the trustees of the trust estate.

*5.3.7* *Transfers of property or service to NRT's*

"Property" for the purposes of Division 6AAA of the Draft Bill is defined to include money and "services" is defined in very broad terms to include any benefit, right, privilege or facility including:

- An arrangement for, or in relation to:

  (i) The performance of work, whether or not property was also provided as part of the work performed;

  (ii) The provision of entertainment, recreation or instruction or the use of facilities for entertainment, recreation, or instruction;

(iii) The conferring of benefits, rights, or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction: or

- That which is under a contract of insurance; or
- That which is under an arrangement for, or in relation to, the lending of money.

As indicated above, transferors will only be subject to tax under the new Division 6AAA where they "transfer" property or services in the relevant circumstances. What will constitute a "transfer" for these purposes is specifically described in the new provisions.

Money or other property that has been applied for the benefit of an NRT will be taken to have been "transferred" to an NRT if the money or other property has been applied for the benefit of, or in accordance with the directions of, the NRT. This includes the situation where money or property is applied in discharge of a debt due by the NRT.

There will be a "transfer" of property or service not only to NRT's that were in existence at the time of the transfer but also to NRT's that came into existence as a result of the transfer.

The Draft Bill will deem there to have been a "transfer" of property or services by a person to an NRT in certain defined circumstances; for example:

- Where one person causes another person to transfer property to an NRT. This may be the case in a back-to-back arrangement where one person transfers property to another on the condition that the other transfer property to an NRT. The first person would be deemed to be the transferor of the property to the NRT; and

- Where an entity transfers property or services to an NRT and that entity is in the process of being wound up or otherwise ceases to exist. If the Commissioner of Taxation is satisfied that a person (or entity) would benefit (either directly or through interposed entities) as a consequence

of the entity being wound up or ceasing to exist, then the Commissioner may treat that person or entity as the transferor. The Draft Bill specifies that there will be a deemed transfer in these circumstances only if the Commissioner is of the opinion that it is appropriate to treat a person other than the entity which was wound up or ceased to exist as the transferor. The Explanatory Notes to the Draft Bill indicate that in circumstances where the entity which transferred property or services to an NRT is wound up or ceases to exist for bona fide commercial reasons, and the transfer was on an arm's length terms, then the Commissioner would not consider it appropriate to treat some other person as the transferor.

*5.4 Emigration structures to avoid*

I have seen structures promoted by certain Johannesburg lawyers in which the emigrant disposes of his interest-bearing assets to a trust on a capitalisation basis, for example, an interest-bearing asset of R500 000 earning an interest return of 20% per annum is sold for R2,5 million. The emigrant then arrives in Australia with a loan due to him of R2,5 million from an off-shore entity. Under this alternative the income is received and accumulated in the off-shore entity and then the loan due to the Australian emigrant is then repaid over a number of years with effect that the loan is reduced over time.

Although section 99B of the ITAA will not apply in the circumstances where the loan is due by the trust, there are other anti-avoidance provisions which could significantly adversely affect the emigrant.

I refer here specifically to Division 13 of the ITAA dealing with international tax avoidance. The manner in which the Australian Tax Office can strike at these transactions is quite simple. Since there is a loan due to the emigrant in Australia he can deem there to be an arm's length interest to be placed on such a transaction which will force income in the hands of the emigrant.

This was the situation that we wanted to avoid right from the beginning by entering into a structured emigration plan. The aspect of accumulating the income off-shore in a tax haven will be totally annihilated under this division. The relevant section is in fact section 136AB(1) of the ITAA which provides that where -

(a) A taxpayer has supplied property under an international agreement,

(b) The Commissioner having regard to any connection between any two or more of the parties to the agreement or to any other relevant circumstances, is satisfied that the parties to the agreement, or any two or more of those parties, would not dealing at arm's length with each other in relation to the supply;

(c) Consideration was received or receivable by the taxpayer in respect of the supply but the amount of that consideration was less than the arm's length consideration in respect of this supply; and

(d) The Commissioner determines that this sub-section should apply in relation to the taxpayer in relation to the supply, then for all purposes of the application of the ITAA in relation to the taxpayer, consideration equal to the arm's length consideration is in respect of the supply shall be deemed to be consideration received or receivable by the taxpayer in respect of the supply.

The motto of the story is for emigrants to be wary of capitalisation schemes which leave loans due to them on their arrival in Australia.

5.5 Emigration structures under future Australian Legislation

The Australian Treasurer, Paul Keating, gives no excuse for the complex draft accruals legislation. He believes that if a taxpayer wants to plan his affairs in such a manner as to reduce his tax rate below the ruling Australian tax rate then he must cope with this complex piece of accruals legislation.

It is obvious that under these circumstances, certain Australian taxpayers will rather forego any structured emigration plan than attempt to challenge the accruals legislation.

However, there does exist the alternative for family groups to optimise estate plans in relation to beneficiaries in Australia. Whereas in the case of an individual that emigrates his assets (but for the settling-in allowance) are blocked, the situation is different to an individual with beneficiaries offshore. The South African assets inherited by non-resident beneficiaries may be fully repatriated offshore via the Financial Rand route. The only requirement that Exchange Control provides is that where the inheritance is substantial, the repatriation must be done on a staggered basis over a few years.

Furthermore, the abovementioned repatriation can now be coupled with the specific exemption provided in the Draft Accruals Legislation. That is, any transfers of property from a deceased estate to an NRT (where such transfer is in accordance with the deceased person's will), will not make the Australian beneficiaries an attributable taxpayer. Thus any inheritance transferred to an Isle of Man trust can be invested in tax concessionary deposits and accumulated there, without being accrued back to the respective beneficiaries. Care must be taken in such a situation not to make corpus distributions to Australian beneficiaries, who could then fall foul of the section 99B provisions in the ITAA.

Then, there will still be the brave who are prepared to set up emigration structures and challenge the accruals legislation. However, it is unfortunate that the Exchange Control Regulations in South Africa complicate matters further. But for Exchange Control Regulations, a South African inter-vivos trust could include a further beneficiary being an Isle of Man discretionary trust. The assets of the South African inter-vivos trust could then be vested in the Isle of Man discretionary trust. Under such circumstances, the transfer would not be made by the emigrant (future Australian resident) and accordingly the accruals legislation would not apply.

However, in order to avoid the practical distribution problems in South Africa (in relation to Exchange Control approval), the assets of the South African inter-vivos trust will have to be vested in the emigrant. The income from the emigrant's block assets can then be remitted freely via the favourable Commercial Rand mechanism. Then the usual arrangement can be entered into whereby, the future income stream (and residual capital assets) will be disposed to an Isle of Man trust, to ensure the emigrant does not fall foul of the ordinary assessing rules in Australia. However,

this will still give rise to the transfer of property to the NRT. The emigrant may remain silent on his interest in the NRT. However, if at a subsequent date he obtains funds from the NRT, Australia has the monitoring systems (Cash Transactions Reports Act 1988) to identify these payments. The emigrant will then be liable to additional tax on the income accumulated in the NRT.

The emigrant may be able to "smoke screen" the identification process by ensuring that funds from the NRT do not come back directly to the emigrant. For example, the NRT may enter into a back-to-back loan arrangement with a local financial institution. Under such a situation, the NRT will loan the money to the local financial institution and the local financial institution will in turn loan the money to the emigrant in Australia.

Another novel alternative, is for the future income stream (and residual capital assets) to be disposed of to a life office in Guernsey. The life office, will in turn issue a life policy on the life of the emigrant. The emigrant will, by arrangement, be able to borrow on the policy. Then at the maturity date, one will have to refer the ordinary income assessing provisions in Australia. The lump sum payment will not fall within "gross income". However, benefits under certain life policies are captured by the capital gains tax provisions. One clear exception to the capital gains tax provisions is where the benefit is paid out to the original beneficial owner of the policy. This alternative, therefore, does have its merits under the proposed accruals legislation.

## 6. *CONCLUSION*

When one contemplates the setting up of an emigration structure, one must not loose sight of the actual financial costs involved in the setting up and maintaining such structures and the total wealth of the emigrant. Although most sanctions and boycotts against South Africa have significant harmful effects, the contrary may be said for the intending emigrant. Australia does not have a double treaty with South Africa and accordingly the Australian Tax Office will not have access to the "exchange of information" facility which is ordinarily available between double tax treaty countries. This aspect will work always in favour of the emigrant and should not be under-estimated.

The other aspect which also tends to work in favour of the emigrant is the fact that although the out-flow of the income stream may appear high in Rand terms when it actually arrives off-shore in US or Australian Dollars it is significantly less and is not as material in the new home country.

Another aspect in favour of the emigrant is the fact that most of these structures are never apparent to the Australian income tax authorities (unless cash is remitted frequently to Australia). Presently, only the income tax returns of companies lodged in Australia are required to provide certain specific information in relation to transactions concluded with related off-shore entities.

This is known locally as the "25A Statement" which is attached to the company income tax return. However, the same disclosure requirements in relation to transactions with related off-shore entities do not, at present, apply to local individual residents.

In conclusion, although South Africa may be a comparable tax jurisdiction with Australia, it has a number of tax concessions available to non-residents. Such tax concessions will be annihilated by the accruals legislation unless an effective emigration structure is adopted.

1 SEPTEMBER 1990

## Foreign Tax Treaties

Australia has concluded a number of treaties with other countries to avoid international double taxation and to prevent fiscal evasion. Tax treaties covering the usual areas of possible taxation have been made with the following countries:

- Austria
- Belgium
- Canada
- Denmark
- Finland
- France
- Germany
- Ireland
- Italy
- Japan
- Korea
- Malaysia
- Malta
- Netherlands
- New Zealand
- Norway
- Phillipines
- Singapore
- Sweden
- Switzerland
- United Kingdom
- United States of America

## Former list of designated jurisdictions

Part A (Tax haven countries)

| | | |
|---|---|---|
| Andorra | Equador | Montsarrat |
| Antigua-Barbuda | Gibraltar | Mauru |
| Anguilla | Granada | Netherlands Antilles |
| Bahamas | Guatemala | New Caledonia |
| Bahrain | Hong Kong | Oman |
| Bermuda | Jamaica | Panama |
| British Channel Islands | Jordan | San Marino |
| British Virgin Islands | Kenya | Seychelles |
| Campoine | Kuwait | St Christopher-Nevis |
| Cayman Islands | Lebanon | St Helena |
| Cooke Islands | Liberia | St Vincent |
| Costa Rica | Liechtenstein | Tahaiti (French Polynesia) |
| Cyprus | Macau | Turks and Caicos Islands |
| Djiboutie | Maldives | United Arab Emerates |
| Dominican Republic | Monaco | Uruguay |
| | | Venezuela |

Part B (Tax haven centres or incentives)

| | | |
|---|---|---|
| Belgium | - | to the extent that an entity is a co-ordination centre. |
| Brunei | - | to the extent that an entity derives foreign source income. |
| Luxembourg | - | to the extent that an entity is a holding company or investment fund. |
| Marshall Islands | - | to the extent that an entity derives foreign source income. |
| Palau | - | to the extent that an entity derives foreign source income. |
| Singapore | - | to the extent that an entity is an operational headquarters taxed at reduced rate of 10% |
| Switzerland | - | to the extent that an entity is a holding company or domiciliary company. |

ABBREVIATIONS

| | | |
|---|---|---|
| Act | - | Income Tax Act, 1962 |
| CFC | - | Controlled Foreign Corporations |
| Draft Bill | - | Taxation Laws Amendment (Foreign Income) Bill, 1990 |
| EDA | - | Estate Duty Act |
| FTC | - | Foreign Tax Credit |
| ITAA | - | Income Tax Amendment Act, 1936 |
| NRST | - | Non-Resident's Shareholders Tax |
| NRT | - | Non-Resident Trust |
| NRFT | - | Non-Resident Family Trust |

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