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TIME IS RUNNING OUT IF YOUR RESIDENCE IS IN A TRUST, A COMPANY OR A CLOSE CORPORATION (CC)

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Did you purchase your residence in one of the above entities? Now do you find yourself wondering how you can extricate yourself from this without incurring transfer duty, capital gains tax (CGT), and dividends tax (DT)?

The government has given you an opportunity to unwind this situation by transferring the residence into your name (or the name of a beneficiary or shareholder) without paying transfer duty, DT and CGT. ***But you must act before 31 December 2012.***

Why has SARS given you this tax break? Part of the condition of this opportunity is that SARS requires that (subject to some recent concessions noted below) you liquidate or deregister the trust, company or CC once the transaction has been completed. This will considerably reduce the number of trusts, companies and CCs in existence and will make SARS' tasks of administration and enforcing taxpayer compliance easier.

Of course, if your residence is in another entity as part of a long term strategy it may not be in your interest to take this opportunity. **A very important factor is to take expert advice to ensure no tax is paid if you do decide to transfer your residence.**

Does it make economic sense to have my residence in an individual's name?

One day you will dispose of your residence (unless as noted above your residence is part of a long term strategy such as preserving your assets in a family trust).

The CGT is significantly lower if the property is in your name. CGT is 13.3% in your name (assuming you pay the maximum marginal rate of income tax at 40%), 18.6% in a company and CC and 26.6% in a trust. In addition, there is a R2,000,000 "primary residence exclusion" for individuals plus a R30,000 "annual exclusion". You also do not have to worry about other taxes like DT.

The table below compares the different entities.

N.B. The figures shown below should not be taken at face value; they are only a rough guide to illustrate the potential tax savings. Take proper advice on your particular circumstances!

DISPOSAL OF A RESIDENCE: ILLUSTRATIVE CGT COMPARISON

Capital Gain	CGT Payable By Seller		
	Individual	Company / CC	Trust
R2,000,000	R0	R372,960	R532,800
R3,000,000	R129,204	R559,440	R799,200
R4,000,000	R262,404	R745,920	R1,065,600

(Note: If the table above does not display correctly, please see the "online version" - link above the compliments slip)

NOTES

- Dividend tax of 15% applies when companies and CCs distribute the profits. So if you want to take your profit out of the corporate, **you will pay another 15% dividend tax over and above the CGT**.
- A "special trust" (i.e. a trust created solely for the benefit of a person who suffers from a mental illness or a person who suffers from any serious physical disability) is treated as an individual in this instance.
- Holiday homes - although the "primary exclusion" of R2,000,000 applies only to a "primary residence" and not to a secondary residence such as a holiday home, the tax savings will still be significant.
- On death, the "annual exclusion" increases to R300,000 for the year of death.
- All exclusions are shown at the new, increased rates likely to come into effect shortly.
- CGT for individuals is shown at the maximum marginal rate so it will be a lot less for anyone with a low marginal rate.
- With a trust, you may be able to reduce the CGT substantially by having the profits taxed in the hands of a beneficiary with a low tax burden.

The benefits are self-evident from the table – where there is a R2,000,000 capital gain, it is R372,960 more favourable than a company or CC and R532,800 more beneficial than a trust.

Other Considerations

- **Do I qualify?** Not everyone will qualify, but take professional advice. If your property is mainly used for residential domestic purposes, you are off to a good start.
- **Does my holiday house or secondary residence qualify?** Yes, the benefit has been extended to houses other than your primary residence, subject to restrictions relating to domestic, rather than business, usage. Remember that the "primary exclusion" of R2,000,000 won't apply here
- **What about my company/trust structure?** If you have a "multi-tier" structure (e.g. your company owns the house, and your trust or another company owns the shares in the company) the benefit has also been extended to you (again, subject to restrictions and requirements, so taking advice is essential).
- **Even if I qualify, will I benefit?** Take full advice on this – depending on your particular circumstances, there may be good reason to leave the property where it is. Consult a professional on considerations such as estate planning, asset protection, conduiting a trust's distributions to a beneficiary with a low tax burden etc.
- **Are there any risks?** The disposal must be carefully structured by a professional to avoid any triggering of donations tax, dividends tax, adverse tax effects of any loan accounts etc. If the property is bonded, remember to give the bank timeous notice of cancellation and also check that the transferee will qualify for a new bond (and if so, at what interest rate).
- **To whom should I transfer the property, how should I dispose of it, and at what price?** Once again, take advice here - everyone's circumstances will be different, and there are many considerations.
- **When must I dispose of it?** By 31 December 2012.
- **What will it cost me?** The good news is that there is no transfer duty payable, and CGT is "rolled over" i.e. not payable now. Provide for conveyancer's fees, bond cancellation and registration fees, the cost to deregister or liquidate entities etc.
- **Once I have moved my residence into my name, how long do I have before de-registering or liquidating the entity that owned the residence?** SARS gives you six months to begin these proceedings and will give an extension if you ask. If there are other assets in these entities, SARS have made concessions which may help you – speak to a professional.

Depending on your circumstances, there are significant potential benefits to you. **Act now** as the deadline is 31 December 2012, after which this opportunity disappears.

AS SARS ENFORCES COMPLIANCE WITH NEW POWERS, WHERE DOES THAT LEAVE YOU, THE TAXPAYER?

SARS is aggressively pursuing improved revenue collections from taxpayers. Key to this is a campaign to get taxpayers to comply with all tax laws. SARS has expanded its powers considerably and a High Court judge has called some of these powers "draconian".

The main provisions of the new Tax Administration Act (TAA) are effective from 1 October 2012. They give SARS officials increased powers like search and seizure powers (without a search warrant) - SARS officials can arrive unannounced at your premises to ascertain the business being carried out, demand the identities of people working there and check whether the business is registered for tax.

What do the Courts say?

A recent High Court judgment, dealing with the pre-TAA powers of SARS, found that when SARS uses the powers given to it "checks and balances may be necessary to safeguard the rights of taxpayers". In the case, SARS had asked the taxpayer to complete a lifestyle audit and, based on the information received from the taxpayer, R1.3 million in additional tax was levied. In terms of provisions of the Income Tax Act (which still apply until 1 October), Revenue may make an estimate of the tax owing if SARS is not satisfied with the information given by the taxpayer. Despite the fact that the taxpayer objected to the additional assessment, SARS obtained a judgment for the tax owed from a court. This it is able to do in terms of the Income Tax Act, which allows SARS to obtain a civil judgment against a taxpayer where monies are overdue. In obtaining this judgment, SARS, who are not (until 1 October) obliged to inform the taxpayer of this process, did not do so.

These events happened in 2005. In 2007, the taxpayer's objection to the 2005 additional assessment was upheld as a SARS official had erroneously calculated the 2005 extra taxes. In 2010, the taxpayer applied for and was refused a bond by a bank, as the SARS judgment obtained in 2005 had not been rescinded. On application by the taxpayer, the South Gauteng High Court rescinded the judgment.

The judge used harsh language in his decision: the additional assessment from the lifestyle audit was performed in a manner which "suggests that suitably qualified or experienced persons were not engaged to perform the forensic analysis or accounting calculations. In the result their estimates were fundamentally flawed". The fact that no SARS official pursued the taxpayer's objection was "self-evidently incompetent".

Has this judgment affected the TAA?

Several of the issues raised by the Court have been addressed in the TAA. SARS still has the right to issue additional assessments, but the taxpayer must be given a "statement of the grounds for the assessment". Taxpayers are still required to pay tax even if there is an objection or appeal pending but the taxpayer may request that payment be suspended. A Senior SARS official may allow the suspension of the payment based on specified criteria. Finally, SARS may obtain a civil judgment against a taxpayer but must give the taxpayer ten business days' notice of intention to apply for the judgment (except when satisfied that giving such notice "would prejudice the collection of the tax").

SARS hasn't diluted any of its powers but there is more even-handedness shown to taxpayers. SARS is obliged to apply its mind when making estimates, a taxpayer has a chance of getting payment suspended until after the objection and appeal is finalised and SARS must (except as noted above) give the taxpayer notice when applying for a civil judgment.

ANNUAL DUTY AND ANNUAL RETURNS: ANOTHER BURDEN?

We live in an age of increasing compliance, which carries with it both a cost and the consequences of non-compliance.

Why annual returns?

All companies and close corporations (CCs) are obliged to file an annual return with the Companies and Intellectual Property Commission (CIPC). The CIPC is the statutory body via which, among other functions, all companies are registered or deregistered plus all changes to a company's status are recorded, such as changes to directors. CCs can no longer be registered but all changes to their status including deregistration are handled by the CIPC.

The cost of compliance

The CIPC is funded by annual duty which is payable with your annual return. The cost is relatively small – for companies it ranges from R100 for turnover below R1 million to R3,000 if turnover is R25 million or above; CCs pay R100 if turnover is below R50 million and R4,000 if turnover is R50 million or more.

The consequences of non-compliance

If you do not file an annual return and pay annual duty for 2 successive years, CIPC will send you a notice of an intention to deregister your business. If you do not respond, your business will be deregistered – **this means it will cease being a legal entity and will be unable to trade. Directors or members can be held personally liable for debts of the business.**

Should the business be deregistered, there is a process to have the business restored as a registered entity.

Annual duty and returns are not just another statutory requirement. They may seem minor but they can have major consequences. Make sure you have a register of all legal requirements and a system to check that they are all completed.

Note: If you are behind with your annual duty returns, now is a good time to do them as CIPC are waiving late filing fees and penalties until 31 March 2013.

BUSINESS 101: IF YOUR HEAD ISN'T IN THE CLOUDS, YOUR IT PLATFORM SOON WILL BE!

Cloud computing has grown rapidly overseas and is beginning to take off in South Africa. This is technology which puts small and medium businesses (SMEs) on the same IT footing as the larger corporates and multi-nationals. Normally entities with large amounts of cash available have been able to get a technological advantage over SMEs - but the Cloud makes technology accessible and affordable to SMEs.

How does it work – an example

Take a start up company called Climate Corporation which writes crop insurance for farmers. Every day it runs about 10,000 weather simulations, yet it only has a few desktops and cannot afford a large IT infrastructure. It rents data storage and computer server time from Amazon Web Services (AWS) at a small percentage of the cost of setting up these services themselves. AWS has spare capacity which it rents out to third parties.

Cloud computing includes not just storage and capacity but software as well – the complete IT package, and the customer pays on a usage basis only. More and more companies are renting out their IT platforms and as this trend mushrooms, so standardisation of services offered has emerged.

Experts compare the Cloud to utilities such as electricity. Initially, it was only available to the wealthy and large businesses, but the setting up of the electricity grid made it accessible and affordable to the general population.

What does this mean to you?

The Cloud is the next great wave of technology. As we have seen, it is a great leveller and gives SMEs the ability to compete with multi nationals and large entities. The onus is now on you to get to grips with the Cloud and see how it can enable your business. *The earlier you get in, the better your chance of getting the edge over your competition.*

Have a Great October!