

11 GOOD REASONS TO EMIGRATE

Introduction

Despite recent relaxations, exchange controls in South Africa remain firmly entrenched and apply to all exchange control resident entities and individuals. While generally they apply only in respect of South African assets, they sometimes apply in respect of non-South African assets. There are even exchange control restrictions which apply to non-residents. Individuals who emigrate from South Africa are only subject to exchange controls in respect of their South African assets acquired prior to emigration. This raises the question of whether emigrants are treated better than residents from an exchange control point of view and, if so, whether this alone is a good reason to emigrate? Further, the question arises whether there other exchange control restrictions which encourage emigration? Depending on the circumstances, the answer to both questions could unfortunately be yes!

Set out below are 11 good reasons to emigrate from South Africa as at July 2011, primarily looked at from an exchange control point of view.

First Reason

The main reason which very high net wealth clients give for emigrating is that this is the only way to legally remit substantial amounts of cash from South Africa on an unrestricted basis, in order to diversify their asset portfolios or to fund their overseas lifestyles. This is because emigrants can utilise the emigrant remittance mechanism to remit an unlimited amount of capital (cash) abroad, while residents cannot do so. Even if the emigrant's capital is owned by a local discretionary trust, the capital can be remitted if the trust is categorised as a so-called own asset trust. Resident individuals who do not emigrate yet wish to remit capital in order to diversify their local asset portfolio and spread country risk, have limited options, like the R4 million per annum foreign investment allowance option, the institutional asset swap mechanism and the foreign fixed property allowance. While the latter two options allow for unlimited externalisation, various restrictions and disadvantages apply to them.

Second Reason

Emigrants can remit abroad any South African earned passive income (like dividends, interest and rentals) without restriction, while residents cannot do so. There is no



limitation whatsoever on the amount of income which may be remitted by emigrants. Even where such income is received via a local discretionary or vesting trust, it may still be remitted, as such trusts are regarded as transparent for exchange control purposes if categorised as so-called "own asset" trusts.

Third Reason

Emigrants can remit abroad all the cash received from South African inheritances (received after emigration) while residents cannot remit any portion of such inheritances outside of the specific options mentioned above, like the R4 million per annum foreign investment allowance. In order for an emigrant to receive a South African inheritance, the emigration must have occurred, however, before the testator's death, otherwise a special application is required which may not necessarily be granted, hence the benefit of formally emigrating as soon as possible (as opposed to simply relocating overseas).

Fourth Reason

Emigrants can hold South African investments acquired after emigrating directly or indirectly from abroad, while residents cannot do so because such holdings will constitute so-called "loop structures", which are illegal. This ridiculous anti-looping rule is the Exchange Control Department's interpretation of Regulation 10(1)(c) and is strictly applied.

Fifth Reason

Emigrants can transfer a limited amount of moveable goods, like furniture, Kruger Rands, paintings and motor vehicles (up to a maximum combined value of R1 million) abroad on emigration, while residents can never do so.

Sixth Reason

Up to 1998, residents were obliged to report the receipt of any foreign inheritances to an Authorised Dealer and obtain approval for keeping such inheritances abroad, while emigrants were not obliged to do so. While this reporting requirement has been abolished, uncertainties, and reporting obligations, remain in respect of "inheriting" a discretionary interest in an offshore trust. Emigrants have no such issues.



Seventh Reason

Emigrants can remit abroad any salary or directors fees received for services rendered in South Africa, while residents cannot do so.

Eighth Reason

South African residents cannot open any foreign bank accounts without Authorised Dealer or South African Reserve Bank approval, except in certain limited circumstances, while emigrants may freely do so.

Ninth Reason

Exchange control residents are restricted in their overseas travel expenses, overseas purchases and online gambling. They may not operate overseas credit cards nor contribute to overseas pension plans (subject to certain limited exceptions). Emigrants are not similarly restricted and additionally may operate South African debit cards off their “unblocked” South African accounts, without limit. Exchange control residents who live abroad without having formally emigrated are treated as residents in respect of their local assets. However, in respect of their travel allowances, they are treated as emigrants in the sense that they are not allowed to make use of their annual R1 million travel allowance, nor are they allowed to make use of the annual R4 million foreign investment allowance, as these allowances are only available to residents.

Tenth Reason

Emigrants have flexibility to return to South Africa at any time as they are not obliged to give up their South African passports, but South African residents can only escape the exchange control system by formally emigrating and then are obliged to remain abroad for at least five years, otherwise they will have “failed” their emigration. The consequences of a so-called failed emigration are severe, including the compulsory repatriation of emigration capital remitted abroad back into South Africa, and no refund of the 10% CGT exit tax. However, as is clear from the above, residents temporarily abroad are treated as emigrants for this purpose, so that their continued utilisation of these allowances is illegal, thereby further incentivising a formal emigration.



Eleventh Reason

For individuals who are ordinarily resident in South Africa, it is almost impossible to emigrate from an exchange control point of view without also ceasing to be ordinarily resident in South Africa. Consequently, the 10% CGT exit tax will apply to certain assets (but not to all assets). However, the cessation of South African tax residence means that the emigrant is no longer taxed on global income and gains going forward. Sometimes individuals emigrate in order to escape this global tax system. If they do so mainly for tax avoidance reasons, then the provisions of s 80A could arguably apply. However, if such individuals wish to tax emigrate to escape these taxes, the numerous exchange control advantages of emigration are excellent and incontestable non-tax reasons to end tax residence. As long as these exchange control reasons are such individual's main reasons for emigrating, the provision of s 80A cannot apply.

Disadvantages

In addition to the potential liability for the 10% CGT exit tax, there are some disadvantages to emigrating, like the inability to use the annual travel and foreign investment allowances. However, as indicated above, their utilisation while permanently living abroad is in any case illegal.

Conclusion

In conclusion, it is clear that for very high net wealth individuals there are many exchange control advantages, and few exchange control disadvantages, to emigrating from an exchange control point of view. For this reason alone complete abolition of all exchange controls is long overdue, as they are effectively encouraging very high net wealth individuals to emigrate. However, the tax consequences of emigration should not be forgotten because an exchange control emigration is more than likely to trigger a tax emigration in circumstances where the resident has not already ceased being a tax resident, with the result that the so-called CGT exit tax of 10% may apply to the emigrant's global assets (excluding certain assets). The reason for this is that in order to emigrate, one has to declare to FinSurv that one has the intention of permanently leaving South Africa, thereby breaking ordinary residence. Despite this potential tax cost, depending on the circumstances, it may nevertheless be beneficial to emigrate to obtain the exchange control benefits set out above. Further, after paying the once-off CGT exit tax, the emigrant will escape South Africa's global basis of tax and only be taxed on South African sourced income thereafter. Depending on the emigration



destination, as well as the age of the emigrant, this may be a small price to pay for a substantial ongoing tax benefit.

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