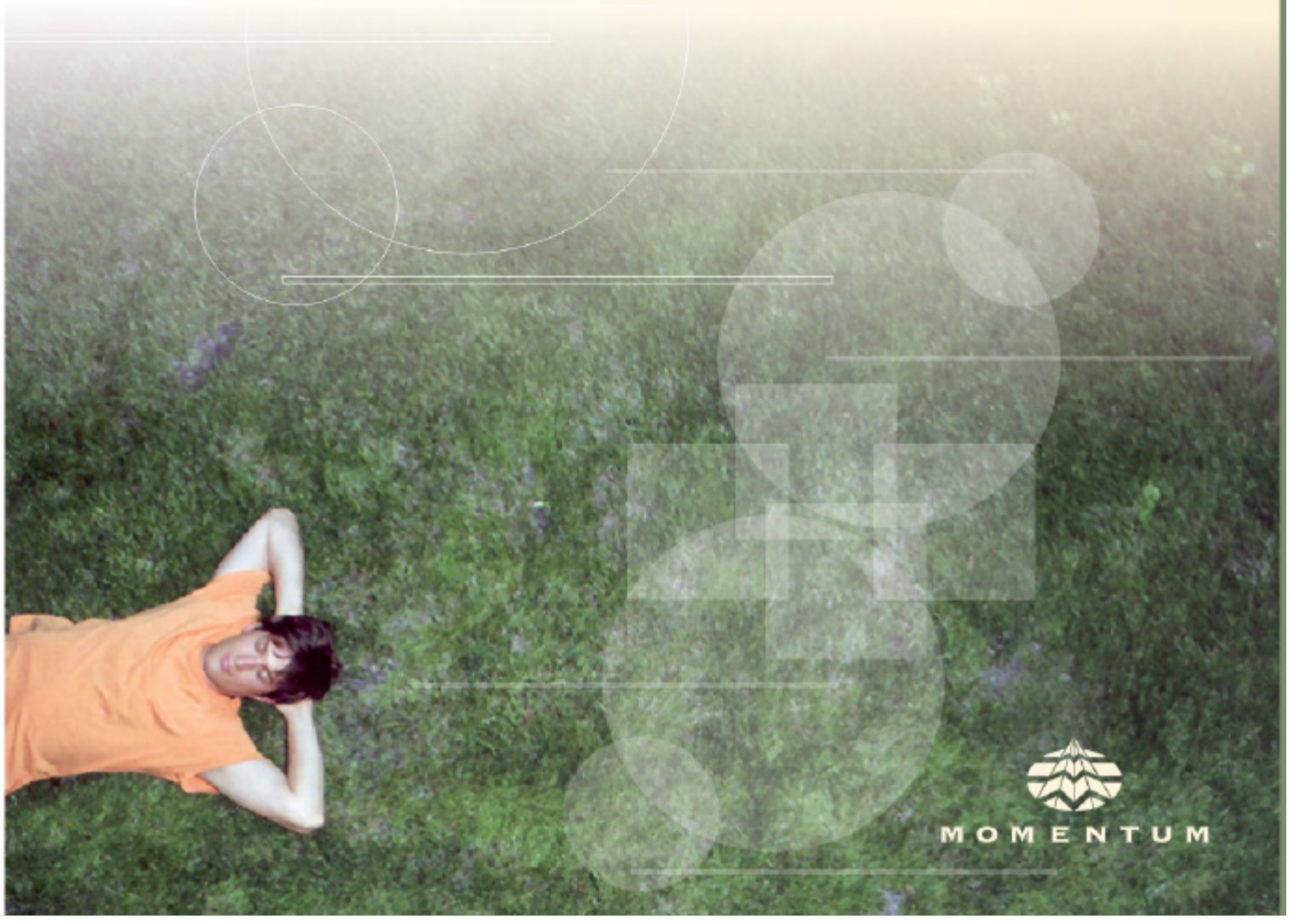
Tax Amnesty
- *Special Report*

June 2003



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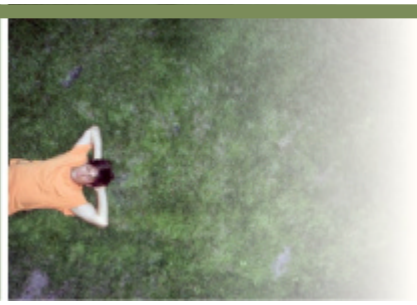


How best to use this booklet

This booklet is structured in question and answer style, and addresses the most critical aspects of the Amnesty to give comprehensive guidance to prospective amnesty seekers, and brokers who want to advise their clients about the amnesty. We have taken pains to deal with the information in a logical and user-friendly manner and without compromising on accuracy and completeness.

The content is divided alphabetically into the following important sections:

A1 Introduction

This booklet is aimed at providing clients of our Momentum-affiliated brokers with a user-friendly guide to the Amnesty legislation contained in the Exchange Control Amnesty and Amendment of Taxation Laws Act 2003 (referred to as the "Act"). It will also serve as a tool to assist clients in simplifying the complexities of the Act and to facilitate the decision-making process when deciding to apply for amnesty.

A2 FirstRand viewpoint

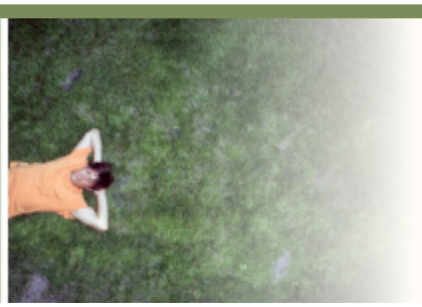
The Firstrand Group is a strong proponent of the Amnesty initiative and in keeping with our reputation as a good corporate citizen, we would encourage clients of our Momentum-affiliated brokers to seriously consider making use of what is a unique opportunity to legitimise those funds or assets that were remitted offshore in contravention of tax laws and exchange control regulations.

In doing so, clients who invested offshore illegally, or who have not declared foreign earnings for tax purposes will, upon being granted amnesty, be able to deal with such disclosed funds and assets without fear of prosecution or incrimination. It is advisable, however, to seek professional advice prior to clients submitting the amnesty application to ensure that all the important considerations have been properly dealt with.

Our intention is to assist our brokers and financial consultants as far as possible in facilitating the process through providing the relevant products and services to ensure that the amnesty dispensation yields satisfactory results and ultimately provides clients with peace of mind in the future.

A3 Background

"Grey money", for want of an authoritative definition, comprises funds that have been exported offshore without the requisite Reserve Bank approval and, as a consequence, in contravention of Exchange Control regulations. Until the inception of the FIC Act, in January 2001, the rendering of advice by financial advisers in SA was unrestricted and many brokerages focused solely on this avenue as a source of new business. Many SA institutions created offshore entities to exploit the opportunities presented by investing the funds of SA residents and emigrants who had "grey money" invested offshore.



B1 Prevention of Crime Act 1998 (POCA)

POCA came into force on 21 January 1999 and classified dealings in the proceeds of *exchange control violations* and *tax evasion* as the proceeds of unlawful activities, thus placing these on the same criminal footing for purposes of the Act, as the more typical money-laundering crimes, eg drug trafficking, theft, prostitution, child kidnapping, bribery and corruption (to mention a few). The Act followed Australian precedent, rather than US and English equivalent legislation where exchange control and income tax contraventions are not criminalised for purposes of money-laundering law.

The cardinal effect of POCA is that a serious offence is committed where someone knows (or ought to know) that proceeds are from unlawful activities and enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, or performs any other act in connection with such property, that is likely to have the effect of:

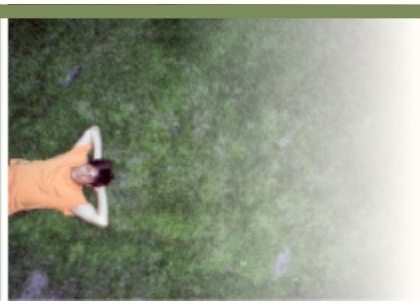
- concealing or disguising the nature, source, location, disposition or movement of the property or the ownership of it or any interest which anyone may have in it;
- enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere to avoid prosecution, or to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence;
- facilitating the retention or the control by the other person of the proceeds of unlawful activities; or
- enabling those funds to be enjoyed by the person.

Despite the severe penalties imposed, POCA had to wait for the reporting enforcement mechanisms of the Financial Intelligence Centre Act, which became effective 3 February 2003, in order to be taken seriously by the SA financial community.

B2 Financial Intelligence Centre Act (FICA)

The FICA and Section 29 in particular have effectively outlawed any prospect of further dealings in grey money. Section 29 stipulates that a person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that –

(a) the business has received or is about to receive the proceeds of unlawful activities;
(b) a transaction or series of transactions to which the business is a party:
  (i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities;
  (ii) has no apparent business or lawful purpose;
  (iii) is conducted for the purpose of avoiding giving rise to a reporting duty under this Act; or
  (iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service; or
(c) the business has been used or is about to be used in any way for money laundering purposes,



must, within 15 days after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

Section 29 is couched in broad terms and draws into the regulatory net not only the proceeds of crime, but also any transaction, which is vaguely untoward or that may appear to be out of the ordinary. Sub-paragraph (b)(iv) even puts a statutory duty on any person to play proxy for SARS, by imposing a duty to report a transaction that is entered into to avoid the payment of tax. The provision "no apparent business or lawful purpose" is even more broad and all-encompassing and open to the widest possible interpretation. Another provision in S29 even creates a reporting duty where suspicious enquiries are made without the prospective client actually contracting for any business. The investment of grey money would almost certainly be hit by this section and place an obligation to report the transaction on **any person** who is privy to it.

B3 Income tax laws

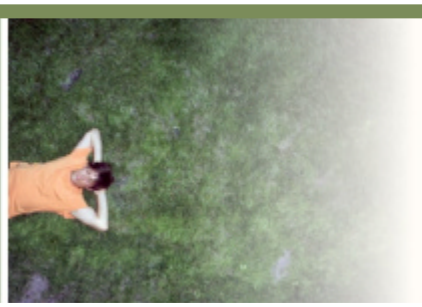
As early as 1997, taxation of passive foreign income was introduced in SA following certain of the Katz Commission proposals. In 2001, the government introduced a more comprehensive taxation of worldwide income based on residence, and this was followed by an amendment of section 78 of the Income Tax Act (ITA), effective 1 January 2003, creating a deemed income charge for failure to report foreign earnings on assets located abroad. This section allows the Commissioner, if he has reason to believe there has been inadequate disclosure, to estimate foreign income attributable to a taxpayer by applying the official interest rate (as per the fringe benefit provisions) to calculate growth on the relevant foreign assets.

B4 International tax enforcement

International tax enforcement has also been strengthened significantly in recent years by expanding SA's international tax treaty network. Most, if not all, treaties have exchange of information provisions with the various Revenue authorities of foreign governments. Moreover tax havens are being increasingly persuaded to enter into information-sharing arrangements in order to erode client confidentiality and barriers to disclosure. Those believing they can continue indefinitely to avoid taxes by hiding assets from their jurisdictions of residence are ignoring the realities of global financial supervision. The worldwide phenomenon is for global anti-money-laundering and anti-terrorism initiatives to be combined with anti-tax avoidance measures. These trends are likely to debilitate those remaining safe havens of undisclosed assets that do not sufficiently adapt their laws to modern-day requirements of international law and best practice.

B5 New information sharing: SARB and SARS

SARS and SARB have prior to the passing of the amnesty legislation generally been constrained from exchanging tax and exchange control information, respectively, relating to individuals between themselves. The major hurdle in terms of information flows was the lack of secrecy waivers between SARB and SARS, preventing vital information flows from each other that would improve mutual law enforcement.



The Amnesty Act now contains the required secrecy waivers in order to overcome these information exchange difficulties. SARS must now provide secrecy waivers in terms of S4 ITA, S4 Customs and Excise Act, and S6 VAT Act and in turn SARB must provide a secrecy waiver under S33 South African Reserve Bank Act. This increased the free flow of information between SARB and SARS will now increase the enforcement capabilities of both organizations relating to foreign violations.

B6 Maximum penalties under various statutes

- **FICA/POCA penalties:** Penalties under the money-laundering laws are notoriously high. S68 of **FICA** prescribes maximum penalties of 15 years imprisonment and/or a fine not exceeding R10 000 000 for failure to fulfil one's reporting duties. S8 of **POCA** goes beyond this by prescribing maximum penalties of 30 years imprisonment and/or a fine not exceeding of R100 million.

- **Income tax penalties:** *Under S76 ITA*, one may be charged a penalty of *two times* the normal tax evaded, in addition to the normal tax, on the amount evaded (thus effectively being 3 times normal tax). *S89* permits SARS to charge interest on late payments of tax at the prescribed rate of tax, presently being 15.5%. *S75A* also permits SARS to publish the names of tax offenders. Finally S104 prescribes a maximum penalty of 5 years imprisonment for making fraudulent statements.

- **Exchange control penalties:** Under Regulation 22, the maximum penalty for an exchange control violation is a fine of R250000 and/or 5 years.

C1 The purpose of the amnesty

The stated objectives of the Exchange Control (Excon) and tax amnesty are:

- to enable transgressors of Excon and income tax regulations to regularise their affairs in respect of their foreign asset holdings;
- to ensure full disclosure and declaration of foreign assets and to facilitate repatriation of these to SA where required; and
- to extend the tax base through the disclosure of previously unreported foreign earnings.

C2 The Amnesty period

The amnesty period will run from 1 June 2003 to 30 November 2003. Applications must be by way of a sworn affidavit or declaration to the newly created Amnesty Unit (the Unit) in the form that the Unit prescribes. Applicants must submit all income tax and/or exchange control applications to the Unit. It is vital to submit the application within the above time frame since no extensions will be given.

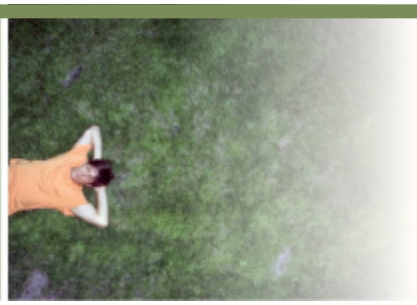
C3 What are the different forms of amnesty?

Relief is provided for both Excon and income tax contraventions. Applicants may need to apply for either one or both forms of amnesty depending on the nature of transgressions. Generally speaking, **the relief granted relating to a successful amnesty application for purposes of –**

- **exchange control** is that the applicant is deemed not to have breached exchange control rules as regards disclosed foreign assets reflected on an asset-by-asset basis as at 28 February 2003 (at the price of the 5% or 10% levy);
- **income taxation (including CGT) concerning -**
  - » undeclared foreign income, is that an individual applicant is deemed not to have breached the Income Tax Act as regards undisclosed foreign income earned on or prior to 28 February 2002 (at the price of fully disclosing and paying both income tax and CGT on one's foreign income for the tax year-1 March 2002 to 28 February 2003); and/or
  - » undeclared domestic amounts previously converted/accumulated into foreign assets, is that the applicant is deemed not to have breached the relevant tax laws (at the price of a 2% levy on the undeclared amounts). This heading includes Estate Duty relief for undisclosed foreign assets of a SA-resident deceased dutiable in SA.

C4 Critical criterion - holding of foreign assets at 28 February 2003

An essential parameter of both the Excon and tax amnesties is that the applicant must have held 'foreign assets' as at 28 February 2003. If the assets have all been spent or consumed at this date, there is nothing to grant amnesty on, and the taxpayer will not be eligible to apply for amnesty (without exonerating such person for past tax or Excon criminal contraventions). A successful amnesty applicant who has converted previous foreign assets into new disclosed assets held at 28/02/2003 is exonerated from transgressions relating to the previous assets (except as regards donations to other persons of foreign assets made prior to 28/02/2003, since these are not covered by the amnesty).



C5 What happens if you do not disclose the full value of all your illegal foreign assets

The amnesty proceeds on the basis that it is to disclosed assets held at 28/02/2003 that amnesty protection will apply! This means that the amnesty simply does not apply to undisclosed assets at this date, but without diminishing the amnesty protection that is afforded to you on disclosed assets. Likewise, if you undervalue an asset for the purposes of reducing the amnesty levy, this does not disqualify your amnesty application, and amnesty protection will apply to the disclosed value of the asset. Therefore undisclosed assets, or the non-disclosed asset value of a disclosed asset, will leave an applicant fully exposed to future prosecution and tax penalties, but to the extent of that non-disclosure only.

C6 Are subsequent unauthorised asset dealings after 28 February 2003 covered by the Amnesty?

No, they are not covered by the Amnesty! However, it is unlikely that any adverse consequences will follow in relation to subsequent dealings with an amnesty-disclosed asset held at 28/02/03 (eg actions taken to protect the asset's value, etc). Where a new unauthorised asset is created after this date, naturally holding this asset will expose the owner to future prosecution. Of course any dealings in unauthorised assets after 28/02/03 will certainly not prejudice the applicant as regards those assets properly disclosed as at 28/02/03 in one's amnesty application.

C7 How are bearer instruments treated for amnesty purposes?

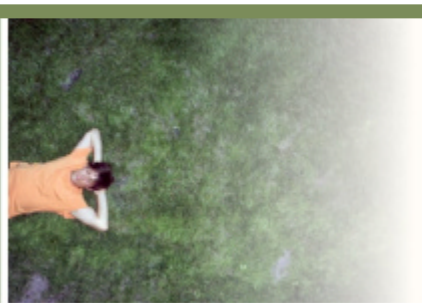
Bearer instruments will only qualify as foreign assets if the holder can prove that the instrument was acquired using funds that the holder owned for at least 18 months before acquiring the instrument. Those not meeting this requirement are referred to in the Act as "foreign bearer instruments". On the face of it, these instruments do not reflect the name of owner, nor does the issuer know who the owner is. These instruments have been targeted to eliminate anonymous holdings that could otherwise represent and facilitate funds obtained from criminal activity (such as drug smuggling and related money laundering), examples being numbered bank accounts and foreign bearer bonds. The measure is thus necessitated in the far broader war against criminal money-laundering activities.

C8 Can you apply for amnesty on unauthorised foreign assets that you donated prior to 28/2/03?

Where assets are donated prior to 28 February 2003, the donor cannot apply for amnesty for those donated assets. Of course, in this case, the recipient may apply, but only to the extent that he/she is a SA resident who still holds foreign assets at 28/02/03, and they are treated as unauthorised assets in his/her own name. Accordingly, the donor remains subject to prosecution for his/her past holding of those assets, which many feel is an unsatisfactory outcome that may discourage certain applicants from applying for amnesty for their other unauthorised assets.

C9 Who may apply?

Any natural person (including a deceased estate), close corporation, trust or related party *that is a SA resident* and that holds any *unauthorised* or *undeclared* foreign asset on 28 February 2003. Only 'SA residents' on 28 February 2003 may apply – and the definitions of 'resident' for Exchange Control and tax purposes are different.



Unauthorised assets here refer to assets that were accumulated or transferred offshore in breach of Exchange Control Regulations and *undeclared* assets refer to a non-disclosure under the Income Tax or Estate Duty Acts.

C10 Are you a resident for Exchange Control purposes?

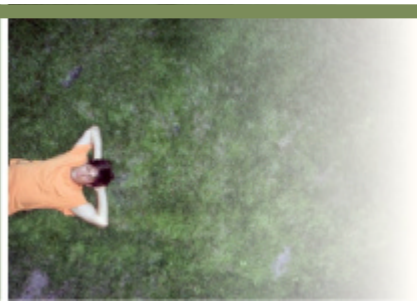
To apply for the Excon amnesty, one must be an Excon resident. For Excon purposes, it is someone who has taken up residence or is *domiciled* in SA, regardless of whether that person has a South African or foreign nationality. Domicile is a UK concept comprising the domicile of origin (usually the country of one's birth following one's father's domicile), the domicile of choice (this alters the domicile of origin requiring one to be both physically in SA and hold a settled intention to reside permanently here) and domicile of dependence (children usually follow the father's domicile, until attaining the age of 16). At any time an individual may only have one such domicile.

C11 Are you a resident for Income Tax purposes?

To apply for the tax amnesty, one must be a tax resident. For tax purposes, a resident is defined under section 1 of the Income Tax Act as an "ordinarily resident" *or else* someone who satisfies the "physical presence" test. *Ordinarily resident* was explained in a 1992 Appellate decision to mean 'a person must be habitually and normally resident here, apart from temporary or occasional absences of a long or short duration'. The physical presence test is met if a person was physically present in SA for a period/s exceeding 91 days in aggregate during the relevant tax year, as well as for a period/s exceeding 91 days in aggregate during each of the three preceding tax years, *and* also for a period/s exceeding 549 days in aggregate during the three preceding tax years (unless the person has been absent for a continuous period in excess of 330 full days). SA expatriates living abroad would not usually qualify for amnesty to the extent they do not meet either of the residence tests.

C12 What is a facilitator?

A new category of applicant has been added, namely a **related party facilitator**. This means a company, in which the applicant or his or her relatives hold the shares or interest; or a trust of which the applicant is a beneficiary, or an individual (or his/her deceased estate). The facilitator must have assisted an applicant on or before 28 February 2003 by accumulating foreign assets; or by transferring funds or assets from the Republic, for the benefit of that applicant in a manner that involved any contravention of the Exchange Control Regulations. The foreign assets in question must no longer be held beneficially by that related party. Such facilitators must therefore have previously beneficially held the assets of the applicant (eg a local trust, export/import agent or traveller's cheque carrier). This definition contemplates someone acting other than as a broker or financial adviser. A facilitator must apply jointly with the normal applicant, and make disclosures in relation to unlawful activities and undeclared income for tax purposes. Companies and trusts applying as facilitators are typically those that have acted under the control of or in consort with the controlling shareholder/ beneficiary in order to facilitate his/her illegal offshore activities. The primary example is the use of a family company or trust to over and under invoice *(see below)*; a more mundane facilitator would be an SA individual who carries traveller's cheques abroad on the strength of his/her own travel allowance on behalf of an applicant.



C13 Can companies apply?

Except for facilitator companies that qualify, companies do not qualify to apply for amnesty on grounds that they have enjoyed a far more favourable exchange control regime than individuals – they have always been permitted to invest in sizeable business projects offshore, and must usually repatriate foreign earnings (save where special dispensation has been obtained). Although a company cannot apply, an individual shareholder may apply if the value of his/her/its shares has been affected by an Excon contravention (committed by the company). The Explanatory Memorandum to the Amnesty Bill gives this example: on 28/02/2003, individual owns all the shares of a foreign company. Company owns £1 million of foreign assets obtained in contravention of Exchange Control and £2 million of foreign assets obtained without any contravention. Result: the individual may apply for amnesty as regards his company shares because the value of those shares is partly derived from Exchange Control violations.

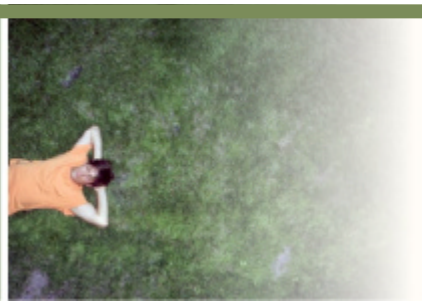
C14 Can financial advisers apply?

Advisers and facilitators who assisted investors by merely giving advice and/or sales services in investing their assets offshore are excluded from applying for amnesty. The view is that they have no assets to contribute as consideration for amnesty relief in their capacity as advisers, and therefore do not qualify as applicants. Moreover there is no obligation on applicants to provide the names of their advisers, and even if such names are volunteered, the Amnesty Unit is obliged to delete those names prior to sending documentation of successful applications to SARS and SARB. There are thus built-in confidentiality safeguards to prevent SARS or SARB accessing names of advisers. Also nothing prevents an adviser or broker applying for amnesty in his/her own right.

C15 Can your financial adviser advise you on the amnesty without having to report you?

Financial advisers may now advise clients on the amnesty without their clients having to fear being reported on under S29 FICA, and similarly financial advisers need not fear incriminating themselves for failure to report persons they consult in regard to the amnesty. Advisers are expected to play an important role in advising and assisting clients with their amnesty applications, as well as in relation to the placement of amnesty investment funds, whether locally or abroad. The adviser exemption was contained in Government Gazette No. 24906 (GN 704 of 26 May 2003).

The reporting exemption covers *"every person who carries on a business or is in charge of or manages a business or who is employed by a business and in that capacity assists or advises a client in connection with an application or prospective application for amnesty whether such an application is in fact made by or on behalf of the client or not, in respect of every transaction which is concerned in such an application"*. This exemption is automatic (i.e. it need not be applied for). Moreover, no reporting duty arises even if the financial adviser knows that the client will not or did not apply for the amnesty. The exemption is restricted to *those acting an advisory capacity* and *in connection with an application or prospective application for amnesty,* meaning that the exemption will effectively fall away once the amnesty is over, except perhaps where the adviser advises after the amnesty period in connection with an amnesty application that was submitted to the Amnesty Unit.



Obviously the specific knowledge of the client's affairs gleaned by the adviser while acting in accordance with this exemption during the time of the amnesty will be safeguarded from any future reporting duty at any time, i.e. even indefinitely after the amnesty has run its course. This exemption does not cover any advice relating to placing new potential foreign investments or switching existing ones, except in the unusual circumstances where the adviser can show that such advice was necessary *in connection with an application or prospective application for amnesty*.

C15.1 Does the financial adviser exemption go far enough?

A criticism of this exemption is that it does not cover offences contained in the Prevention of Crime Act 1998 (POCA). The cardinal effect of POCA is that a serious offence is committed where someone knows (or ought to know) that proceeds are from unlawful activities and enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, or performs any other act in connection with such property, that is likely to have the effect of:

- concealing or disguising the nature, source, location, disposition or movement of the property or the ownership thereof or any interest which anyone may have therein;
- enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere to avoid prosecution, or to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence;
- facilitating the retention or the control by the other person of the proceeds of unlawful activitie; or
- enabling those funds to be enjoyed by the person

The fear of certain reputable academics is that the act of giving amnesty advice by financial advisers may have the effect of contravening POCA. Intermediaries are unlikely to have the necessary unlawful intent, however, where they merely attempt to assist or advise clients to comply with an Act of Parliament (the existing Amnesty legislation) - accordingly intentional wrongdoing is unlikely to result. Although negligence on the part of an intermediary is sufficient to constitute a POCA offence, here too, in our opinion, there is little risk of incrimination, given the express intention of government "of facilitating the role of professional advisors in assisting their clients to apply for the amnesty for contraventions of the Exchange Control Regulations and Tax evasion". Prosecution is extremely unlikely if advisors restrict their advice to the amnesty, and refrain from focussing on transactions involving the property or money held offshore. Similarly, intermediaries would best desist from giving advice where they suspect they may be advising in regard to the type of unlawful proceeds that are not forgiven by the amnesty legislation, e.g. real crime monies relating to drugs, theft, child crimes, extortion, etc (the list is endless).

C16 Can a resident donor of an offshore trust apply for amnesty?

The donor of a *non-resident* discretionary trust may elect that any unauthorized foreign asset held on 28 February 2003 by that trust and not yet vested in any beneficiary, be deemed to be held by the donor. The donor is then deemed *for* Excon purposes to have held that foreign asset since the time the trust acquired it and until that foreign asset is disposed of by the trust.

Section C1 - 23 *continued*

For income tax purposes the asset is then deemed to be held from 1 March 2002. Any disposal of the asset (which also includes when the trust benefits vest in the beneficiary) is then also deemed to be made by the donor, which will give rise to a Capital Gains Tax (CGT) event. The donor's election overrides the normal income and capital gains tax treatment that would otherwise have applied to the trust itself. In order to make this election, the donor must submit the founding document of the discretionary trust as at 28 February 2003 together with his application. There is no provision for a beneficiary of an offshore discretionary trust to apply for amnesty. On the other hand, a beneficiary for a vested portion of a foreign trust would in all probability qualify to apply as being a holder of foreign assets (in the form of rights against the trustees). The draft legislation referred to a "donation, settlement or other disposition" as a prerequisite of the section, meaning "interest-free" loans would have been included, but the Act now only refers to "donations". Accordingly those with already paid off interest-free loans should not apply, as they no longer hold foreign assets at 28/02/2003. If the trust loan still exists, the grantor will of course be eligible as holding a foreign loan at 28 February 2003. *(See below for the donations tax treatment of donations made during the 2003 tax year)*.

C17 Do assets held by a nominee as at 28 February 2003 qualify?

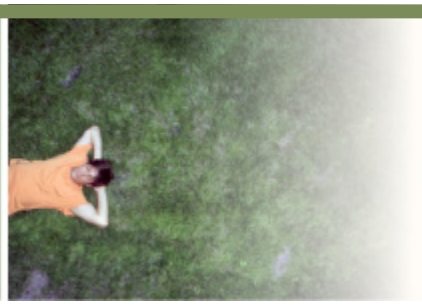
Assets 'held' are defined to mean a direct beneficial holding of those assets. This means that the applicant must be the 'de facto' owner. Accordingly for nominee holdings of assets, an applicant will need to adequately prove, probably with documentary evidence, that he is the direct beneficial owner.

C18 How do you know you are under investigation, and therefore excluded from the Amnesty?

The Unit will not approve applications where the exchange control authorities or SARS have delivered a notice to an applicant or related party, as the case may be, that he/she is subject to an audit, investigation or other enforcement action relating to any contravention of the Exchange Control Regulations or failure to comply with the Income Tax Act, 1962, before the submission of the application. The justification of this exclusion is that there is no saving to the fiscus of investigative costs for a person already in the investigative net. However this exclusion will not apply if the notice of investigation is subsequently withdrawn before 30 November 2003. According to the Explanatory Memorandum to the Bill, delivery of a notice, in technical terms, means handing notice to the relevant party, sending notice to the relevant party by registered post at the last known address, faxing notice to the relevant party (followed by a formal handing over of notice or sending by registered post), and electronic notice to the relevant party (followed by a formal handing over of notice or sending by registered post.

C19 What taxes qualify for the amnesty?

Transgressors regarding withholding taxes on employment income and royalties are not eligible for the amnesty on the basis that withholding-type taxes fall outside the scope of the amnesty because these violations represent a breach of fiduciary duty to other private parties, not just a violation that worked solely to the detriment of fiscus. Exclusions also apply to RSC, UIF and Skills levies, these being motivated on similar grounds. On the other hand normal income tax, STC, CGT and donations taxes do qualify, as does Estate Duty regarding previously undisclosed amounts.



C20 How is the application to be submitted?

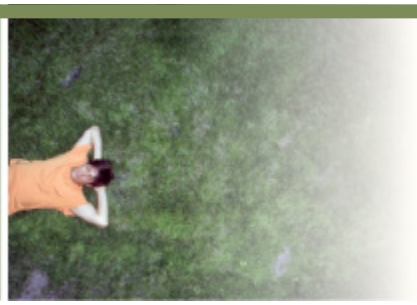
Applications must be submitted within the window period by way of a sworn affidavit or solemn declaration accompanied by the prescribed form, to the Amnesty Unit (the Unit). A relatively easy and user-friendly draft Amnesty Application form (numbered FEA 001), comprising eight pages with some 10 parts to be completed by the applicant, has been made available for comment by SARS. Thus, there is a single form containing the affidavit and all the essential requirements for a successful amnesty application, which in itself ought to greatly simplify the task. Documentary proof of amounts disclosed will need to be separately attached.

C20.1 How will the Amnesty Unit function?

The Unit is an independent body that has been specifically set up to process the amnesty applications. It comprises a chairperson, and at least four SARB appointees and four SARS appointees, all of whom are appointed by the Finance Minister. In addition the Unit will comprise such support personnel from SARS and SARB as needed to handle the eventual workload. All functionaries employed by the Unit are subject to the secrecy provisions of S4 ITA, in the same manner as normal SARS employees. The Unit decides whether or not to grant amnesty to applicants, based on compliance with procedural and other stated parameters. There are different disclosure requirements for each of the exchange control and income tax amnesty applications. Once considered, the Unit must notify the applicant of its decision to approve or reject the application. No time frame has been specified for the Unit to notify applicant of its decision, and the Unit is not required to provide reasons for rejecting an application, unless it is declined on technical grounds (but see below for the latest date the Amnesty Unit should have given applicants an answer). The disclosure requirements for the two amnesty applications are relatively streamlined, but nevertheless to a degree quite onerous, to enable efficient processing.

C21 When must you submit your tax return?

To qualify for the tax amnesty, the applicant must have submitted an income tax return for the tax year ending 28 February 2003, **or else SARS must have granted an extension for its submission**. It is therefore vital to obtain your extension for submission of the 2003 tax return and any others that are outstanding. Prospective applicants who have not finalized their 2002 or preceding year tax returns must do so as a matter of urgency. Any outstanding tax returns must, subject to the granting of an extension, be submitted to SARS by 28 February 2004 at the latest. The amnesty rules clearly stipulate that no extensions are to be granted beyond the end of the 2004 tax year. It is suggested that a motivation other than that one is applying for amnesty be given (the reasoning here is that if the applicant is refused amnesty, SARS will not know that the applicant applied for amnesty, thus protecting this confidential information). The preferred application process envisages that once the Unit grants amnesty approval, the applicant should then proceed to complete his/her tax return for 2003 within the time extension permitted by SARS. It is critical that applicants obtain their time extensions from SARS in regard to all their outstanding tax returns prior to applying for amnesty. The legislation has stipulated this requirement in a bid to cultivate on-going compliance by taxpayers with their continuing tax obligations.

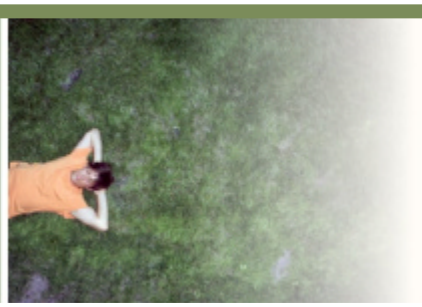


C22 What is the closing date for applying for a tax extension?

Government Gazette No 24840 (Vol 455, 12 May 2003) requires that taxpayers (other than companies and close corporations) must submit their 2003 tax returns within 60 days from 12 May 2003. Close corporations must submit their most current tax return within 60 days of the close of their financial years. Accordingly amnesty applicants must be sure to have obtained the appropriate tax extensions well in advance of the relevant cut off dates (in the case of an individual taxpayer, the date is approx. 11 July 2003).

C23 By when at the latest must the amnesty unit have notified applicants of the success of their application?

Since any outstanding tax returns must have been submitted to SARS by 28 February 2004 at the latest in the case of a successful application), the Unit must by implication have processed all amnesty applications well before this date in order to allow the applicant sufficient time to submit his/her 2003 tax return.



D1 What information must you supply when applying for exchange control amnesty relief?

Applicants for exchange control amnesty relief must include the following in their applications:

1) disclose the *market value* in the relevant foreign currency of each foreign asset held as at 28 February 2003 partly *or wholly* in contravention of exchange control. The words *'partly or wholly'* are significant here, meaning that where an asset is held *wholly* as a legitimate asset, it need not be disclosed. If, on the other hand, the asset comprises wholly unauthorised content or else contains both legitimate and unauthorised content, its full value must be disclosed;
2) describe the identifying characteristics and the location of the asset;
3) submit a valuation certificate by a valuator or government official, or other form of proof of the *market value* in the *relevant currency* of that foreign asset as the amnesty unit may, on good cause shown, allow;
4) provide an original or certified copy of a statement of account indicating the balance or market value as at 28 February 2003 (applicable to financial instruments);
5) confirm that no foreign assets or foreign bearer instruments were derived wholly or partly from the proceeds of any unlawful activities.

"Unlawful activities" means all crimes other than:

(i) failure to comply with exchange control laws, and the Income Tax or Estate Duty Acts.

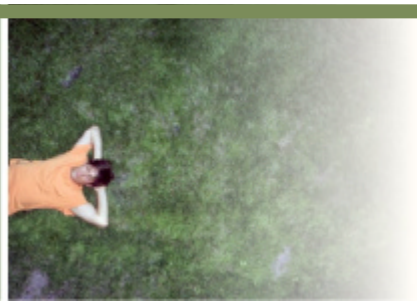
(ii) fraud such as misrepresentation or nondisclosure necessary to facilitate contraventions detailed in (i).

D2 How is the leviable amount of foreign assets calculated?

28 February 2003 is the crucial valuation date for purposes of calculating the quantum of foreign assets that will be subject to the levy. The market value of foreign assets at 28 February 2003 (as disclosed per (i) of the preceding clause) must be reduced by so much of the market value of those foreign assets legitimately held abroad (eg in terms of the R750 000 allowance, post-1998 March inheritances, post July 1997 earnings abroad, etc). If the applicant is not using the R750 000 allowance, it will nevertheless be automatically granted to him. This is achieved by translating the R750 000 allowance (or any unused portion)into the relevant foreign currency at the spot exchange rate on 28 February 2003, as if the applicant had made use of it. The foreign currency value of this allowance, together with all other legitimate foreign assets, is then deducted from total foreign assets to arrive at the leviable amount. This leviable amount is thus stated in foreign currency (not yet converted to Rand).

D3 How do you know which of your foreign assets comprise legitimate as opposed to unauthorised assets?

If you can show an audit trail that demonstrates that a foreign asset has been fully funded from legitimate proceeds, you need not disclose that asset for purposes of the amnesty. Also, in the case of a foreign asset that has been funded by both legitimate and unauthorised funds, if you can demonstrate by audit trail the percentage of legitimate and unauthorised content, one then simply deducts the legitimate content, to arrive at the unauthorised content that will be aggregated with similar amounts, thereby arriving at the leviable amount. However the real problem arises where it is impossible (based on inadequate guidelines in the amnesty legislation) to say with any certainty what percentages of one's foreign asset is made up of legitimate/unauthorised content.



The following example demonstrates the problem: Mr X has $2 million of unauthorised funds sitting in a US bank account. He thereafter uses the R750000 allowance (converted at R10/$), and invests $75000 into the same US bank account. Thereafter he withdraws $100000, which he invests in US S&P stocks. As at 28/2/03 he has $175000 in the bank account, and his shares are worth $150000 (rose from $100000). It is not possible to say with any certainty where the legitimate asset holding (representing the R750000) is sitting. Nor do the amnesty provisions shed any light on how to resolve this problem (ie whether to use a LIFO, FIFO, weighted average or other method). If LIFO were adopted in the above example, the legitimate assets ($75000) would be residing in the S&P shares at 28/02/03, and represent a value of $112500 not subject to the levy. If FIFO were adopted, the legitimate assets would still be in the bank account as representing only $75000 not subject to the levy. Momentum has posed this problem to the SARS authorities who will seek to resolve the matter, where necessary by issuing a guideline to resolve this uncertainty.

D4 What does the market value of an asset mean?

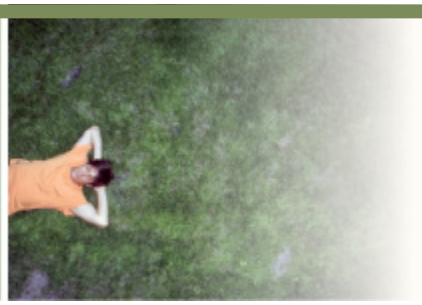
The market value of an asset is that market value criteria specified in para.31 of the 8th Schedule, dealing with various classes of assets. For example the market value to be placed on a foreign life policy is the higher of the surrender value or fair market value (assuming the policy runs to maturity) on 28/02/2003. Para 31 also specifies valuation criteria for financial instruments, participatory interests (eg unit trusts), fiduciary, bare dominium and like interests, immovable farming property, and finally a *catch-all* for 'other assets'. The valuation criteria for 'other assets' is *the price that could have been obtained upon sale of the asset between a willing buyer and seller dealing at arm's length*.

D5 Do subsequent foreign gains or losses increase or decrease the leviable amount?

The interesting aspect about the leviable amount is that it remains constant irrespective of any gain or loss arising on the underlying asset from 28 February to the date the levy is paid. For example, on a leviable amount of say $2 million of foreign assets, if the underlying foreign asset value increases to 3million, the leviable amount nevertheless remains at $2 million. Similarly where the underlying foreign assets reduce to $1million when the levy is paid, the leviable amount remains at $2million.
(See example below of 10% levy chargeable as regards a loss made).

D6 How is the 5% levy on repatriated funds calculated and paid?

An exchange control levy of 5% will be imposed on the *leviable amount* of all funds repatriated to SA. The *leviable amount* must be converted into Rands at the spot rate on the date the funds are repatriated. The levy must be paid to the authorised dealer. The levy may only be paid by using one's foreign assets. Importantly, the leviable amount may also not be reduced by any foreign exchange commissions or fees that became payable in order to repatriate the funds. One therefore simply applies the 5% levy to the portion of the leviable amount that the applicant has chosen to repatriate. As a point of clarity, the 5% levy is also payable on all foreign assets required to be repatriated in order to pay the levy itself (also see below for treatment of the 10%). Failure to pay this levy timeoulsy will result in the applicant's amnesty being withdrawn.



D7 When must the funds subject to the 5% levy be repatriated?

The funds must be repatriated 3 months, or earlier, from the date the amnesty application is approved. The Unit may grant a further extension not exceeding 3 months if it can be shown that the assets cannot reasonably be converted within that period, or the applicant wishes to rely on a tax-exempt foreign dividend to pay the levy (in anticipation of the imminent coming into effect of the exemption on foreign dividends, where the recipient holds a substantial interest in the foreign company issuing the dividend).

D8 How is the 10% levy on non-repatriated funds calculated and paid?

The levy is 10% of the non-repatriated *leviable amount*, converted to Rands, at the spot rate on the date of payment of the levy (and which payment date must be not later than 3 months after the date of amnesty approval, with the right to apply for a further 3 months where the assets cannot reasonably be converted within that period). Once again, foreign assets are required to be repatriated in order to pay the levy, but in this case the 10% levy (not the 5% levy) applies even as regards those funds *needed to be repatriated* to pay the 10% levy. Failure to pay the levy timeously will also result in the applicant's Amnesty being withdrawn. The Explanatory Memorandum to the Bill quotes the following example: Trust discloses £8 million of foreign assets held in violation of Exchange Control as at 28/02/2003. The amount increases to £9 million after receiving amnesty approval. Trust repatriates £5 million to South Africa on 20 September 2003 and holds the remaining £4 million offshore. **Result:** The 5% levy applies to the £5 million repatriated. The 10% levy applies to £3 million of the £4 million remaining (£8 million amount as at 28 February 2003 less the £5 million repatriated). Trust needs to repatriate a further £300 000 to pay the 10% levy.

D9 Are you leviable at 5% or 10% as regards intervening foreign losses on disclosed foreign assets?

A peculiarity of the workings of the 5% and 10% levy is that where one has a leviable amount of say, $2 million on 28/2/2003, which is valued at only $1.5 million at date the levy is payable (due to intervening capital losses), and the full $1.5 million is repatriated, the effect is that the 5% levy is payable on the $1.5 million, and the 10% levy is chargeable on the $500,000 of lost value (as if retained abroad, and even though no longer represented by foreign assets). This is one of the few cases where one is allowed to pay the 10% levy out of repatriated funds, since in truth there are no retained foreign assets left to pay the 10% levy.

D10 Can you pay your levy using Rand Common Monetary Area assets?

The amnesty levy may not be paid from assets held in any country that forms part of the common monetary area for purposes of the Exchange Control Regulations (ie Namibia, Lesotho and Swaziland), or any funds denominated in the currency of any such country. The reason is that such funds are freely transferable to SA in any event, and cannot thus add anything for Exchange Control purposes.

D11 Can you use foreign assets as collateral in order to pay the levy?

The Explanatory Memorandum envisages that applicants, once amnesty approval has been granted, may collateralise their foreign assets in order to pay the 10% levy on retained assets.

D12 What foreign assets may be legitimately held for exchange control purposes?

The under-mentioned list is not exhaustive, and is merely a guideline. Specific details should be obtained from an authorized dealer affiliated to one of the major banks.

- **Foreign earnings:** Exchange Control Circular no D.125 dated 1 July 1997 exempted foreign income earned (after this date) from having to be reported in terms of Regulation 6. Regulation 6 requires an individual to declare any accrual of foreign currency, and offer it for sale to an authorized dealer within 30 days of accrual. Such income relates mostly to earnings from foreign services rendered. Similarly, where reporting duties were complied with prior to this date, such funds would also be legitimate foreign assets.

- **Foreign inheritances:** Exchange Control Circular no D.125 dated 1 July 1997 stipulated that foreign inheritances retained abroad must after this date be referred to the Exchange Control authorities for exemption from Regulations 6 and 7. Regulation 7 requires that a person must, within 30 days, declare any foreign assets to which that person becomes entitled. Exchange Control Circular no D.199 dated 17 March 1998 thereafter exempted foreign inheritances from the provisions of Regulations 6 and 7 (from that date). Again, where reporting duties were complied with prior to this date, such inherited assets would also comprise legitimate foreign assets.

- **Unused travelers' cheques:** These must generally be offered for sale or re-imbursement to the authorized dealer within 30 days of one's re-entry into South Africa.

- **Investment allowance:** Presently the R750 000 allowance per qualifying person of age 18 or over.

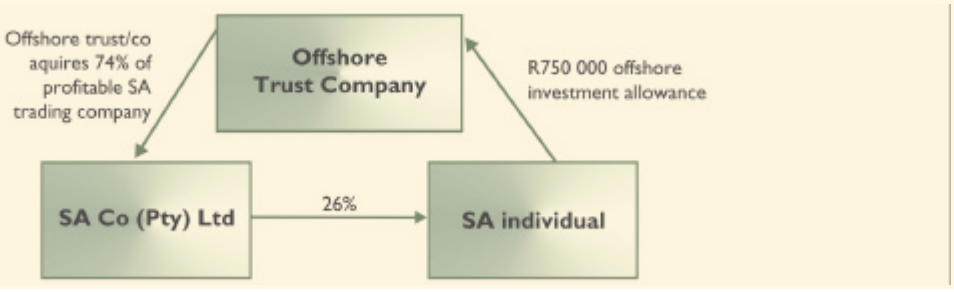
- **Foreign shares:** If acquired in terms of approved company share incentive schemes.

D13 Is there a general anti-avoidance provision in the Exchange Control regulations?

Exchange control regulation 10(1)(c) operates as a general anti-avoidance provision to the effect that no person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose, enter into any transaction whereby capital or any right to capital is directly or indirectly exported from SA.

D14 How to apply regulation S10 (1)(c)?

A typical corporate template (varying in detail from case to case) that was used by some to export funds out of SA was as follows:



In this example the SA individual invests his R750000 allowance into an offshore company (let's say he holds 100% of the shares), and the offshore company in turn acquires a 74% stake in a profitable SA concern. The individual holds the remaining 26 % shareholding in his own name. The 74% holding by the offshore company permits SACo to borrow locally (without contravention) in order to fund its SA operations. The ongoing 74% dividend earnings of SACo are remitted abroad, and the sale proceeds of the 74% stake can similarly be remitted abroad, as accruing to a foreign owner. Generally the exchange control experts appear to view this type of structure as an infringement of regulation 10(1)(c) that would permit the applicant the right to apply for amnesty.

D15 Do unauthorised foreign loans reduce the leviable amount?

According to the SARS explanatory memorandum, unauthorised loans or other liabilities do not reduce the leviable amount. By way of an example, X bought a house in the US for $1 million being an unauthorised asset, against which he took a US mortgage loan of $½ million. Because the foreign loan was taken on the strength of an unauthorised asset, such borrowing is in itself unauthorised, and it cannot reduce the leviable amount subject to the Excon levy. Distressingly, the levy will thus be charged on the $1million without reduction.

E1 What information is needed to apply for income tax amnesty relief?

Those filing for income tax amnesty relief must in their applications:

1) disclose all receipts and accruals for the 2003 tax year, relating to a foreign assets held by that applicant on 28 February 2003, the value of which has been wholly or partly derived from receipts or accruals from a source outside the Republic that were not declared to the Commissioner, as required by the ITA, in any previous year of assessment;
2) describe the identifying characteristics and the location of the asset;
3) disclose the amounts that were not declared for *domestic* income tax or estate duty purposes to the extent that those amounts were accumulated as or converted to foreign assets; and the dates on which those amounts were accumulated or converted. **The 2% levy is chargeable on these undeclared amounts (see below)**;
4) confirm in the application that no foreign assets or foreign bearer instruments were derived wholly or partly from the proceeds of any unlawful activities, meaning proceeds from true criminal activities (this is a critical declaration for the success of the application);
5) attach a statement of foreign assets and liabilities as at 28 February 2002, at both *historical cost* and *estimated market* value. These items must be reported in the relevant foreign currency. *Historical cost* refers to the original acquisition cost, stated in the foreign currency. SARS has the right to estimate the market value of all foreign assets and liabilities if there is failure to attach this statement. This information has been requested on grounds that the historic cost and liability information acts as a balance sheet comparison of starting and ending foreign assets for that year (useful for a capital reconciliation). The fair market value information assists income determination for future years.

E2 What is the position for Close Corporations with year-ends other than 28 February?

The relevant amnesty tax-paying period is defined to be the last tax–year ending on or before 28/02/2003. This means that where a CC applicant has a tax-year ending at 31 December for example, the relevant tax-paying period for purposes of the amnesty is the calendar year 2002.

E3 How will donations made in the 2003 tax year to a foreign trust be treated?

Something of a curiosity arises as regards someone who donated to a foreign trust during the 2003 tax year, and who seeks amnesty and makes the election to treat the assets as being his/her own. In such case the donor is deemed to have held the donated trust asset from 1 March 2002 and throughout the tax year, which on literal import means that he/she could not have made the donation during the 2003 tax year, and should not be subject to resulting 20% donations tax. Whether or not the drafters foresaw this implication is not known, but that no donations tax is payable would appear to be the correct result given that, should the donor die after making this election, the relevant donation would fall into his/her dutiable estate. SARS cannot expect the donor to have paid both donations tax and estate duty in these circumstances. It is unlikely that SARS will challenge such interpretation. The overall treatment as regards the election for trust donors has much to recommend that these persons, where possible, should seek amnesty relief, as thereby legitimising their past actions. Moreover the subsequent vesting of the trust assets into the names of the beneficiaries is such that these offshore holdings by the beneficiaries are likely to become legitimised.

F1 What is the 2% levy chargeable on?

A 2% levy will be imposed on all "amounts that were not declared to the Commissioner as required by the Income Tax Act, 1962, or the Estate Duty Act, 1955, to the extent that those amounts were accumulated as or converted to foreign assets". This provision deals with failure to previously declare domestic income for SA tax purposes prior to it being transferred abroad – being a significant addition to the Act that was necessitated by the realisation that the amnesty must be sufficiently comprehensive in order to encourage taxpayers to come forward and use the amnesty. The inclusion here of *undeclared* amounts for estate duty purposes mostly concerns foreign assets of a deceased person that were dutiable, but not declared, in the SA estate duty return. An SA executor that is *functus officio*, and no longer holds foreign assets of the estate at 28 February 2003 will however not be eligible to apply for amnesty –thus materially limiting the scope and relevance of this provision. There is a degree of uncertainty relating to what the words *"not declared …as required by the Income Tax Act"* means. Examples in point relate to non-disclosure in one's tax return of income that is tax-free or exempt, as well as omissions of domestic assets from a statement of assets and liabilities. Are such items subject to the 2% levy where the original undeclared income or amount was not subject to tax in the first place? This question has been put to SARS, and we are awaiting their answer. As presently worded, these undeclared amounts will in all likelihood be subject to the 2% levy. On the other hand, it needs to be emphasised that all after-tax monies (that can be proved to be so) would definitely not be subject to the 2% levy.

F2 What proof is needed as regards amounts subject to the 2% levy?

Documentary proof of the actual dates and amounts must be provided for transfers/accumulations that occurred after 28 February 1998, whereas 'considered estimates' under sworn affidavit are likely to be accepted, in the absence of other documentary proof, for such transactions before this date. There is an evidentiary burden here that prospective applicants must be sure they can meet. This may prove to be an administrative burden when attempting to identify relevant exchange rates and the dates and previously undeclared amounts spanning back many years.

F3 How 2% levy is calculated and paid?

The SARB exchange conversion rate at date of each separate accumulation or conversion must be used to work out the Rand value amount of undeclared income, against which the 2% levy is charged. The 2% levy must be paid not later than 3 months after the date of amnesty approval by the applicant to the bank account of the Corporation for Public Deposits (in this case no3-months extension is provided, probably because there is no requirement that exclusively foreign assets be used to pay this levy).

G1 What currency conversion rates apply to translate to foreign amounts into Rands?

Amnesty taxpayers who are not familiar with disclosing foreign income for tax purposes will be initiated into this practise when submitting their 2003 tax returns. There are special rules that apply in relation to the methodology for conversion of foreign income into its Rand equivalent, and these rules may differ as between:

- the different types of income (eg interest, dividends, capital gains etc);
- the tax year ending February 2003, and subsequent tax years.

As regards foreign taxes creditable against SA tax, prescribed conversion rates also apply.

G1.1 Terminology

Reference below to *average exchange rate* means the average rate determined by using daily, weekly or monthly closing spot rates (at the taxpayer's choice, which must be applied consistently), and may also be computed on a weighted average basis. Reference to the *ruling exchange rate* means the spot rate or other SARS approved rate in relation to exchange rates during the year. The under-mentioned treatments apply as regards foreign assets *not* held for the purposes of a *trade* – we are thus dealing here with passive assets held for purposes of investment, rather than for purposes of trade (being the bulk of the assets to which the amnesty is likely to apply).

G1.2 Foreign taxes creditable against SA taxes

S6quat (4) ITA prescribes the exchange rate as regards creditable foreign taxes as being:

- for the tax year ending 2003, one translates the foreign tax on each date such tax is paid (ie using the ruling exchange rate on that date, normally being the spot rate), or if the foreign tax has not yet been paid at year-end, then using the year-end spot rate;
- as regards tax years ending after 2003, one converts the foreign tax by aggregating it for the year and applying the average exchange rate for that year.

G1.3 Foreign income of a Controlled Foreign Company (CFC)

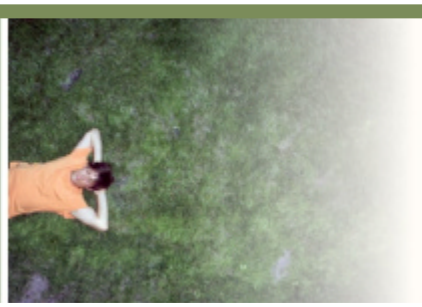
S9D (6) ITA prescribes the exchange rate as regards CFC income:

- for the tax year ending 2003, one translates the CFC's foreign income at the end of the tax year (ie using the ruling exchange rate on that date, normally being the spot rate);
- for tax years ending after 2003, one translates the CFC's foreign income at the end of the tax year by applying the average exchange rate for that year.

G1.4 Foreign dividends

S9E(10) ITA for foreign dividends earned in the tax year ending 2003 requires one to translate the foreign dividend on the date that it accrues to the resident (i.e. using the ruling exchange rate on that date, normally being the spot rate);

S25D applies to dividends for tax years ending after 2003, such that one translates the foreign dividends received in that tax year by applying the average exchange rate for that year.



G1.5 Foreign income generally

S25D ITA prescribes the exchange rate as regards foreign income generally (unless otherwise prescribed to the contrary):

- for tax year ending 2003, one translates foreign income to Rands on each date of accrual (ie using the spot rate on that date);
- for tax years ending after 2003, one convert one's income to Rands by aggregating that income for the year, and applying the average exchange rate for that year;

G1.6 Capital gains on foreign assets

This excludes foreign currency assets (eg bank accounts, fixed deposits, etc) as well as foreign equity instruments (eg foreign shares, unit trusts, etc). **Para 43 ITA** prescribes the currency conversion treatment of CGT on foreign assets disposed of:

- for the 2003 tax year, as calculating the gain/loss in the foreign currency (ie foreign proceeds less the base cost expenditure) and translating it to Rands using the ruling exchange rate (usually the spot rate) on the date of disposal.
- for tax years after 2003, as calculating the gain/loss in the foreign currency (ie foreign proceeds less the base cost expenditure) and translating it to Rands using the average exchange rate for the year of disposal;
- there are separate provisions to deal with where the proceeds are earned in a different currency from some or part of the base cost expenditure.

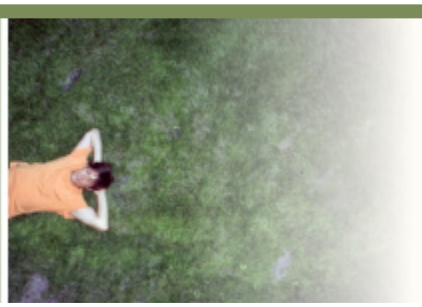
G1.7 Capital gains on foreign equity instruments

Para 43 ITA prescribes the treatment of CGT on foreign equity instruments disposed of. These are shares, unit trusts, index-linked instruments, and gold and platinum coins, as well as any future or option in relation to the aforesaid items. The CGT currency conversion treatment is that:

- for the 2003 tax year, one must convert the proceeds to Rands at the ruling exchange rate on the date of disposal, and one must convert the base cost value at 1 October 2001 and any subsequent expenditure to Rands at the ruling exchange rate on the aforesaid date or date of expenditure.
- for tax years after 2003, one must convert the proceeds to Rands at the average exchange rate of the year when disposed of, and one must convert the base cost value at 1 October 2001 and any subsequent expenditure to Rands at the average exchange rate for the tax year ending 2002 or year of expenditure.

G1.8 Capital gains on 'foreign currency' assets

For individuals' tax years ending February 2003 and prior years, there was no CGT levied on foreign currency assets. These are defined to be amounts held in units of currency, including debts and loans owing to a person. Accordingly foreign currency gains made on cash, savings and fixed deposits held with foreign banks during the Amnesty tax year (namely from 1 March 2002 to 28 February 2003) are simply not subject to CGT . Of course for subsequent capital gains arising on those assets for tax years after February 2003, CGT will be payable in terms of new paras 84 to 96. Under this new legislation, the taxpayer must for each separate country's currency that he holds (in foreign currency assets) maintain a foreign currency pool. Thus all US$ bank accounts etc will go into one pool.



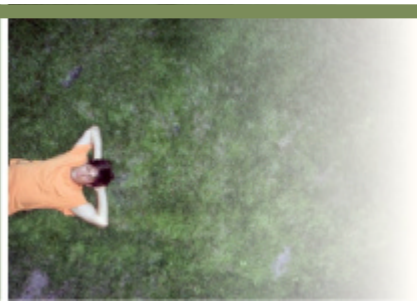
For the most part, an individual's base cost of say, the US$ pool is determined by adding all his/her US$ currency assets at 1 March 2003 (or such later date SA residence is obtained) and converting them at the average $/R exchange rate for the tax year ending February 2004. Similarly asset sales reduce the pool using the average exchange rate in the year of disposition, and asset acquisitions increase it, using such rate in the year of acquisition. Interest earnings would also be added to the pool's base cost. When a CGT event occurs, one must convert the proceeds of the currency asset to Rands using the average exchange rate of the year of disposal and *deduct* its Rand base-cost value (ie a proportion of the pooled base cost) in order to arrive at the gain.

G2 Can amnesty relief be obtained on amounts already in the tax net?

Since the amnesty is intended only for parties with undisclosed revenues relating to undisclosed foreign assets, no relief is to be given for amounts already within the tax system. The amnesty cannot therefore undermine revenues that Government could have otherwise obtained. Hence, no amnesty relief will be granted for amounts where the required taxes have already been paid, or which become payable for a tax return that has already been submitted before the amnesty application is made.

G3 Can special tax relief be claimed on amnesty-favoured amounts?

Taxpayers cannot benefit from tax reductions (deductions, allowances, assessed losses, assessed capital losses and foreign tax rebates) in respect of amnesty-favoured amounts. The logic is that benefits of reductions should not inure if the full tax on non-disclosed revenues is not being charged. On the other hand, reductions are permissible regarding underlying revenues properly within the tax net. Accordingly one may claim normal permissible deductions, allowances, assessed losses, assessed capital losses and foreign tax rebates as regards the 2003 tax year, but not for preceding tax years.



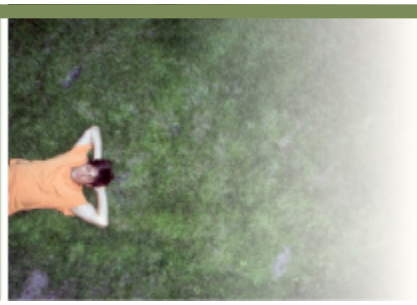
Section H1 - 2

H1 How must a facilitator apply for amnesty?

Facilitators must apply jointly with an applicant in prescribed form confirming that there is no reason for the facilitator to believe that the relevant assets or funds (held on behalf of the applicant) were derived from proceeds of unlawful activities. Facilitators are entitled to apply for the Excon amnesty as well as the tax amnesty as regards the 2% levy on domestic amounts accumulated/converted to foreign assets that were not declared for tax and estate duty purposes. Examples are a controlled SA company that under-invoices exports for the benefit of the proprietor, or that over-prices the cost of imports, with the surplus funds in both cases being illegally accumulated abroad for the proprietor's benefit. In each instance, the facilitator company has acted in consort with the owner, resulting *not only* in an illegal shift of funds violating exchange control for the proprietor's benefit, *but also* in a reduction of the SA consort company's tax liability (by overstating expenses of imports, and/or understating revenues on sales).

H2 Are all companies eligible to apply for amnesty as facilitators?

There are marked restrictions that apply in order for a company to be eligible to apply as a facilitator. In essence the company must be 100% owned by the applicant or his/her relatives. This excludes such companies held by a family trust or another company of the applicant, as well as companies owned by individuals that are not related. If the individual applies in these circumstances, but not the facilitator company, the latter is left with the serious risk of future prosecution or tax penalties.



I1 What are the powers, obligations and composition of the Amnesty Unit?

The Unit comprises a chairperson, and at least four SARB appointees and four SARS appointees, all of whom have been appointed by the Finance Minister. The Unit is independent, and may appoint such support staff members as are needed to carry out the resulting workload. The Unit must grant, deny or withdraw approvals for amnesty. The amnesty unit must not, except as specifically provided, interfere with the powers and functions assigned to SARB and SARS relating to interpretation of Exchange Control and tax legislation; or discretions exercised thereunder; or as to the determination of any liability for taxes or levies.

The Unit's personnel are subject to the taxpayer confidentiality provisions as contained in S4 ITA, thus requiring them to preserve secrecy and preventing them from communicating any applicant's identity or affairs, save for specific circumscribed exemptions. However both SARS and SARB are allowed to provide the Unit with any information it may request, despite the confidentiality requirements that SARS and SARB are subject to. A member of the amnesty unit who has a personal or financial interest in any matter on which the amnesty unit must decide, must disclose that interest and withdraw from the proceedings of the amnesty unit when that matter is being evaluated.

I2 How is confidentiality of amnesty information secured?

In addition to the confidentiality obligations that all Amnesty Unit personnel are subject to (as per S4 ITA mentioned above), there are other safeguards, which differ as to whether the applicant was successful in his amnesty application or not. In the case of a successful application, the Unit is obliged to furnish SARB and SARS with a copy of the approved application (including all information submitted therewith, but without reflecting any names of persons other than the applicants). This means that SARB and/or SARS will know the identities of all successful applicants, being an inevitable consequence arising from the need for these government bodies to update their records relating to the applicant.

Where names of people (other than the applicant) appear on the records supporting the application, the Amnesty Unit is obliged to delete those names prior to sending the documents to SARS and SARB (the Act does not state how such names must be deleted!). This affords protection to anyone whose name has been mentioned or recorded in an applicant's submission, whether knowingly or inadvertently. Moreover, another provision prohibits the amnesty unit, SARS or SARB from requesting any details from the applicant or facilitator regarding any person who advised or assisted an applicant on the method of accumulating foreign assets or transferring funds or assets from SA the Republic.

I3 How is confidentiality secured for unsuccessful applicants?

Any information submitted by an unsuccessful applicant may not be disclosed to any person, and the application documents must be submitted to the National Treasury on the date of the Unit's termination, to be retained by the National Treasury for a period of at least five years. The secrecy provisions as applicable to the amnesty unit shall also apply to the National Treasury as regards that information.

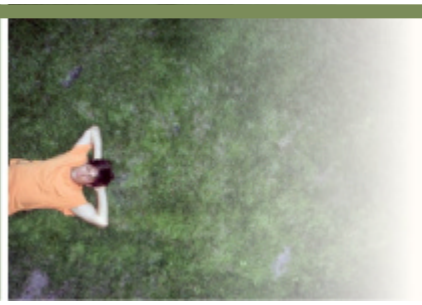
I4 Can one challenge the Amnesty Unit's decision?

Applicants that are aggrieved by the amnesty unit's decision may lodge an objection to the Chairperson, who will refer the matter to a two-person panel consisting of a SARS and an Exchange Control official. Thereafter there is a right of appeal to the Special Tax Court (established under S83 ITA). If the Amnesty Unit withdraws an amnesty grant, once given, it must provide reasons. If unsuccessful in the Special Tax Court, the applicant may escalate his/her dispute to the High Courts, and for which the normal appeal rules will apply.

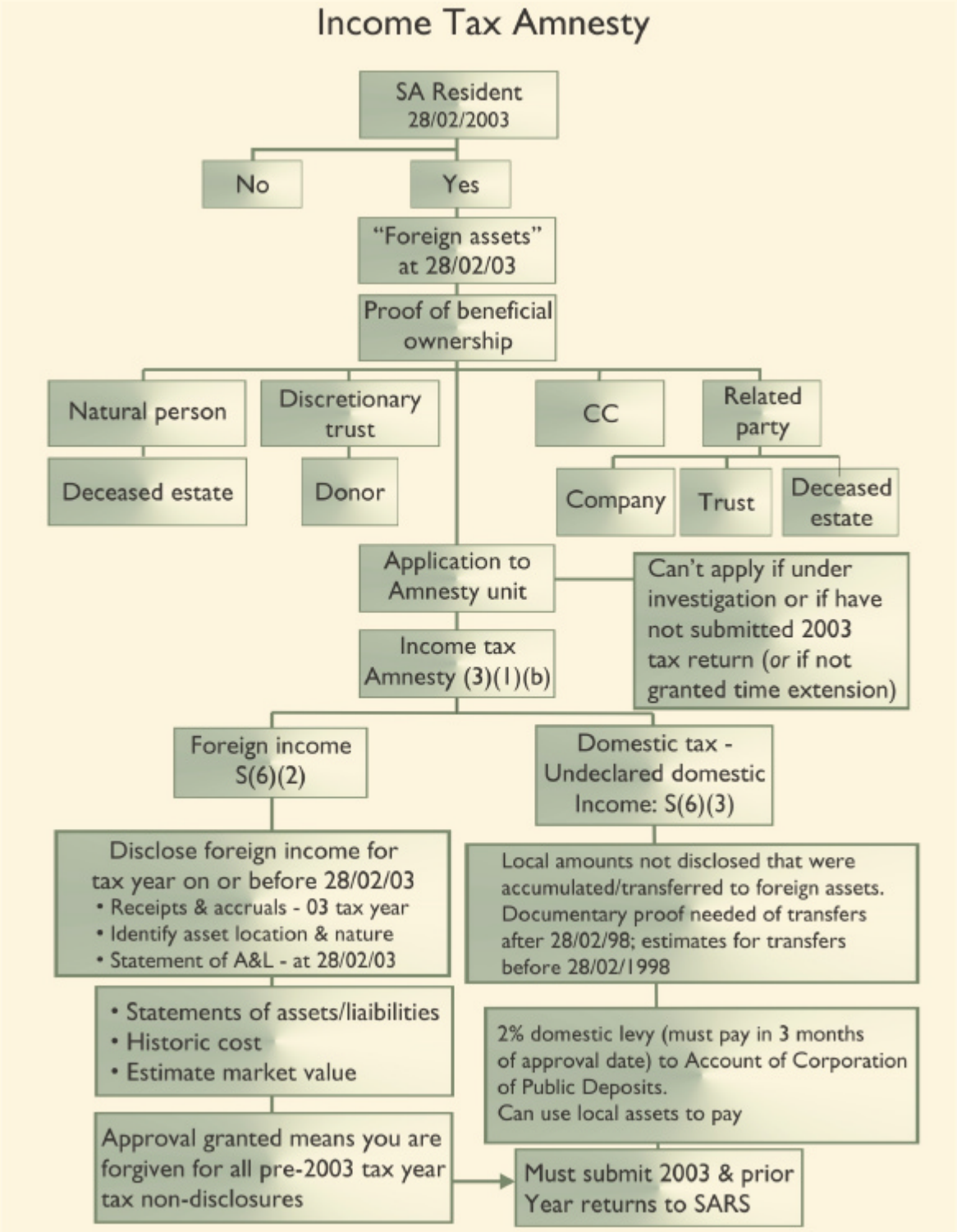
I5 What may be covered in Amnesty Regulations?

The Minister may make regulations for generally giving effect to the objects and purposes of the Amnesty, including the ability to address any unintended consequences, anomalies or incongruities that may arise with regard to foreign assets held by a discretionary trust; foreign asset holdings held by a foreign company or trust of the applicant; changes of tax residence by an applicant; questions as to whether a foreign asset is unauthorized or an amount was not declared.

This regulatory authority is mainly intended to address unintended consequences that may unexpectedly arise during the amnesty review process. This broad grant of regulatory authority is necessary because the short time-frame for the amnesty made it impossible to address these issues in a timely fashion within the normal Parliamentary review process.

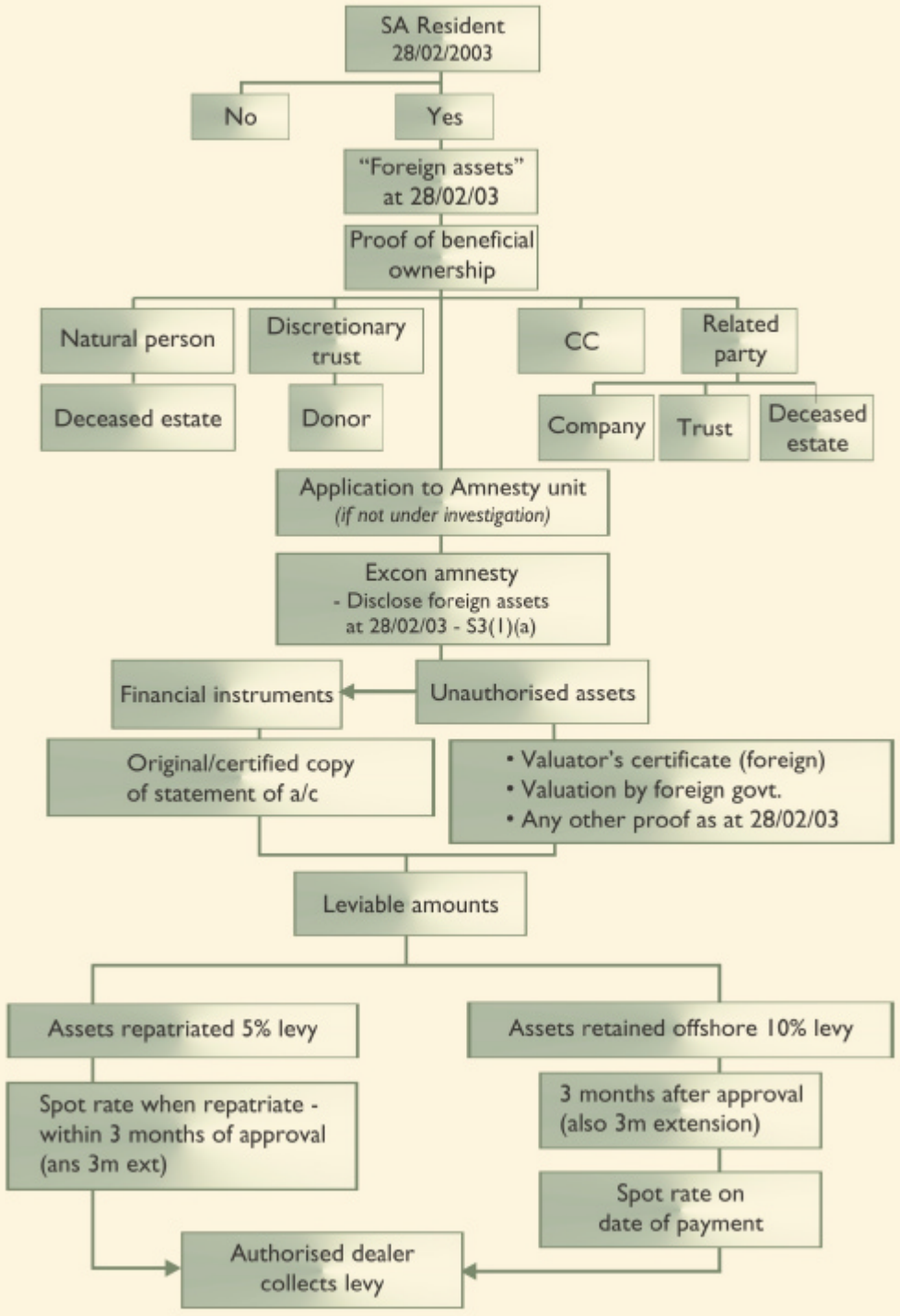


Income Tax Amnesty



Exchange Control Amnesty Decision Tree

Exchange Control Amnesty Decision Tree



ANNEXURE A

APPLICATION FOR - EXCHANGE CONTROL AMNESTY AND ACCOMPANYING TAX RELIEF

1. APPLICATION SUBMITTED AS

NATURAL PERSON	☐	DECEASED ESTATE	☐	CLOSE CORPORATION	☐
TRUST	☐	FACILITATOR	☐		

2. APPLICANT

NATURAL PERSON
(Including a deceased estate)

SURNAME

FIRST NAMES

IDENTITY/PASSPORT NUMBER

INCOME TAX REFERENCE NO.

TRUST

NAME OF TRUST

INCOME TAX REFERENCE NO.

CLOSE CORPORATION

NAME OF CLOSE CORPORATION

INCOME TAX REFERENCE NO.

CC REGISTRATION NO.

CONTACT DETAILS OF APPLICANT/APPLICANT'S REPRESENTATIVE

NAME AND SURNAME

POSTAL ADDRESS

Code

STREET ADDRESS

Code

WORK TELEPHONE NUMBER Dialling code

HOME TELEPHONE NUMBER Dialling code

CELL PHONE NUMBER

FACSIMILE NUMBER Dialling code

E-MAIL ADDRESS

3. FACILITATOR

THIS SECTION SHOULD BE COMPLETED JOINTLY WITH THE APPLICANT

NATURAL PERSON

SURNAME	
FIRST NAMES	
IDENTITY/PASSPORT NUMBER	
INCOME TAX REFERENCE NO.	

DECEASED ESTATE

SURNAME	
FIRST NAMES	
IDENTITY/PASSPORT NUMBER	
INCOME TAX REFERENCE NO.	
NAMES OF BENEFICIARIES	

COMPANY/CLOSE CORPORATION

NAME OF COMPANY/CC	
INCOME TAX REFERENCE NO.	
CC REGISTRATION NO.	
NAMES OF MEMBERS	

TRUST

NAME OF TRUST	
INCOME TAX REFERENCE NO.	
NAMES OF BENEFICIARIES	

See next page for contact details of facilitator

CONTACT DETAILS OF FACILITATOR/FACILITATOR'S REPRESENTATIVE

NAME AND SURNAME	
POSTAL ADDRESS	Code
STREET ADDRESS	Code
WORK TELEPHONE NUMBER	Dialling code
HOME TELEPHONE NUMBER	Dialling code
CELL PHONE NUMBER	
FACSIMILE NUMBER	Dialling code
E-MAIL ADDRESS	

4. ELECTION BY DONOR

a) Has the applicant elected to be deemed to hold any foreign assets actually held by a non-resident discretionary trust on 28 February 2003 Yes ☐ No ☐

If YES, a schedule must be attached setting out a description of the identifying characteristics and location of the assets confirming that they:

- were acquired by the discretionary trust by way of donation by the applicant
- were wholly or partly derived from unauthorised assets, and
- were not vested in any beneficiary of the discretionary trust

b) Country where trust was formed

.....

and

c) Place of effective management

.....

5. STATEMENT OF FOREIGN ASSETS AS AT 28 FEBRUARY 2003 FOR EXCHANGE CONTROL AMNESTY

NATURE OF THE ASSET	LOCATION OF FOREIGN ASSET	MARKET VALUE IN FOREIGN CURRENCY	SUPPORTING DOCUMENTS Indicating description and value
1. **CASH**			Declaration
2. **CURRENT AND OTHER SHORT – TERM FOREIGN ASSETS** (Bank accounts, call deposits, time deposits.)			Original or certified copy of statement of account.
3. **LISTED FINANCIAL INSTRUMENTS** (Shares, stock, bonds, debentures listed on recognised exchange.)			Statement of account and price as quoted on exchange.
4. **OTHER FINANCIAL INSTRUMENTS** (Instruments not listed on recognised exchanges, unlisted shares)			Valuation Certificate
5. **FIXED PROPERTY**			Valuation Certificate
6. **INSURANCE POLICIES**			Valuation Certificate by insurer of policy
7. **INVESTMENT IN COLLECTIVE INVESTMENT SCHEMES** (Unit Trusts)			Statement by management company of scheme
8. **INTANGIBLE ASSETS**			Valuation Certificate of e.g. patents or copyrights
9. **OTHER FOREIGN ASSETS**			Declaration
Total (Carry forward to Paragraph 8)			

Supporting documents must be provided for all assets, which includes balances and values as at 28 February 2003.

6. STATEMENT OF FOREIGN ASSETS AND LIABILITIES AS AT 28 FEBRUARY 2002 FOR PURPOSES OF TAX RELIEF

NOTE: ALL FOREIGN ASSETS AND LIABILITIES MUST BE REFLECTED AT BOTH HISTORICAL AND ESTIMATED MARKET VALUE AND THE STATEMENT MUST BE ATTACHED TO THIS APPLICATION

7. DOMESTIC TAX RELIEF

a) APPLICANT

DATES ON WHICH AMOUNTS WERE ACCUMULATED OR CONVERTED	AMOUNTS NOT PREVIOUSLY DECLARED FOR			
	INCOME TAX	STC	DONATIONS TAX	ESTATE DUTY
TOTAL (Carry forward to Paragraph 9)				

b) FACILITATOR

DATES ON WHICH AMOUNTS WERE ACCUMULATED OR CONVERTED	AMOUNTS NOT PREVIOUSLY DECLARED FOR			
	INCOME TAX	STC	DONATIONS TAX	ESTATE DUTY
TOTAL (Carry forward to Paragraph 9)				

Note: Documentary proof of the dates and amounts in the form of deposit slips, bank statements, etc, must be provided in respect of amounts accumulated as or converted to foreign assets after 28 February 1998. Documentary proof is preferable in respect of amounts accumulated as or converted to foreign assets on or before 28 February 1998 but may be replaced by other evidence, such as a declaration of amounts and dates by the applicant or facilitator, if necessary.

8. EXCHANGE CONTROL AMNESTY LEVY

Total market value in foreign currency of foreign assets held wholly or partly in contravention of Exchange Control regulations	
Less Total market value of assets not held in contravention of Exchange Control regulations	
Less Unutilised foreign capital allowance – (R750 000 or remaining portion thereof converted to foreign currency at the SARB published rate for 28 February 2003)	
Total leviable amount	
Value of assets for repatriation	
5% Levy on repatriated amount	
Value of assets retained off-shore	
10% Levy on retained amount	
Total	R

Note: Levy must be paid to the Corporation for Public Deposits through an authorised dealer

9 DOMESTIC TAX LEVY

		AMOUNTS NOT DECLARED (Converted to Rand at SARB published rate on date of conversion or accumulation)	
		APPLICANT	**FACILITATOR**
	Income Tax		
Plus	STC		
Plus	Donations Tax		
Plus	Estate Duty		
	Total Leviable amount		
	2% Levy thereon		

Note: Levy must be paid to the Corporation for Public Deposits

10 SWORN AFFIDAVIT OR SOLEMN DECLARATION

APPLICANT

I, (Full names and surname) .....

Identity number | | | | | | | | | | | | | | |

Hereby swear/solemnly declare* that the information furnished above, as well as the supporting documents and statements are true and correct in every respect and that none of the funds, foreign assets, or bearer instruments that I hold were derived from proceeds of any unlawful activities ..

....

Signature *Date* *Place*

I certify that prior to my administering the prescribed oath/affirmation*, I put the following questions to the deponent and wrote down his/her answers thereto in his/her presence:

1) Do you know and understand the contents of the above statement? Answer .....

2) Do you have any objection to taking the prescribed oath/affirmation? Answer .....

3) Do you regard the prescribed oath/affirmation as binding on your conscience? Answer .....

I certify that the deponent acknowledges that he/she knows and understands the contents of this statement which was sworn to/affirmed* and signed by the deponent in my presence.

.....

*Justice of the Peace/Magistrate/Commissioner of Oaths**

Designation ..... Ex officio Republic

Full first names and surname

Address .....

.....

....

Date *Place*

*Delete whichever is not applicable

FACILITATOR

I, (Full names and surname) .....

Identity number | | | | | | | | | | | | | | |

Hereby swear/solemnly declare* that the information furnished in paragraph 7(b) above, as well as the supporting documents and statements , are true and correct in every respect and that I have no reason to believe that any of the funds or foreign assets I assisted the applicant to accumulate outside or transfer from the Republic represented or were derived from the proceeds of any unlawful activities.

....

Signature *Date* *Place*

I certify that prior to my administering the prescribed oath/affirmation*, I put the following questions to the deponent and wrote down his/her answers thereto in his/her presence:

1) Do you know and understand the contents of the above statement? Answer .....

2) Do you have any objection to taking the prescribed oath/affirmation? Answer .....

3) Do you regard the prescribed oath/affirmation as binding on your conscience? Answer .....

I certify that the deponent acknowledges that he/she knows and understands the contents of this statement which was sworn to/affirmed* and signed by the deponent in my presence.

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*Delete whichever is not applicable