New law may put lid on asset disclosure

Tax experts believe significant sums of undeclared assets have been hoarded offshore by South African taxpayers but they might be reluctant to declare them under the special voluntary disclosure programme because of the way it deals with trusts.

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The Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Bill was signed into law by President Jacob Zuma last week.

It takes effect retrospectively from 1 October 2016 and applications can be made until end-June. However, the act has not yet been published in the government gazette, the last step for it to enter the statute books and for there to be absolute legal certainty about it.

Tax professionals say the delay in getting the bill promulgated has dampened initial enthusiasm, and they cannot really begin to promote it until it is fully enacted.

"This delay is causing problems for taxpayers," Hogan Lovells head of tax Ernie Lai King said. "The people with significant sums appear to be still mulling over whether they will apply for the special voluntary disclosure programme as they have sufficient assets to emigrate and to join their assets rather than apply under the special voluntary disclosure programme or the voluntary disclosure programme.

"There are major reservations, especially where assets are held through foreign discretionary trusts. The South African Revenue Service [SARS] has a simplistic view that all foreign offshore trusts are sham trusts and the trustees will follow the instructions of the settlor/donor or a discretionary beneficiary.

"So SARS, under the programme, requires the settlor/donor or beneficiary of an offshore discretionary to deem all the foreign trust/assets to be owned by the South African settlor or South African beneficiary," said Lai King.

"It is not that simple, as the offshore trustees have a fiduciary duty to all the beneficiaries [both South African and nonSouth African residents] of the trust and legally the South African settlor and the South African beneficiary of the discretionary trust have no legal right to demand from the trustees that all the trust assets be deemed to be theirs.

"The South African resident will have to pay the taxes on the deemed assets in terms of the special voluntary disclosure programme and cannot demand from the trustees to distribute sufficient cash out of the trust to meet these taxes," he said.

"The approach of SARS is regrettable as there are wellestablished anti-avoidance attribution rules that apply to discretionary offshore trusts that pull the trust's income and capital gains back into the settlor's/ donor's hands. SARS should have just applied these well established laws."

Paul Gering, tax partner of accounting firm PKF, agrees that the failure of the special voluntary disclosure programme to provide adequate relief for trusts will deter taxpayers from declaring their assets.

The imposition of estate duty on declared trust capital in addition to the penalty would also weigh heavily. However, he expected the income from the penalties imposed on the newly declared assets to be as high as R10bn to R15bn.

"Certainly there is interest, but it is an expensive regularisation process. The country needs the revenue that will accrue from this and it is of concern that there has been such a long delay, that SARS has taken such a high-handed approach and that the programme was not more inclusive," Gering said.

South African Institute of Chartered Accountants senior executive for tax Peter Farber said it was difficult to gauge the level of interest as everyone was waiting to see what the final requirements would be.

"It was very difficult to promote until we knew what these final positions would be. I think it will start now and we will see a lot more interest trickling in."

PricewaterhouseCoopers tax partner Kyle Mandy said the final version of the programme was much better than the first draft and he expected a significant uptake.

Source: Business Day