

# Potential tools in a well-structured estate plan



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**Offshore trusts and companies could be essential.**

Although recent statistics have shown a steady decrease in the volume of offshore trusts and companies being established by South Africans for tax planning purposes, their value is just as relevant today for estate planning purposes as it had been in years gone by.

This decline is largely due to, amongst other things, enhanced transparency, ever increasing regulatory requirements and aggressive changes in tax legislation, both locally and abroad. This, understandably, has in most cases given rise to an incremental increase in professional fees charged by the service provider, usually situated in a suitable financial services centre such as one of the Channel Islands, Mauritius or Cayman, to name a few.

From this it is clear that offshore trust- and company structures are no longer for everyone. However, that said and for those of you who are fortunate to have substantial assets situated in a foreign jurisdiction or multiple foreign jurisdictions, the fees may be a small price to pay considering the estate planning benefits these structures may hold.

Much has been said and written about the single Will/multiple Will conundrum when it comes to holding assets in foreign jurisdictions and especially if those foreign jurisdictions are Civil Law (forced heirship) countries. The conclusions seem to favour the use of multiple Wills and very careful planning, but very little has been said about any alternatives.

An offshore company can be utilised very efficiently to combat the succession laws and potential inheritance tax applicable in some common law and most civil law countries alike. This is, simply put, because the company does not die with the shareholder and as a consequence the assets owned by the company are unaffected by the death of a shareholder. It is rather the shareholding of the company that will be subject to succession laws and inheritance taxes of the country where the company is situated. If this country is among the ones mentioned above, no inheritance tax is applicable and the shareholding can generally be dealt with in terms of a simple offshore Will or even in terms of a single worldwide South African Will. The shareholding will however still form part of the dutiable South African estate.

In addition to the South African estate duty obligations, some countries like the United Kingdom and the United States of America will also seek to levy estate taxes, at death, on most assets (especially fixed assets) owned by an individual if the assets are situated in those countries ("situs assets"). Both the UK and the US broadly levy estate tax/inheritance tax at a rate of 40%. Estate tax in the US will largely be applicable if a non US tax resident owns US situs assets in excess of \$60,000. Inheritance tax in the UK will be applicable if the UK situs assets are in excess of GBP325,000. The fact there are existing estate duty double taxation treaties in place between South Africa, the UK and the US unfortunately does not eliminate the application of US or UK estate taxes, and the application thereof merely reduces the total tax liability from 60% to 40%.

It is therefore quite possible to consolidate foreign assets, owned in multiple jurisdictions, under one umbrella i.e. by transferring/acquiring foreign assets in multiple jurisdictions in an offshore company established in a suitable financial services centre. On death, neither the succession laws nor the estate/inheritance taxes in the countries where the assets are situated will apply to the assets owned by the company. The shareholding of the company must however, on death, be dealt with in accordance with the deceased's Will, but as mentioned these will be subject to the succession laws of the country where the company is incorporated. If this country is among the financial services centres mentioned above, the succession laws are such that an offshore Will drafted under English law or a South African Will, will be able to deal with the shareholding effectively.

For individuals who own assets or are contemplating acquiring future assets in multiple jurisdictions spread across common and civil law countries, the use of a foreign company may be the ideal vehicle to eliminate the requirement of various Wills drafted in accordance with each specific country's legal requirements and may have the additional benefit of reducing unnecessary foreign estate- or inheritance taxes.

An offshore trust established in a suitable financial services centre can also provide similar benefits as discussed above, however, given that the trust concept is not widely recognised in many civil law countries, the use of a trust in isolation may be cumbersome and may result in negative tax consequences. Special inheritance tax rules are also applicable in the UK if UK assets are held directly by the trust. Such assets may, therefore, nevertheless be subject to a form of UK inheritance tax. A combination of an offshore trust and company is often utilised to combat the above disadvantages. In this instance the formation of a trust would generally be the first step. Once the trust is established and funded the trustees would incorporate and fund a wholly owned offshore company (generally in the same jurisdiction where the trust is established). The company would then acquire the assets in the multiple foreign jurisdictions, which can include most civil law countries.

On the demise of the settlor, who is generally also the person who funded the trust, the trust and the company would continue to operate unaffected and the

assets held by the company or trust would not be subject to any of the succession or inheritance tax laws that would have applied had the settlor owned the assets in his personal capacity.

The only assets the settlor/funder will have to deal with at time of death will be the value of any outstanding loans payable by the trustees to him. This can, however, be dealt with in terms of his Will. As from 1 March 2013, any outstanding loan can be bequeathed to the trustees without any capital gains tax consequences. The loan would however still form part of his South African estate for estate duty purposes.

*\*Please note: The scope of this article is limited to the potential estate planning benefits offered by trusts and companies. Various other issues such as any applicable domestic and foreign income taxes, capital gains taxes, withholding taxes and the application of double tax treaties should be given careful consideration. The reader is also strongly advised to obtain professional tax advice on these and related matters prior to establishing any of these structures or transferring or acquiring assets as such.*

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