

- ❑ BEPS: Transfer Pricing & Misinvoicing
- ❑ Panama Papers

UPDATE ON BASE EROSION AND PROFIT SHIFTING (BEPS)

Transfer Pricing

Actions 8 - 10: Transfer pricing (1)

Key outcomes

- OECD Transfer Pricing Guidelines, which are used to interpret arm's length standard used in treaties based on the OECD and UN Model Tax Conventions, are strengthened and clarified in the areas of:
 - Hard to value intangibles: Returns from exploitation of an intangibles do not necessarily go to its legal owner (usually in a low tax country) and measures to counter information asymmetry
 - Contractual allocation of risk and capital: Will only be respected if consistent with actual decision making, meaningful control over risk and financial capacity to assume the risks
 - Other high-risk transactions: Contracts may be supplemented or replaced by actual conduct of party, arrangements may be disregarded if they lack commercial rationality

Actions 8 - 10: Transfer pricing (2)

South Africa

- ❑ Income Tax Act section 31 introduced in 1995, most recent amendments in principle in 2011 and 2014 - Provides that transfer prices must be at arm's length

- ❑ Revisions to Guidelines will assist in countering BEPS using the provisions of section 31 as will the following domestic remedies that have been proposed:
 - Maintenance of specific transfer pricing documentation and records - SARS released a draft public notice requiring large corporates with cross-border transaction with connected persons to maintain specific transfer pricing documentation released for public comment in December 2015, consultation with commentators held on 09 May 2016. Further consultation with the banking sector is being scheduled to address sector specific concerns

Actions 8 - 10: Transfer pricing (3)

South Africa

- ❑ Insertion of section 42(a) of the TAA to clarify the requirements to be met against taxpayers failing to submit relevant information to the SARS by asserting legal professional privilege
- ❑ Amendment to section 46 of the TAA and access to foreign based information
- ❑ Amendment of section 47 of the TAA clarifying persons who may be interviewed or called upon to provide information on a company or entity under audit
- ❑ Amendment to section 49 of the TAA allowing SARS to request such persons above to submit under oath or solemn declaration

Actions 8 - 10: Transfer pricing (4)

South Africa

- ❑ Amendment to section 99 of the TAA extending the prescription period where a taxpayer requires additional time to submit information and for certain classes of BEPS related transactions i.e. transfer pricing, substance over form, GAAR and hybrid instruments etc.
- ❑ Inclusion of inbound services (for which outbound payments are made) into the list of reportable arrangements
- ❑ Broadening of the corporate tax return to improve and increase disclosure requirements of transfer pricing and other BEPS related transactions

Action 13: Transfer pricing documentation

Key outcomes

- ❑ Three tier approach to increase quality of information provided to tax administrations and limit compliance burden on taxpayers
 - Master file – Overall group information
 - Local file – Detailed information specific to operations in country
 - Country-by-country (CbC) report – Indicators of economic activity for each country the group does business, supplied to home tax administration and exchanged with others, for risk analysis
- ❑ Minimum standard for consistent implementation of CbC reports

South Africa

- ❑ Tax Administration Act section 1 “international tax standard” definition extended to CbC reporting in 2015
- ❑ Signed multilateral competent authority agreement on exchange of CbC reports in January 2016
- ❑ Draft regulations released for public comment in April 2016

Transfer pricing audits – previous financial year

Industry	Banked thus far
Mining and Quarrying	R721 017 046
Oil Refinery	R94 570 727
Manufacturing	R42 500 000

Transfer pricing status – current audits

Industry	Number	Nature of Risk
Mining and Quarrying	13	Sales to offshore subsidiaries
Oil Refinery	4	Intra-group purchases and export of crude oil, lubricants, chemicals and services to offshore subsidiaries.
Transport, storage and communication	4	Royalties
Manufacturing	7	Related party transactions
Wholesale and Retail Trade	1	Financial assistance

Transfer pricing status – current capacity

- Currently 25 staff members
- Recruitment process is midway for hiring of additional capacity

Transfer pricing status - challenges

- ❑ Scarcity of experienced resources – global challenge
- ❑ Competition between SARS and private sector
- ❑ Positive retention (i.e. reason coming to SARS): diversity of work /exposure and making a difference.
- ❑ External candidates: no audit experience from tax authority perspective, unfamiliar with SARS governance procedures and systems. It can take up to a year for an external candidate to get familiar with the SARS internal processes.

Transfer pricing – International Collaboration

- ❑ UN Workshop on Practical Issues in Transfer Pricing for Developing Countries in Panama City, USA: 20th April to 24th April 2015.
- ❑ OECD Working Party 6: 18th May 2015 to 22th May 2015; 29th June to 10th July 2015; 7th December to 11th December 2015; 7th March to 11th March 2015. South Africa participates actively in the discussion on the Revised Discussion Drafts on Intangibles, Documentation and other BEPS issues.
- ❑ UN Primer Workshop on Transfer Pricing for Developing Countries in Lusaka, Zambia: 17th and 18th June 2015.
- ❑ ATAF summit in Kenya: 27th July to 30th July 2015.
- ❑ UN Transfer Pricing Manual Update in Santiago: 16th November to 19th November 2015.
- ❑ Efforts underway to receive training from the IRS (USA), Canada, Australia & UK

Trade Misinvoicing

- ❑ Trade misinvoicing has been illustrated and communicated widely from a top down perspective – Global Financial Integrity (“GFI”) Reports

- ❑ Current Research and Analysis focus on a bottom-up approach
 - Select a subject sector of economy with broad downstream impact,
 - Consider data availability - trade statistics, product pricing data,
 - Cascade research and analysis down to economic entity level
 - Test research and analysis against sample of financial data obtained from economic entities

**PANAMA PAPERS:
SARS ACTIVITIES & PARTICIPATION IN
GLOBAL PANAMA PROJECT**

OVERVIEW OF PANAMA PAPERS

- ❑ Leak of information held by Mossack Fonseca, Panama-headquartered legal firm involved in incorporation of offshore entities
- ❑ First obtained by German newspaper Süddeutsche Zeitung and shared with the International Consortium of Investigative Journalists (ICIJ) in 2015
- ❑ > 100 media partners involved in analysing the information
- ❑ Details of the leak:
 - > 11.5 million internal files
 - > 210 000 offshore companies
 - > 14 000 banks, law firms, company incorporators, etc. involved
 - Includes nearly 40 years, from 1977 through the end of 2015
 - 2.6 terabytes of data
- ❑ Incorporation of offshore companies may take place for legitimate or other reasons

Source: ICIJ

CHALLENGES AROUND PANAMA PAPERS

- ❑ The ICIJ released a searchable database of basic corporate data drawn from the information at its disposal on 9 May 2016
- ❑ The database does not include records of financial transactions, emails and other correspondence
- ❑ In response to requests for additional details by tax authorities to the ICIJ and media partners, the ICIJ stated that; “The policy of ICIJ, and our parent organization, the Center for Public Integrity, is not to turn over such material.”
- ❑ Earlier in 2016 the Global Forum listed Panama as one of two jurisdictions that had not committed to automatic EOI – Panama changed its stance in May 2016 but further details around implementation are awaited
- ❑ In short, the data available to SARS with respect to the Panama Papers is a useful starting point for further enquiry but will require substantial follow-up work

SARS PARTICIPATION IN GLOBAL PANAMA PROJECTS

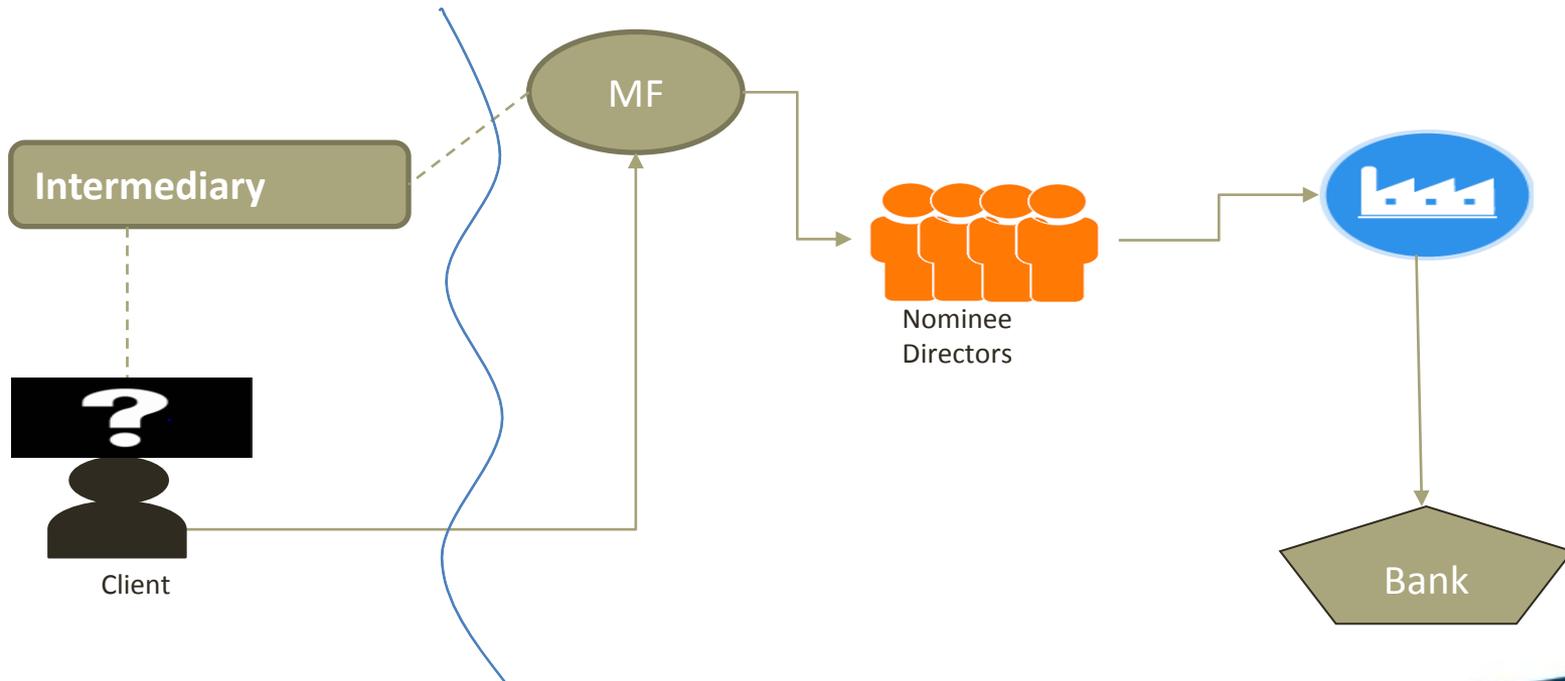
- ❑ Joint International Tax Shelter Information & Collaboration Network (JITSIC)
- ❑ Part of the Forum on Tax Administration (“FTA”)
- ❑ Objective: collaborate and exchange information on the most effective ways to tackle tax avoidance
- ❑ SARS participated in a special “Panama Papers” JITSIC meeting on 13 April 2016
- ❑ International action plan was agreed on, aimed at obtaining more information and sharing it efficiently amongst tax administrators

THE PANAMA DATA

- ❑ Data downloaded on 10 May 2016 (date released by ICIJ)
- ❑ Converted to spreadsheet format, to ease SARS income tax data base search
- ❑ Roughly 1700 individual South African resident names (duplicates removed)
- ❑ Roles vary: shareholder, director, beneficiary
- ❑ 56 South African intermediaries found
- ❑ Full set of underlying documentation not yet available (our understanding is that no country has yet been successful in obtaining this from ICIJ)

TYPICAL STRUCTURE (1)

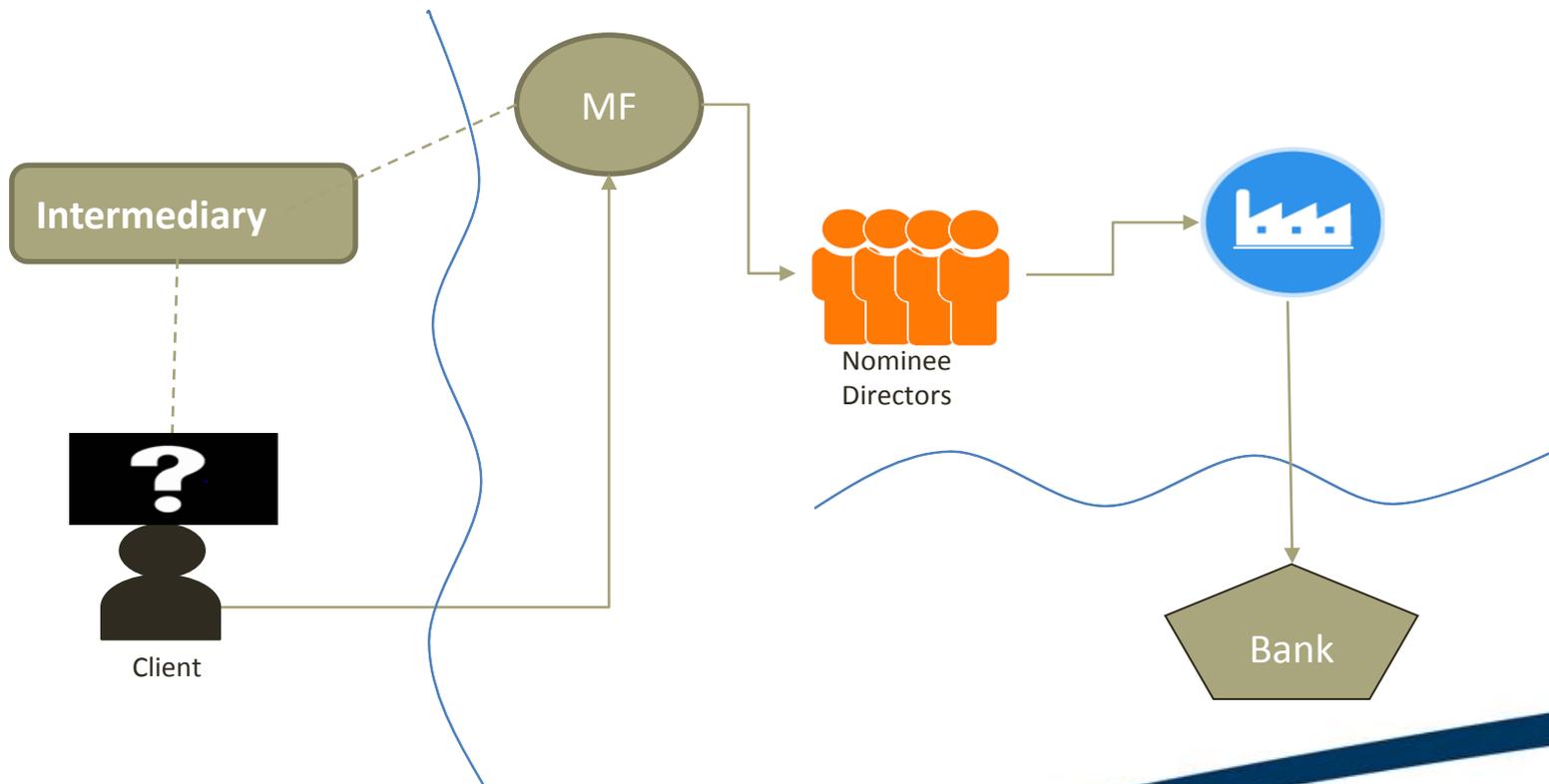
Offshore company and bank account in the same jurisdiction



Source – JITSIC:
PRELIMINARY
ANALYSIS GUIDE
PANAMA PAPERS
INFORMATION

TYPICAL STRUCTURE (2)

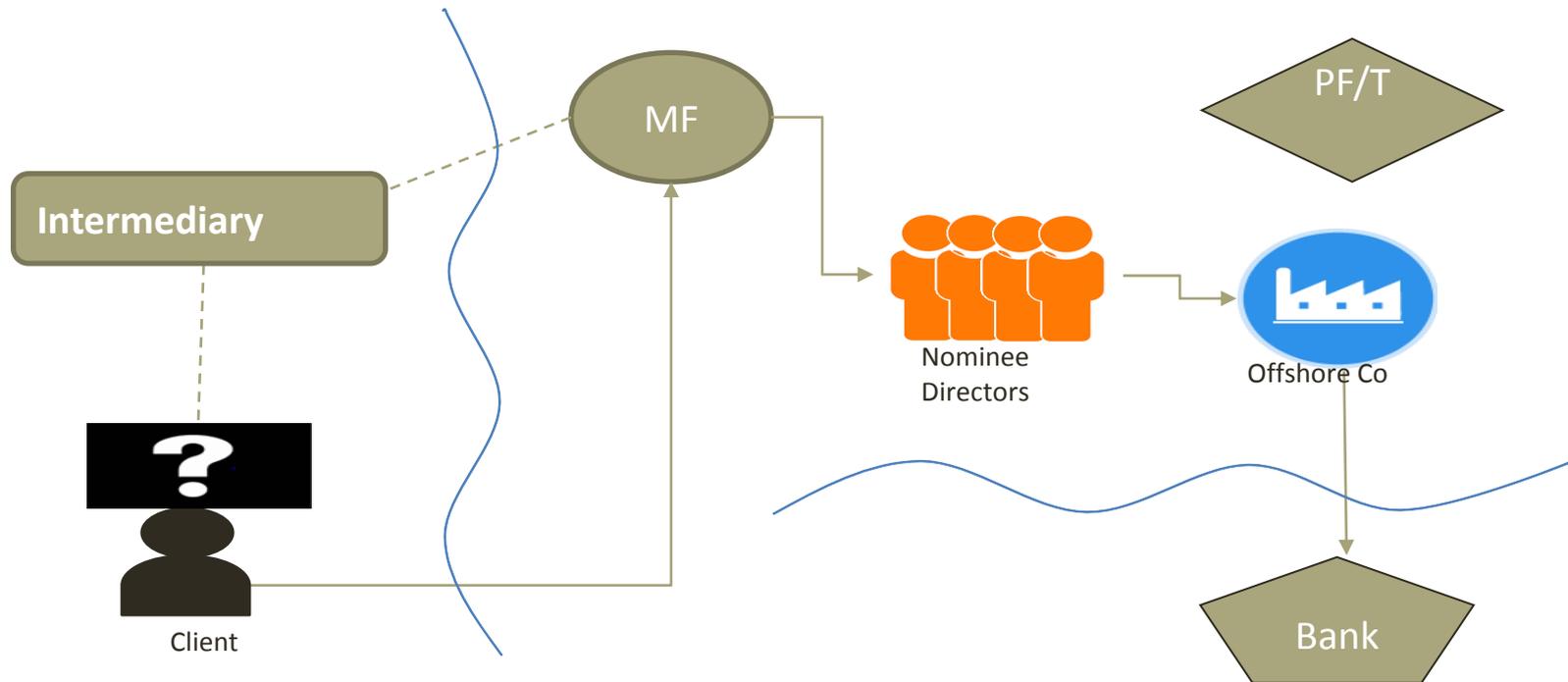
Offshore company and bank account in different jurisdictions



Source – JITSIC:
PRELIMINARY
ANALYSIS GUIDE
PANAMA PAPERS
INFORMATION

TYPICAL STRUCTURE (3)

Use of a Panamanian Foundation/Trust (PF/T)



Source – JITSIC:
PRELIMINARY
ANALYSIS GUIDE
PANAMA PAPERS
INFORMATION

MATCHING THE DATA

- ❑ Process to match the identities to the SARS database commenced
- ❑ Done in batches to manage system running times
- ❑ Thus far 79 of a total of 560 off-shore entities have been matched (in degrees of accuracy) to 81 South African residents

PROFILING THE MATCHES

- ❑ A centralised managed project was established
- ❑ Profiling includes verifying the Panama data against the income tax declarations of the SA residents
- ❑ Too early to predict the level of tax avoidance or evasion
- ❑ Profiling results will inform Enforcement action
- ❑ Both Profiling & Enforcement (audit) are lengthy processes by nature

PANAMA PAPERS - WAY FORWARD

- ❑ The current VDP process (and proposed new Special VDP) remains open for taxpayers who wish to regularise their tax affairs
- ❑ But VDP / SVDP is only available until taxpayer is informed of impending audit or when an actual audit commences
- ❑ International cooperation will intensify once a better understanding of the Panama data becomes available