SUBMISSION: COMMENTS ON DRAFT PUBLIC NOTICE LISTING ARRANGEMENTS FOR PURPOSES OF SECTION 35 OF THE TAX ADMINISTRATION ACT (“TAA”)

Dear Madam,

The South African Revenue Service’s draft public notice listing arrangements for purposes of section 35 of the Tax Administration Act (TAA) issued in March 2013 refers. Please find SAICA National Tax Committee’s response to the request for comments on the draft public notice.

General comment

The notice itself

The notice itself states that it is “supplementary to all previous notices issued under section 80M(2)(c) of the Income Tax Act … and serves as an extension of the reportable arrangements listed therein.” Section 80M was deleted by the Tax Administration Act and essentially replaced by section 35. Section 35(2) of the Tax Administration Act requires of SARS to list an ‘arrangement’ by public notice, if satisfied that the ‘arrangement’ may lead to an undue ‘tax benefit’.

In terms of section 269 of the Tax Administration Act “…notices … issued under the provisions of a tax Act repealed by this Act that are in force immediately before the commencement date of this Act, remain in force as if they were issued under the equivalent provisions of this Act, to the extent consistent with this Act, until new … notices … are issued under such provisions.
In our view the draft notice is a “new notice” and we submit that it can therefore not be “supplementary to all previous notices issued under section 80M(2)(c)...”

In light of this (and in order to simplify the law by having all requirements in a single source), it is suggested that the existing notice be withdrawn commensurate with this notice being issued and the existing reportable arrangements (suitably amended) incorporated into the notice.

Effective date

The draft notice contains no date from when it will be effective. This is likely to lead to uncertainties as to whether it applies to arrangements that are entered into prior to the date the notice was published, but where amounts are first received by or accrued to participants subsequent to such date.

It is therefore recommended that the notice clearly stipulate that the notice will apply to arrangements entered into on or after a specified future date or the date of publication in order to address such uncertainties.

Specific comments with regard to the Schedule to the notice

General

The notice states that any word or expression assigned a meaning in a tax Act has the meaning so assigned. A tax Act includes the Tax Administration Act and most Acts administered by SARS. As such, it is possible that a term or expression could have different meanings depending on which tax Act is being considered. As all the reportable arrangements listed in the notice would seemingly relate to the Income Tax Act, it is that Act and the Tax Administration Act that should be referenced and not “a tax Act”.

Reportable arrangement

*Paragraph 2(a) - Technical, managerial and consultancy*

It is unclear how, if at all, this reportable arrangement is related to the withholding tax on service fees to come into effect on 1 January 2016. We understand that SARS is concerned that non-residents providing such services are not being taxed in respect of such amounts, notwithstanding that they may be attributable to a permanent establishment of the non-resident in South Africa (“SA”). Introducing a further reporting requirement on the recipient of such services will result in a significant and undue administrative tax burden on taxpayers. SARS should accordingly identify a mechanism that achieves its objectives, but also minimises the administrative burden for taxpayers. Having both the withholding tax on
service fees, with its own requirements and obligations, and the reportable arrangement will certainly result in an unreasonable administrative burden for taxpayers.

The scope of service fees covered by the arrangement is far broader than that to which the withholding tax on service fees applies. In this regard, the withholding tax does not apply to the imparting of scientific, technical, industrial, commercial knowledge or information. Also exempted from the withholding tax are service fees that constitute remuneration from an employer to an employee. The scope of service fees covered by the arrangement should be narrowed.

One of the problems that arises with respect to the withholding tax and which is equally applicable to the proposed reportable arrangement is that of composite arrangements where a non-resident provides a number of different things for a single fee, one or more of which may comprise technical services. For example, a non-resident may, in return for a singular fee, provide a South African resident with the design of an item of plant, the manufacture and supply of such plant, the installation of the plant, initial training of staff in relation to the use of the plant and on-going support and maintenance related to the plant. Significant difficulties arise as to whether any portion of the fee relates to the services provided and, if so, how much. A solution is required to address such difficulties, although the reportable arrangement notice is certainly not the appropriate mechanism for this.

Given the above, it is our submission that this arrangement should be withdrawn from the draft notice and that alternatives should be investigated to address the concerns of SARS that non-resident suppliers of technical services are not paying the taxes that they should be paying.

The reportable arrangement listed under paragraph 2(a) requires a resident taxpayer to be aware of the fact that a non-resident service provider has a bank account, physical address or office in South Africa. We submit that this places too onerous a burden on the South African taxpayer, who cannot be expected to have knowledge of such detailed information concerning its non-resident service providers.

A further point is that the document does not mention the time period over which the R5m service fees are to accrue. It is recommended that this needs to be clarified in the notice.

**Paragraph 2(c) - Foreign tax credit**

Paragraph 2(c) uses the words “tax credit” which is not a term that is defined in the tax Acts. We assume that this refers to the rebates referred to in the Income Tax Act. It is suggested that the wording be changed or that the term “tax credit” be defined for purposes of the notice.
The wording “or has given rise to a foreign tax credit” seems to base reportability on hindsight which will confuse matters and will mean that taxpayers have to report existing transactions.

We suggest that the words “by any person or persons that are party to that” be deleted and replaced with “in terms of that” as the current wording would require of the taxpayer to know the tax positions of other parties to the transaction.

Paragraph 2(e) - Controlling Interest

Paragraph 2(e) refers to “Any arrangement in terms of which a person or persons acquire the controlling interest in a company that…” The draft note states that “unless the context indicates otherwise, any word or expression to which a meaning has been assigned in a tax Act as defined in section 1 of the Tax Administration Act, 2011, has the meaning so assigned.”

The term “controlling interest” is not defined in the Income Tax Act or the Tax Administration Act. It is recommended that this be clarified by defining the term

Please do not hesitate to contact us, should you have any questions regarding the above.

Yours faithfully

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The South African Institute of Chartered Accountants