SUBMISSION: DRAFT PUBLIC NOTICE LISTING ARRANGEMENTS UNDER SECTIONS 35(2) AND 36(4)

Dear Madam,

We refer to the call for comment on the above-mentioned Draft Public Notice. Set out below is SAICA National Tax Committee’s comments on the Draft Public Notice listing arrangements in terms of sections 35(2) and 36(4) of the Tax Administration Act No. 28 of 2011 (the TAA) for second round for comment:

**General comment**

The reportable arrangements referred to in 2.1 are all very widely and vaguely described. This will create uncertainty and render it difficult for taxpayers to comply. More specificity should be introduced into the regulations.
The reportable arrangement

The reportable arrangement in 2.1 is not clear given the wide meaning of “arrangement”. It is possible that a non-resident service provider may provide a number of services to a resident over an extended time period in respect of different projects. The fees on these projects may exceed R5 million in total but the fees for the services rendered for each specific project may individually be less than R5 million. This raises the question as to whether each project will be considered to be a separate “arrangement”. If so, none of them would be reportable. However if the entire business relationship with the non-resident service provider constitutes an “arrangement” then it would be reportable. The regulations do not provide guidance in this regard and should do so.

The wording of 2.2 is not clear and renders the provision meaningless. It refers to a person becoming a participant in an arrangement before the date of publication of the notice and that arrangement qualifying as a “reportable arrangement on that date”. This is not possible. In most cases, an arrangement entered into before the publication date of the public notice could not have qualified as reportable arrangement as this public notice making it a reportable arrangement had not yet been issued. In our view, this should be amended to read as follows: “reportable arrangement on that date... had this public notice already been in force”?

Excluded arrangements: The provision in 3.1

The provision in 3.1 dealing with “Excluded arrangements” is also not clear and not congruent with the reportable arrangements identified in 2.1. This provision refers to an arrangement “where the tax benefit which is derived...from that arrangement does not exceed R5 million”. The term “tax benefit” has the
meaning set out in section 34 of the TAA as amended i.e. it includes “avoidance, postponement or reduction of a liability for tax” therefore a deduction from income which results in a reduced tax liability could also be a “tax benefit”. This means that that a corporate resident taxpayer in 2.1.1 that claimed R5,5 million in fees for a service from a non-resident as a deduction from its income, would have a tax benefit of only R1 540 000 (i.e. 28% of R5,5 million). This implies that the transaction described above would be an “excluded arrangement”, notwithstanding the fact that it is specifically listed as a reportable arrangement in 2.1.1?

The provision is also problematic as it is not clear how participants to the arrangement are meant to ascertain whether the tax benefits derived exceed R5 million, especially if the arrangement is conducted between independent parties that are not privy to each other’s tax affairs.

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

Yours faithfully

Piet Nel CA(SA)

PROJECT DIRECTOR: TAX

The South African Institute of Chartered Accountants