Dear Sir/Madam

CALL FOR COMMENT: DRAFT GUIDE TO REPORTABLE ARRANGEMENTS

We refer to the above-mentioned call for comment. Please find enclosed the comments of the SAICA National Tax Committee.

1. Chapter 1 Overview

1.1 Paragraph 1.1 – Introduction and background

First Paragraph
The first paragraph of paragraph 1.1 currently reads as follows: "Chapter III, Part IIB of the Act contains the Reportable Arrangement provisions, and was substituted for section 76A with effect from 1 April 2008". The sentence should be amended to read as follows:

“Chapter III, Part IIB of the Act contains the Reportable Arrangement provisions, and substituted the previous provisions dealing with Reportable Arrangements which was contained in section 76A of the Act with effect from 1 April 2008”.

Second Paragraph
The second paragraph of paragraph 1.1 should be expanded by the addition of the following sentence: "The relevant sections contained in the Act can be found in Annexure A".

1.2 Paragraph 1.5 – Broad overview of Reportable Arrangement provisions

Insertion of a new paragraph 1.5 – Definitions
We propose that a new paragraph 1.5 be inserted which deals with the various definitions relevant to the Reportable Arrangement provisions.
Paragraph 1.5 – Broad overview of Reportable Arrangement provisions needs to be renumbered as paragraph 1.6.

It is further stated in paragraph 1.5 that an “objective test is applied in determining whether a tax benefit constitutes one of the main benefits and the subjective purpose of the taxpayer is not taken into account”. This is a reference to the exclusion from the reportable arrangements rules set out in Government Notice No. 384 of 1 April 2008.

It is not clear from the Guide the reasons for which SARS takes this approach in determining what a “main benefit” is. In this regard, it is noted that the use of an objective test is not prescribed by the legislation.

It is submitted that while a “tax benefit” can be objectively quantified as set out in paragraph 6.3 of the Guide, it is not possible to objectively determine whether that tax benefit is the “main” benefit in a commercial arrangement. For example, restructuring of corporate groups may have tax benefits but they also have commercial benefits which may be difficult to quantify (i.e. in the form of corporate synergy, enhanced efficiency etc). It is not clear how SARS may “objectively” determine which of these benefits is more significant (i.e. whether it constitutes the main or one of the main benefits in any given transaction). This surely requires a subjective determination of what the taxpayer considers to be the significant benefits of the transaction.

Furthermore, it may be argued that the use of a subjective test is supported by the wording in the definition of “tax benefit” in section 80T of the Income Tax Act. Section 80T defines “tax benefit” as referring to any avoidance, postponement or reduction of any liability for tax. “Avoidance”, “postponement” and “reduction of tax” are all purposive acts by a taxpayer and it would need to be determined subjectively what the purpose of the specific taxpayer is.

For these reasons, we are of the view that this paragraph within the Guide should be amended so as to delete reference to the “objective test” and assert the view that a subjective test must be used in interpreting the “main benefit” exclusion set out in Government Notice No. 384 of 1 April 2008.

We further note the second last paragraph of this paragraph which refers to Government Notice No. 384 of 1 April 2008 and propose that the words – in brackets – Annexure B – be inserted after the date.

2. Insertion of new chapter/section dealing with definitions

We are of the opinion that chapter/section 2 needs to be inserted which sets out all the definitions relevant to the Reportable Arrangement provisions as well as the SARS
interpretation of terms relevant to the Reportable Arrangement provisions which are not specifically defined.

2.1 Current chapter/section 2 – Information-gathering powers

With the insertion of the chapter/section that deals with definitions, this chapter/section – and all following chapters/sections – should be renumbered.

The first paragraph of chapter/section 2 refers to a number of sections contained in the Act, i.e. sections 66, 69, 70, 74, 74A, 74B, 74C and 80R. These sections should be included in an Annexure C to the documents. Equally, paragraph 6.5.2 refers to section 24J which also should be included in the same annexure.

2.2 Insertion of new chapter/section dealing with the parties who are required to disclose Reportable Arrangements

We are of the opinion that the Guide is incomplete without a detailed discussion of the various parties who are required to disclose Reportable Arrangements. The proposed discussion should also deal with the following:

- Circumstances where the promoter is not a South Africa based promoter;
- Circumstances where the promoter is a member of a profession such as accountants, lawyers, to name a few;
- Circumstances where there is no promoter, for example in-house arrangements.

The following issues should also be dealt with:

- Who is a promoter?
- Who is excluded from the definition of promoter;
- Non-South African based promoters.

The same would be required in respect of the term "participant" to the extent that it relates to a company or trust referred to in paragraph (b) of the definition of "promoter" contained in section 80T of the Act.

3. Current chapter/section 3 – Tests applied to determine whether an arrangement is a "Reportable Arrangement"

3.1 Paragraph 3.2 – Test
Step 1: Is there an arrangement, as defined?
The note should be expanded to refer the reader to the discussion of the definition of "arrangement" in chapter/section 4 of the Guide or alternatively, the discussion of the definition of "arrangement" must be included in the proposed chapter/section 2 dealing with definitions (see above).

4. Chapter/section 4 – Definition of arrangement

With reference to the second sentence which states that "(T)he onus is on the participant to an arrangement to determine whether it needs to be disclosed to SARS, and to prove on a balance of probabilities that the transaction operation or scheme does not constitute an "arrangement" as defined". We note that this comment suggests that all participants as per paragraph (b) of the definition of "participant", being companies and trusts, is aware of the fact that the transaction they entered into is an "arrangement" for purposes of Chapter III, Part IIB of the Act. The Guide needs to deal with situations where the companies or trusts may not be aware of the fact that the transactions they entered into are Reportable Arrangements.

5. Chapter/section 6 – Reportable Arrangements in terms of section 80M(1)

5.1 Paragraph 6.1 – Introduction

The first paragraph after the last bullet point states that "(T)he assumed tax treatment of an arrangement is, generally speaking, apparent from the agreements as well as from the financial model (if any) which accompanies the arrangement. The financial model itself usually offers the most accurate reflection of what the tax benefits are assumed to be, or what they will be if not challenged by SARS. There is normally consent among the parties as to what these assumed tax benefits are, as they sign off on the agreements which underpin the model." We note that not all parties to these transactions are given insight to or privy to the financial models which underpin these arrangements. A participant, being a company or trust, could therefore not be aware of the assumed tax treatment of the arrangement other than to the extent that it directly has an impact on the tax liability of that company or trust. These situations should also be addressed in the Guide.

5.2 Paragraph 6.4 – Quantifying the tax benefit

The first paragraph states that "(A) participant is required to calculate the tax benefit of the arrangement in question by taking into account the assumed tax effect in the hands of each participant and comparing this with the position as if the arrangement had not been entered into, or as compared to an appropriately identified control transaction". As noted above, not all parties to these transactions are given insight to or privy to the financial models which underpin these arrangements. A participant, being a company or trust, could therefore not be aware of the assumed tax effect in the hands of each participant other than to the extent that it directly has an impact on the tax liability of that company or trust and will therefore not be able to determine the
assumed tax effect in the hands of each participant and do the comparison as required. These situations should also be addressed in the Guide.

6. **Chapter 8 – Excluded arrangements**

   In terms of Government Notice No. 384 of 1 April 2008 an arrangement is an excluded arrangement if a tax benefit is not the main or one of the main benefits of the arrangement. The concept of “one of the main benefits” (in particular the use of the plural word “benefits”) is difficult to comprehend. In this regard it is submitted that there can only be one main benefit. This concept should be interpreted and explained in the Guide.

7. **Chapter 15 and 16 Flowcharts**

   The legislation indicates that if there is no tax benefit, or if it is less than R1m, this overrides the specific inclusions under section 80M(2), such as that in respect of hybrid instruments. The flow charts depicts the situation differently (i.e. that the tax benefit and *de minimus* exclusions does not apply to section 80M(2)) and the text does not give comment. This potential inconsistency between the Act and the Guide should be addressed in more detail.

   Furthermore, flowchart 2 seems to be aimed at further elucidating the decision tree. However, these two charts are substantively identical. It is suggested that Flowchart 2 be limited to the characteristics listed in section 80M(1)(a) to (e).

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

Yours faithfully

**MUNEER HASSAN CA(SA)**  
**PROJECT DIRECTOR: TAX**  
*The South African Institute of Chartered Accountants*

cc: nalberts@sars.gov.za