Dear Sir / Madam

CALL FOR COMMENT: MEDIA STATEMENT ON AVOIDANCE CLOSURE ALERT – FUNNEL FINANCING MASQUERADES

We refer to your call for comment regarding the above-mentioned. Set out below please find SAICA’s comments, which have been provided by members of our National Tax Committee.

1 It is very unclear from the media statement exactly how a typical “funnel financing” scheme would operate. Part II of the Media Statement is vaguely written and does not disclose the mechanics of such a scheme or how tax avoidance arises as a result of the scheme. This is out of step with previous media statements released by SARS including the media statement released on 21 February 2008 dealing with company restructuring measures which set out detailed examples of the schemes which SARS sought to counter. It is not possible to comment on the proposed legislative measures without understanding the mischief that these measures are to remedy. We request that the Media Statement be re-issued with clearer examples provided.

2 The intended legislation is to be retrospective from the date of the media statement i.e. 20 March 2008. We submit that such retrospective amendments would not be administratively fair (and thus potentially unconstitutional in terms of the right to administrative justice) in the current context given that the media statement does not state which legislative measure is to be adopted. Instead a list of possible legislative measures that may be taken is provided. This is against SARS general practice to identify the legislative measure that will be adopted in its media statement before introducing legislation which applies retrospectively from the date of the media statement. Given the uncertainty as to which legislative measure
will ultimately be adopted, we would submit that SARS may not apply retrospective amendment from the date of this media statement.

3 Given that the media statement claims that the “funnel financing masquerades” violate the General Anti-Avoidance Rules (“GAAR”) on multiple levels, it is unclear why any new legislative measures are necessary, at all. We fail to understand SARS’s reluctance in applying GAAR to route the mischief that these schemes cause. The statement in Part C of the Media Statement that “experience suggests that certain practices cannot easily be deterred in the marketplace other than by targeted anti-avoidance rules” would indicate that SARS is unable to apply GAAR easily. If this is the case, we would submit that it is GAAR that needs to be amended instead of introducing new specific legislative measures which can have unintended effects.

4 Various options are proposed in this media release. One is a pre-approval system (under specified circumstances) so that taxpayers will bear the burden of revealing the full array of facts before obtaining the benefits of section 45 tax deferral. We are of the view that this option may delay legitimate inter-group transactions as SARS may have resource constraints.

5 Usually international practice is also referred to. It may be useful to include what International best practice views are on these issues.

Please do not hesitate to contact me should you require further information.

Yours faithfully

M Hassan CA(SA)

PROJECT DIRECTOR: TAX
The South African Institute of Chartered Accountants