2 December 2008

The South African Revenue Service
Private Bag X923
PRETORIA
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BY E-MAIL: klouw@sars.gov.za

Dear Sir

COMMENTS ON THE DEFINITION OF “PROMOTER” AS CONTAINED IN SECTION 80T OF THE INCOME TAX ACT, NO 58 OF 1962 AND OTHER ISSUES

Set out below please find the SAICA National Tax Committee’s submission on the definition of “promoter” as it is contained in section 80T of the Income Tax Act, No 58 of 1962 (“the Act”) which, together with sections 80M to 80S of the Act, deals with reportable arrangements.

1. Background to the “promoter” concept

1.1 It is our understanding that the concept of “promoter” originates from countries such as the United States of America (“USA”) and the United Kingdom (“UK”) which tax laws also include “reportable arrangement” provisions.

1.2 One major difference between the USA and the UK on the one hand and the Republic of South Africa (“SA”) on the other is that the market for so-called products in the USA and the UK are enormous whereas the market for such products in SA is, at best, extremely small or limited. Consequently, targeting of the types of activities envisioned by the legislators in USA and UK becomes difficult, if not impossible.

1.3 It was also the practice of professional advisors based in those countries (which included large accounting firms) to deliberately develop extensive tax practices which had as their main objective the developing, marketing (which included call centres devoted to “cold calling” potential clients or targets) and implementation of so-called “tax products”. This practice was/is in sharp contrast with the practices of the majority of professional advisors based in SA.
1.4 This difference in approach between practices in the USA and the UK and SA is significant. The South African Revenue Service (“SARS”) has chosen to model the reportable arrangement legislation on the legislation in those countries, which resulted in legislation which in our view is unsuitable for the South African market.

2. **Definition of “promoter”**

2.1 Although the reportable arrangement legislation in SA is modeled on the legislation introduced in the USA and the UK, it is noted that there are certain, at first glance insignificant, differences between the definition of “promoter” as per, for example, the UK provision and the SA definition of the same term.

2.2 Section 80T of the Act definition of a “promoter” is “relation to a reportable arrangement means any person who is principally responsible for organising, designing, selling, financing or managing that reportable arrangement” (our emphasis).

2.3 The UK definition of a “promoter” is, in essence, someone who, in the course of providing services relating to taxation design, or make available for implementation, proposals and arrangements of a type prescribed within the regulations, i.e. so-called hallmarked or stamp duty land tax schemes. A “promoter” however excludes persons in respect of whom certain tests, i.e. the “benign tax advice”, “non-tax advisor” or “ignorance test”, apply. In more limited circumstances a promoter also includes someone who organises or manages the implementation of a scheme.

2.4 Unlike the current situation in SA, it is further noted that professional tax advisors are excluded from the definition of “promoter” in certain circumstances.

2.5 The SA version of the definition is significantly broader than the UK definition by virtue of the position of the word “or” in the definition. If it was intended that the definition should be similar than the UK provisions, then the definition should be revised to read as follows:

>a “promoter” is “relation to a reportable arrangement means any person who is principally responsible for

(a) designing and selling or

(b) designing or selling and organising or managing

that reportable arrangement”.

2.6 We do not believe that the person responsible for managing the transaction be included in the definition of "promoter”? Banks often appoint an outside party, unrelated to the transaction, to act as "facility agent” or "inter-creditor agent”. If that person played no part in setting up the transaction and is merely there to ensure that the interests of the parties are adequately catered for, there is no reason to include them in the definition of promoter. Therefore, we recommend that the reference to "managing” be removed from the definition.
3. **Guidance issued by the South African Revenue Service**

3.1 The SARS has not issued any significant guidance which can be used by taxpayers to determine whether or not any transaction entered into by them or to be entered into by them is a reportable arrangement. The interpretation of the legislation is unclear in a number of respects, for example the definition of a tax benefit, what is a reasonable expectation of a pre-tax profit and how this applies to transactions which do not in themselves generate a profit (e.g. routine operating expenditure) and the concept of a financial liability for tax purposes. The need to report (or not) transactions that fall into Part III of Chapter II (s42 – s47) ITA, including the interaction between the current reportable arrangements rules and the new s41(5) is particularly controversial. Given this lack of guidance the reporting requirements and associated penalties are extremely onerous. In addition, the information contained on the SARS website is out of date and relates to the previous version of the reportable arrangement provisions contained in the Act.

4. **Alleged abuse of power granted in section 80R of the Act**

4.1 Allegations have been made in certain sectors that SARS is abusing its power to request additional information as provided for in section 80R of the Act. It would seem that SARS automatically requests additional information when details of reportable arrangement is submitted, even in circumstances where full disclosure has been made as in compliance with section 80O read with section 80P of the Act.

4.2 The automatic request for additional information imposes a significant burden on taxpayers. SARS should restrict the requests for additional information to circumstances where it is clear that the information provided is incomplete or has deliberately been presented in a manner that is misleading or SARS is of the opinion that the general anti-avoidance rules could be applied to the transaction.

Please do not hesitate to contact me should you wish to discuss the above.

Yours faithfully

M Hassan CA(SA)
**PROJECT DIRECTOR: TAX**

*The South African Institute of Chartered Accountants*