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Submission File

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South African Revenue Service
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0001

BY E-MAIL: policycomments@sars.gov.za

Dear SARS

CONCERNS REGARDING SARS TRANSFER PRICING INFORMATION REQUESTS

1. We set out below some concerns brought to the attention to members of the South African Institute of Chartered Accountants' (SAICA) Transfer Pricing Committee in respect of the transfer pricing information requests recently being received by taxpayers from SARS specifically in relation to intra-group services.

Background

2. In terms of section 46 of the Tax Administration Act No 28 of 2011 (the TAA), SARS may, for the purposes of the administration of a tax Act require the taxpayer to, within a reasonable period, submit relevant material to SARS.
3. The definition of "relevant material" in section 1 of the Tax Administration Act is as follows: "any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act..."
4. The Explanatory Memorandum (EM) to the TAA published in 2014 states that the test for what is "foreseeably relevant" has a low threshold and "whether at the time of the request there is a reasonable possibility that the material is relevant to the purpose sought". The reason for extending SARS' information gathering powers in this manner was to prevent protracted disputes around entitlement to information and the consequent waste of resources.
5. The EM also made it clear that the statutory duty to determine the relevance of any information, document or thing for purposes of e.g. a verification or audit, is that of SARS and the term foreseeable relevance does not imply that taxpayers may unilaterally decide relevance and refuse to provide access thereto, which is what SARS stated was happening in practice.



6. It is also noted in a recent PwC report (Taxing Times 2020 – A survey of corporate taxpayer’s experiences with SARS – Tax Controversy and Dispute Resolution) that almost a third of the respondents to their survey indicated that the relevance of documentation requested by SARS during an audit was unclear.
7. Whereas SAICA has previously made submissions to National Treasury with regard to the request for relevant information (see the submission to National Treasury dated 19 August 2014), we have encountered further concerns in this regard and discuss these next.

Current concerns

No consideration of information already provided & requests not co-ordinated

8. Our concern currently relates to SARS’ requests for information without due consideration of the information already provided by the relevant taxpayers. In many instances, additional information is requested by SARS, but taxpayers have already provided information in this regard. It thus appears that SARS has not evaluated the information already provided, before requesting further information from a taxpayer.
9. A further concern is that it appears that the requests for information from SARS are not being co-ordinated as multiple requests for the same information are coming from multiple sources within SARS. An example of this is when the same financial information that the SARS transfer pricing risk department requested from a taxpayer, is then again requested by the SARS transfer pricing audit team, which indicates that full information gathered during the risk assessment stage is not considered in detail and/or is not handed over to the audit team for further consideration during the audit. This then results in the audit team sending requests for information already provided by the taxpayer to the audit risk department causing frustration, uncertainty and confusion for the taxpayer.
10. The information requests, in some instances, also seem to be sent indiscriminately and are being sent to taxpayers that are currently being audited. Evidence of this has been seen where a taxpayer is already under audit for transfer pricing practices, having submitted information as requested including transfer pricing documentation, and subsequently receives a request for information pertaining to intra-group services, and including a request to submit the same transfer pricing documentation as well as other details already provided, from a separate team at SARS.
11. In section 4(2) of the SARS Act, it is stated that SARS must perform its functions in the most “cost-efficient and effective” manner and in accordance with the values and principles of section 195 of the Constitution of the Republic of South Africa. In executing this mandate, SARS has, in its Strategic plan 2016/2017 - 2020/2021, acknowledged that it is important that they “do not impose a high administrative and **compliance burden, on the fiscus and taxpayers** respectively” and they are determined to provide “...fair, convenient and diligent services to aid taxpayer compliance”.
12. Submission: Without prejudicing SARS’ right to request relevant information, we respectfully request that SARS thoroughly reviews the information previously provided by taxpayers in respect of requests for information, before issuing further requests for the same information or issuing follow up generic information requests.

13. In this regard, further requests for information should specifically refer to the information already provided and highlight why this information was not complete or sufficient in order to provide the taxpayer with comfort that the information already provided has been considered by SARS.
14. In order to ensure that taxpayers are not required to provide the same information more than once, we request that the different divisions within SARS communicate with each other to obtain a consolidated view of an entity to prevent duplication of efforts and a waste of resources.
15. For instance, where SARS intends to issue a request for information relating to intra-group services, it should first check whether that taxpayer is already being audited by another team at SARS and what information that team has already received from the taxpayer that is relevant to the information request and that it could use, rather than requesting the taxpayer to resubmit the information.

Extent, format and timing of information requested

16. It is of further concern that the *extent of the information* requested by SARS goes beyond what taxpayers are required to keep on record in terms of the transfer pricing recordkeeping notice (i.e. section 29 of the TAA). For instance, the documentation retention notice was introduced with effect for years of assessment commencing on or after 1 October 2016, i.e. for most taxpayers' 2017 financial year. Therefore, asking for this information in respect of the 2016 December year end has the result that SARS is asking for information that taxpayers were not aware they had to keep at that stage. Furthermore, SARS has requested information on all members of a MNE irrespective of whether the South African entity transacts with them or not, including tax numbers contact information and public officer details. A South African taxpayer, which is a member of an MNE, even if the MNE is headquartered here, would often not be in a position to do that as the taxpayer does not have access to that sort of information.
17. In respect of the *format of information* requested by SARS, taxpayers keep their data in a format required for business reporting purposes and this is generally not always the format in which SARS requests the information. For instance, SARS often provides a template to be completed by the taxpayer requiring collation of information from a number of sources, often relating to entities within the Taxpayer Group situated outside of South Africa. For instance, the table of information required by SARS in respect of the services agreements is not in the format that an entity would usually keep the information in. The taxpayer is thus required to spend many hours trying to understand what is required by SARS and then collating the information in the format required by SARS. In addition, in some instances (reported to the SAICA Transfer Pricing Subcommittee), due to the specific request, the taxpayer would require the help of specialist advisors to assist with collating the information from various sources to ensure that it is disclosed in the required format as requested by SARS.
18. This results in a high compliance burden (time, effort, cost of advisors and resources utilised) for taxpayers that now have to compile the information in the format that SARS requires. In particular, extracting and compiling the information in the format requested by SARS (which relates to historical periods), is particularly a very time consuming process



which cannot always be actioned within the short timeframe provided by SARS (usually 14 or 21 days).

19. Taxpayers were also hindered by lockdown restrictions and were not able in all cases to extract relevant information on a timely basis, especially if they were reliant on getting information from foreign, eg European, entities that were closed due to COVID.

20. Submission: SARS should limit its request for information to that normally retained in the normal course of the taxpayer's business or to that required to be maintained under the TAA. In the event, and this should be only the exception, SARS requires information over and above this, they should be explicit as to why such information is required and provide the taxpayer with sound reasons for this together with adequate time to allow the taxpayer to comply.

Interviews held – request for fact patterns

21. In certain instances, SARS conducts interviews to obtain relevant information from taxpayers. We are aware of instances where taxpayers requested a copy of SARS' written summary of the facts discussed during these interviews. However, we are aware that in at least once matter the relevant request was denied. The taxpayers' intention for requesting the summary of the facts was to ensure that all facts were interpreted correctly and if not, that they could be clarified prior to SARS compiling a detailed response based on points that are factually inaccurate.

22. Submission: To ensure that any disputes that arise only deal with the technical aspects of transfer pricing and not the underlying fact patterns, we urge SARS to permit taxpayers to review SARS' written summary of the fact pattern taken during the interviews with taxpayers to ensure that all factual inaccuracies are addressed before SARS responds to taxpayers. This will save all parties (SARS and the taxpayer) a lot of time that would otherwise be wasted on arguing the actual facts rather than the transfer pricing implications arising from those facts.

Extension request denials

23. Whereas taxpayers are required to submit reasons for a request of extension of time to submit information, we have been made aware of instances where SARS does not provide reasons for the denial of a request for extension.

24. Submission: SARS should provide the taxpayer with reasons for not granting an extension of time unless SARS is exercising its rights under section 99(4) of the TAA, which has specific application.

Feedback and use of information provided

25. There have been cases in which, once a taxpayer has provided the relevant information to SARS, SARS does not always revert with feedback informing the taxpayer if the information was sufficient and/or if the matter has been resolved. It has been reported that in such cases SARS just remains silent.

26. Submission: We request that SARS provide the taxpayer with an acknowledgement of receipt in respect of the information provided in all matters, and that it provides the taxpayer with an estimated time period within which the matter to which the provision of information related will be resolved.

27. The Commissioner has asked for improved co-operation between taxpayers and SARS and SAICA fully supports this request. This submission is made in the spirit of improving the compliance process and ensuring that taxpayers do not fall foul of SARS' rights to ask for relevant material.

28. Many taxpayers have expressed their willingness to provide SARS officials with the opportunity to engage further on these issues, specifically relating to the practicalities of the processes businesses are required to follow when recording transactions that have transfer pricing implications.

29. The SAICA Transfer Pricing Committee would welcome the opportunity to meet with the SARS Transfer Pricing Team, as it did in April 2019, in an effort to improve information requests and communication between SARS officials and businesses so that SARS officials can gain a deeper understanding of the practical challenges businesses are facing in preparing the information requested by SARS. The SAICA Transfer Pricing Committee would gladly provide a suggested agenda of topics to be discussed at such meeting in order to provide SARS with the opportunity to prepare for any discussion points, if required. We look forward to hearing from you in this regard.

Should you wish to clarify any of the above matters please do not hesitate to contact us.

Yours sincerely

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Chair: SAICA Transfer Pricing Committee

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The South African Institute of Chartered Accountants