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Submission File

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South African Revenue Service
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Dear Adele

COMMENTS ON THE DRAFT PUBLIC NOTICE REQUIRING THE SUBMISSION OF CBC, MASTER FILE AND LOCAL FILE RETURNS

1. We herewith present our comments on behalf of the South African Institute of Chartered Accounts (SAICA) Transfer Pricing sub-committee (a sub-committee of the SAICA National Tax Committee) on the Draft Public Notice requiring the submission of Country by Country (CbC), Master File and Local File returns (the Draft CbC Notice), released by the South African Revenue Service (SARS).
2. We have deliberately tried to keep our submission as concise as possible, which does mean that you might require further clarification. Should you require any further clarification on any of the matters raised please do not hesitate to contact us.

OBSERVATIONS

Expectations

3. We have been awaiting the issuance of the Draft CbC Notice with much anticipation and its issuance is welcomed.
4. However, following the meeting between SARS and SAICA on 13 April 2017, wherein SAICA requested clarity as to whether there will be formal guidance regarding the submission of Master and Local Files to SARS which would cover SARS' expectations regarding how the files are to be submitted and in what format, we have been expecting the Draft CbC Notice to at least address the matters raised and in fact provide the necessary clarity.
5. However, this does not seem to have occurred and the practicality of implementing the Draft CbC Notice in its current form and time line is questionable due to the lack of clarity it provides, which was its main purpose and our concerns in this regard are detailed below.

6. Submission: We would appreciate SARS' prompt response to the issues raised in this submission to ensure the effective implementation of the Draft CbC Notice within the proposed time frames.

The submission of a return

7. The Draft CbC Notice requires "*persons to submit returns as provided in the notice*".
8. Section 25 of the Tax Administration Act No. 28 of 2011 (the TAA) prescribes what is required in relation to the submission of "returns", i.e. they must contain namely 1) "*the information prescribed by the Commissioner*"¹, 2) it needs to be submitted in the prescribed "*form and manner*"² and 3) it needs to be submitted by the date specified by the Commissioner.
9. Currently, none of these requirements are addressed in the Draft CbC Notice, which results in it being materially defective in relation to the return requirement. We also see no reason why this should not be contained in the Draft CbC Notice, as it is a formal instrument which is issued by SARS, as and when changes are necessitated, as with any other notice.

10. Submission: We submit that the Draft CbC Notice needs to stipulate the requisite information, the form and manner in which the return is to be submitted and the date by which the return is to be submitted, in order for such notice to be valid in terms of the TAA.

The information required to be submitted in the return

11. As a point of departure in complying with the Draft CbC Notice, it firstly needs to be determined *exactly what information is required to be submitted* in terms of the Draft CbC Notice.
12. In this regard, paragraph 2.1 stipulates that the requisite persons must "*submit a return in the form and containing the information specified in the BRS: CbC and Financial Data Reporting relating to the CbC Report, master file and local file*". Likewise, paragraph 2.2 stipulates the requisite persons must "*submit a return in the form and containing the information specified in the BRS: CbC and Financial Data Reporting relating to the master file and the local file*". These requirements, in isolation, do not indicate *what* information needs to be submitted.
13. Paragraph 1 of the CbC Draft Notice requires terms contained in the CbC Draft Notice, to which a meaning has been assigned in a Tax Act or the CbC Regulations³, to have the meaning so assigned.
14. Paragraph 2.1 of the CbC Draft Notice refers to "*information specified in the BRS ... in relation to the CbC Report...*".

¹ Section 25(2) of the TAA

² Section 25(1)(a) of the TAA

³ The CbC Regulations means the regulations for purposes of paragraph (b) of the definition of "international tax standard" in section 1 of the Act promulgated under section 257 of the Act, specifying the changes to the CbC Reporting Standard for Multinational Enterprises, and published in Government Gazette No. 40516 of 23 December 2016

15. Article 4 of the CbC Regulations requires the reporting entity to file a *CbC Report* in accordance with “*Annex III to Chapter V*” in the OECD’s Final Report on Action 13⁴. This Annex provides very detailed and clear guidance in relation to the CbC Report which is required.
16. However, Annex III does not refer to the Master and Local File requirements, which are contained in Annex I and II to Chapter V of that Report, respectively.
17. Therefore, where paragraphs 2.1 and 2.2 refer to “*the information specified in the BRS: CbC and Financial Data Reporting relating to the ... master file and local file*”, the CbC Regulations offer no guidance in defining the terms “master file” and “local file”. This means that these terms, i.e. “master file” and “local file”, are undefined terms in the Draft CbC Notice. Likewise, these terms are not defined in any tax Acts.
18. Consequently, it appears that the Draft CbC Notice requires information over and above what is contained in the CbC Regulations, which are completely standalone regulations and very clear (e.g. effective date, who has the responsibility to file and how, report format, etc.), making it impossible to know what information is required in the return in relation to the “master file” and “local file”.
19. Therefore, we need to refer to the definition of the “BRS: CbC and Financial Data Reporting” in paragraph 1 of the Draft CbC Notice, to determine what information is required to be submitted in the return, and this term means “the Country-by-Country and Financial Data Reporting external business requirement specification reporting schema”.
20. Submission: Given that this reporting scheme has not yet been made available by SARS, it is impossible to determine exactly what information is required to be submitted and whether the Draft CbC Notice properly addresses matters in relation to such required information.
21. Simply stated, one does not know whether SARS requires certain financial information, relating to the Master and Local File, which will be defined/determined by SARS in the scheme or whether one is required to file the entire master file and local file as prescribed in Annex I and II to Chapter V in the OECD’s Final Report on Action 13.
22. We are fully aware that SARS will share the CbC Report with other Tax Authorities in terms of the mutual exchange of information agreements which have been signed.
23. Therefore, it is expected that a uniform format for the CbC Report will be required by all Tax Authorities. In this regard, the need for a BRS scheme in order to report the CbC Report to SARS appears entirely reasonable.

⁴ The OECD/G20 Base Erosion and Profit Shifting Project Transfer Pricing Documentation and CbC Reporting, Action 13 – 2015 Final Report

24. The confusing issue, which is discussed in detail in clause 18 above, is that it appears that information over and above the CbC Report is required to be submitted to SARS in terms of the return required by the Draft CbC Notice.
25. Are we then to assume that this additional information will also be shared by SARS with other Tax Authorities?
26. Submission: Given that the Draft CbC Notice is not clear at all in relation to what information is required to be submitted (either in relation to the CBC Report or the new requirements in relation to a “master file” and “local file”), it is imperative that the draft Country-by-Country and Financial Data Reporting external business requirement specification reporting scheme be issued by SARS, either ahead of or, along with the next draft of the Draft CbC Notice, if the latter notice is to be practically implementable.
27. In addition, taxpayers will require time to ensure that the required information is included in the report, as per the BRS scheme. Given that the earliest submission date for the CbC Report is 31 December 2017, SARS needs to issue this BRS as soon as possible.
28. Once the draft BRS is published, we recommend that a consultation process be followed in this regard. Please refer to our submission below in relation to the *submission date* for the “master file” and “local file” information to be submitted in the requisite return.

The form and manner in which the information in the return is to be submitted

29. Both paragraphs 2.1 and 2.2 require a return to be submitted “*in the form and containing the information specified in the BRS: CbC and Financial Data Reporting ...*”
30. As submitted above, the definition of the BRS refers to a reporting scheme which has not yet been made available by SARS. Therefore, it is impossible to determine in what form the return is to be submitted.
31. Of even greater concern, is that no indication has been provided in the Draft CbC Notice as to when SARS intends making this reporting scheme available to taxpayers. Therefore, this is the first indication that potentially more information than the CbC Report will be required to be submitted (as discussed in clause 18 above), but taxpayers have no way of knowing what exactly they need to prepare or in what format.
32. Paragraph 4 of the Draft CbC Notice requires the return to be submitted “*electronically by using the SARS eFiling platform*”. The current issues experienced with the eFiling platform need to be taken into account, in terms of maximum limits for uploading documents, etc.
33. In addition, the Draft CbC Notice has not made it clear whether this return is required to be submitted together with the reporting entity’s annual tax return or separately.
34. This is of particular relevance when the timing of the return is taken into account (as discussed in clauses 39 and 40 below), especially where reporting entities have already

filed their annual tax return in relation to years of assessment commencing on or after 1 January 2016, which would have been done in the absence of this return, alternatively they are in the process of finalising their tax return which will be submitted before the Draft CbC Notice is issued in final form.

35. Submission: Please refer to the above submission, as exactly the same submission points apply in relation to the need for the BRS scheme to be issued as soon as possible. The timing of when the return needs to be submitted in relation to the submission of a person's annual tax return also needs to be clarified, i.e. will the Draft CbC Notice return be required to be submitted at the same time as the person's annual tax return or separately.

The date by which the return is to be submitted

36. The preamble to the Draft CbC Notice stipulates that the returns referred to in the notice must be submitted for the Reporting Fiscal Years and Financial Years commencing on or after 1 January 2016.
37. Paragraph 3.1 of the Draft CbC Notice requires that a return referred to in terms of paragraph 2.1 of the Draft CbC Notice must be submitted within 12 months from the last day of the Reporting Fiscal Year.
38. The term "Reporting Fiscal Year" is defined in the CbC Regulations, which means that taxpayers have been aware of this reporting requirement since these regulations were issued in draft during 2015 and finalised on 23 December 2016. Therefore, it was possible to plan for the submission of the CbC Report within 12 months from the last day of the Reporting Fiscal Year commencing on or after 1 January 2016 to the extent that the information to be reported remained the same.
39. Paragraph 3.2 of the Draft CbC Notice requires that a return referred to in paragraph 2.2 of the Draft CbC Notice must be submitted within 12 months from the date on which the person's financial year ends, commencing on or after 1 January 2016. As discussed above, paragraph 2.2 appears to require new reporting in relation to the "master file" and "local file", which was never contemplated in the CbC Regulations.
40. Therefore, issuing a notice in June 2017 requiring such information (the extent of which is also unknown, as discussed above) to be submitted in relation to financial years commencing on or after 1 January 2016 is unacceptable as it makes the effective date of this filing requirement retrospective in nature.
41. For example, a person with a 31 December year end, which has potentially affected transactions in excess of R100 million, will now be required to submit a return containing this unknown information by 31 December 2017, in respect of its previous financial year ending 31 December 2016.

42. Submission: It is submitted that since this reporting requirement was not in effect by the end of the financial year concerned, this new requirement to submit a return containing information relevant to that period is retrospective in its application and the retrospective application of any legislation is to be avoided, especially retrospective compliance requirements.
43. Furthermore, the filing date for a return required in terms of paragraph 2.2 of the Draft CbC Notice should be amended to years of assessment commencing on or after 1 January 2018 in order to allow taxpayers time to prepare such detailed documentation in the prescribed format (which format should hopefully be made available well ahead of the time required for such filing).

Adoption of the OECD's BEPS Action 13

44. Given that the Draft CbC Notice merely refers to a "master file" and "local file", without any further reference to the OECD's Final Report on Action 13 (in particular, Annex I and II thereto), it is unclear whether the compilation of such documentation in accordance with that Final Report is actually required or not. The only reference is to the "*BRS: CbC and Financial Data Reporting relating to the master file and local file*".

45. Submission: If SARS requires taxpayers to prepare such detailed documentation, over and above what is intended in terms of the Draft CbC Notice, for submission purposes, then it is recommended that it is stipulated in the Income Tax Act or the revised Draft CbC Notice that a master file and local file must be compiled in accordance with the OECD's Final Report on Action 13 and submitted together with the annual income tax return. However, the timing of the submission of such information needs to be critically reviewed in order to afford taxpayers the time to prepare such information.
46. We also recommend that this reporting should be effective for years of assessment commencing on or after 1 January 2018.

Duplicate reporting

47. Paragraph 2.2 of the Draft CbC Notice requires that a person who meets the set threshold must file the *BRS: CbC and Financial Data Reporting relating to the master file and local file*.
48. In some cases, a taxpayer may meet the requirements of a person as set out in paragraph 2.2 and therefore be required to file *Financial Data Reporting relating to master file and local file* while its parent company is a Reporting Entity, which is required to submit the same master file information in accordance with paragraph 2.1 of the Draft CbC Notice.
49. In these instances, there may be some duplication in the filing of the master file information by the two taxpayers to SARS.

50. Submission: It is proposed that where a Reporting Entity has a requirement to file the *Financial Data Reporting relating to the master file* to SARS in accordance with paragraph 2.1 of the Draft CbC Notice, then a subsidiary which is part of the same group and which meets the threshold set out in paragraph 2.2 of that notice should be exempt from the requirement to file the same information in accordance with paragraph 2.2.

Threshold confusion

51. Paragraph 2.2 of the Draft CbC Notice indicates that a person must submit a return where the aggregate of a person's potentially affected transactions exceed or is reasonably expected to exceed R100 million.
52. It may appear that this threshold is in contradiction to the CbC Regulations where the threshold to prepare a CbC report has been set at R10 billion.
53. Whilst we are aware that the CbC Regulations are in accordance with what has been prescribed by the OECD and there is an obligation on SARS to exchange the CbC Report information with numerous other Tax Authorities, the creation of an additional reporting obligation in the Draft CbC Notice, with a different threshold does create confusion for taxpayers when attempting to determine what is required of them.
54. In addition, the definition of "*potentially affected transactions*" does not exist in any Tax Act, nor in the CbC Regulations, which means that it is undefined in terms of the Draft CbC Notice. The term is only defined in the Final Notice on Document Retention⁵, which notice has not been referred to in the Draft CbC Notice.
55. The Final Notice on Document Retention prescribes what documentation is *required to be kept* (i.e. in relation to the structure and operations of an impacted person⁶, where the threshold is R100 million, and in relation to specific transactions⁷, where the threshold is R5 million), by whom⁸ and in relation to what period (for years of assessment commencing on or after 1 October 2016). It is submitted that the Final Notice on Documentation Retention does not create a reporting obligation to SARS; it appears that the reporting obligation in relation to persons impacted by the Final Notice on Document Retention is being created by the Draft CbC Notice.
56. It would also appear that where a person does have potentially affected transactions which do not exceed R100 million there is no reporting obligation in terms of the Draft CbC Notice. However, there are still document retention requirements in relation to such a person, which are created by paragraph 4 of the Final Notice on Document Retention.
57. Given that the Draft CbC Notice is silent with regard to the reporting obligations in relation to such persons (with potentially affected transactions which fall below the R100

⁵ The Final Notice requiring persons specified in the notice to keep records, books of account or documents in terms of section 29 of the TAA, which was issued by the Commissioner for SARS on 28 October 2016 in relation to years of assessment commencing on or after 1 October 2016

⁶ Paragraph 3 of the Final Notice on Document Retention (referred to in footnote 5 above)

⁷ Paragraph 4 of the Final Notice on Document Retention (referred to in footnote 5 above)

⁸ Paragraph 2 of the Final Notice on Document Retention (referred to in footnote 5 above)

million threshold), there is the potential for confusion on the part of taxpayers who are now expected to reconcile the differing document retention versus reporting requirements in relation to the same information in respect of their “*potentially affected transactions*”.

58. Submission: Given that the document retention and related reporting requirements (referred in clauses 47 to 52 above), which are governed by the CbC Regulations, the Final Notice on Documentation Retention and the Draft CbC Notice, are relatively new and apply in relation to the same or similar financial information, it is recommended that SARS issue an Interpretation Note dealing specifically with the interplay between these regulations and notices, in order to provide taxpayers and impacted “persons” with guidance in this regard.

Practical considerations

59. Submission: We submit that SARS should consider the following practical implications when finalising the Draft CbC Notice:
- 59.1 The timing of the filing of this return - whether it is envisaged that the return required by the Draft CbC Notice will be filed at the same time as the income tax return or separately;
- 59.2 The information required in the return and the format thereof, i.e. the BRS scheme - it is imperative that SARS issue the BRS scheme as soon as possible so that taxpayers will know what the prescribed format for the return to be filed is (e.g. whether they can prepare their own template and submit electronically as an attachment to the tax return or whether SARS requires the population of a template which it will create), including exactly what information is required, and an example of such template;
- 59.3 The availability of the return - the date that the return, i.e. the BRS scheme, will be made available for taxpayers to utilise and interim arrangements for taxpayers who may have already or are in the process of filing their income tax returns for the 2016 financial years; and
- 59.4 The information required in paragraph 2.2 of the Draft CbC Notice, as discussed in clause 30 above, should not be required for financial years commencing on or after 1 January 2016, as taxpayers were not aware of this requirement at all during those financial years and they are not being afforded sufficient time to prepare such information. This provision is therefore retrospective in its application, which should be avoided at all costs. The return in this regard should rather be required for years of assessment commencing on or after 1 January 2018 in order to allow taxpayers time to prepare such detailed documentation in the prescribed format.

CONCLUSION

60. We would like to thank SARS for the opportunity to provide constructive comments in relation to the Draft CbC Notice. SAICA believes that a collaborative approach is best suited in seeking actual solutions to complex problems, such as the timely preparation of documentation and the collation of information as required in terms of the scope and reporting format, as required by the Draft CbC Notice.

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

Yours sincerely

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