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Submission File

10 March 2026

National Treasury / South African Revenue Service

BY E-MAIL: [REDACTED]

Dear [REDACTED]

SAICA COMMENTS ON THE CURRENT STATUS OF PRACTICE NOTE 7¹

The Transfer Pricing Committee, on behalf of the South African Institute of Chartered Accountants (SAICA), welcomes the opportunity to make representation to the National Treasury ('NT') and the South African Revenue Service ('SARS') on the current status of Practice Note 7 of the Income Tax Act No. 58 of 1962 ('The Act'). Specifically, its current status as fit for purpose in providing taxpayers, advisors and foreign Multinationals on South Africa's approach to implementing Section 31 of the Act.

This submission follows the meeting held with the SARS Transfer Pricing Unit on 21 May 2025, where certain concerns regarding the status of the practice note and SARS assurance of their view it remains fit for purpose were raised.

We once again thank NT and SARS for the ongoing opportunity to provide constructive comments in this regard.

SAICA continues to believe that a collaborative approach is best suited in seeking solutions to complex challenges and should you wish to clarify any of the above matters please do not hesitate to contact us.

Yours sincerely

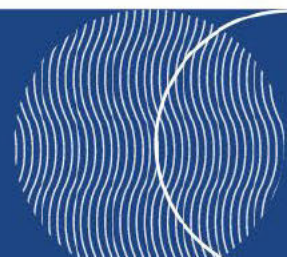
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¹ PRACTICE NOTE NO. 7 DATE: 6 August 1999 - SECTION 31 OF THE INCOME TAX ACT, 1962 (the Act)



PRACTICE NOTE NO. 7 DATE: 6 AUGUST 1999 – SECTION 31 OF THE INCOME TAX ACT, 1962 ('THE ACT') : DETERMINATION OF THE TAXABLE INCOME OF CERTAIN PERSONS FROM INTERNATIONAL TRANSACTIONS.

1. South Africa introduced transfer pricing rules in 1995 and these rules were significantly overhauled in 2012.
2. In support of the rules and to assist taxpayers understand how they should be applied, SARS introduced Practice Note 7 in 1999. ("PN7")
3. PN7 has largely been superseded by both the revised wording of section 31 and updates to the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD TPG") on which it was based. Although still in force, PN7 is arguably no longer useful in assisting taxpayers to understand how SARS will apply section 31.
4. SARS has already considered the changes to South Africa's thin capitalisation rules by withdrawing the out-of-date Practice Note 2 and issuing an updated interpretation note, closely aligned to the OECD TPG in its place.
5. Furthermore, work under the BEPS project has led to a significant change in the transfer pricing documentation requirements, with changes to Chapter V of the OECD TPG.
6. SARS has followed the OECD guidance through the implementation of specific transfer pricing documentation requirements in Section 25 and Section 29 of the Tax Administration Act No. 28 of 2011 (the "TAA"), as well as publishing supporting gazettes and an External Business Requirement Specification ("BRS").
7. In consultation with SARS in our most recent meeting (May 2025), contrary to previous views put forward by SARS, SARS has acknowledged PN7 remains fit-for-purpose and does not require replacing, withdrawing or amending.
8. This is contrary to previous views expressed by SARS where it considered that PN7 was no longer relevant in its current form and indicated that it is open to suggestions for a new draft interpretation note ("IN") to replace it.
9. PN7 was introduced to provide guidance as to how SARS would apply section 31 of the Act, notable providing practical guidance.
10. It is however noted that substantial sections of PN7 are no longer relevant as the sections of the Act to which they relate have been amended and thus the guidance contained in the PN7 is irrelevant.
11. Furthermore, because substantial sections of the PN7 refer to the OECD TPG, this creates confusion on two fronts. Firstly, the guidance is now disparate from the OECD TPG due to the fact the OECD TPG has been updated whereas the PN7 refers to old guidance. Secondly, if SARS intends to apply the ambulator guidance in the OECD TPG, it would be preferable if this was so stated.
12. Below we have separated our analysis of PN7 into sections; that is, those sections which relate to legislation no longer in place, those sections which endorse and follow the

OECD TPG, and those sections which are specific to South Africa and still relate to relevant legislation.

13. With regard to the section discussing elements still relevant, we have also included suggestions on specific areas where we feel PN7 does not provide sufficient clarity and where additional guidance would be appreciated.
14. In summary, we remain of the view that a guidance note explaining SARS' approach to implementing section 31 is useful, but that PN7 is no longer fit-for-purpose as this guidance.

Section 1 – Sections of the PN no longer relevant due to legislative changes

a. Paragraph 1.1.3 - Definition of International agreement

15. PN7 discusses the determination of place of effective management under this heading.
16. This is unnecessary in this Practice Note as SARS has issued a comprehensive interpretation note on place of effective management in terms of Interpretation Note 6, issued in 2023.
17. Furthermore, section 31 has been changed to no longer refer to an international agreement, but to an affected transaction which has a much broader scope than an international agreement.

b. Paragraph 1.1.4 – Connected person / Associated Enterprises definition

18. The application of section 31 is dependent on the parties being “connected persons” as defined or “associated enterprises” as defined.
19. The current PN7 includes an old version of the definition of “connected persons”.
20. Furthermore, SARS has not provided a domestic definition or guidance on the proposed “associated enterprises” inclusion.

c. Paragraph 2.6 and 4 – Reference to section 31 of the Act

21. The introduction states "*Section 31 enables the Commissioner to adjust the consideration in respect of a supply or acquisition of goods or services in terms of an international agreement between connected persons.*"
22. This wording is no longer in section 31. There are also changes to the wording of section 31 that render the content of paragraph 4 irrelevant.
23. Since publication of PN7, there has also been the introduction of both IN 127 and IN 128, both relevant to the application of section 31.
24. Therefore any revised guidance should make reference to these for consistency.

d. Paragraph 12 – Information

25. The content of this paragraph considers the availability of information for undertaking a comparability analysis as well as SARS' approach for requesting information from a taxpayer.
26. The OECD TPG provides comprehensive guidance in Chapter III relating to data sources and information to be used in comparability analyses.
27. The TAA also governs the powers vested in SARS to collect information and when information may or may not be used later in proceedings.
28. It is therefore considered that the guidance in the OECD TPG and the TAA is sufficient, and this paragraph is unnecessary. A reference to the relevant provisions in the OECD TPG and the TAA may be useful.
29. Where SARS includes guidance not in the OECD TPG which it still considers relevant, it is recommended that this be included in updated guidance.

e. Paragraph 14 – Secondary Tax on Companies

30. The legislation in respect of this tax no longer exists.
31. Retaining this simply leads to confusion, especially for foreign entities and advisors referring to PN7.

f. Paragraph 16 – Advanced Pricing Agreements

32. New legislation is in force relating to this and separate guidance is expected.
33. Retaining this simply leads to confusion and contradictions especially for foreign entities and advisors referring to PN7.

34. Submission: It is therefore submitted that PN7 be withdrawn. To the extent there are areas that SARS still considers relevant and that require guidance, this should be set out in a new guidance note.

Section 2 – Sections of the PN no longer relevant as sufficient guidance is in the OECD TPG

35. PN7 states at paragraph 3.2.1, concerning the OECD TPG, that "*this Practice Note is based on, inter alia, those guidelines*".
36. Although South Africa is not a member country of the OECD, the OECD Guidelines are acknowledged as an important, influential document that reflects unanimous agreement amongst the member countries, reached after an extensive process of consultation with industry and tax practitioners in many countries.
37. The OECD Guidelines are also followed by many countries which are not OECD members and are therefore becoming a globally accepted standard."
38. SARS indicated at our 2025 meeting that reliance for guidance could also be placed on the country profiles found on the OECD website.
39. Considering SARS' stance on acceptance of the OECD guidance, the implementation of the BEPS transfer pricing documentation approach and the fact the South Africa country profile is updated regularly on the OECD website, we are of the opinion any replacement guidance for PN7 should clearly state exactly this, and only provide guidance where SARS takes a contrary view to that of the OECD, or where there are specific nuances in our legislation which need explaining.
40. Having a situation where the guidance adopts portions of the OECD TPG and references these, is problematic due to the ambulatory nature of the OECD TPG and the current out-of-date status of PN7.

a. Paragraph 1.2 – Definitions

41. PN7 contains a number of definitions which are also defined in the OECD TPG but may vary slightly, e.g.,
 - "uncontrolled transaction" in PN7, compared to "comparable uncontrolled transaction" in the OECD TPG,
 - "multinational" in PN7 compared to "multinational enterprise" in the OECD TPG, or
 - "Advance Pricing Agreement" in PN7 compared to "Advance Pricing Arrangement" in the OECD TPG.
42. Whilst common sense would undoubtedly prevail regarding these variances, it creates an unnecessary need to explain or update when this is unnecessary.

b. Paragraph 5 – Financial Transactions

43. Chapter X of the OECD TPG was introduced into the 2022 edition of the guidelines.

44. This adopts the final version of the BEPS actions on the transfer pricing of financial transactions, which SARS has indicated it endorses.

45. Submission: This paragraph is therefore no longer needed.

c. Paragraph 7 – The arm's length principle

46. The OECD TPG provides a comprehensive description of this. PN7 simply refers to this.

47. Submission: This paragraph is therefore no longer necessary.

d. Paragraph 8 – Principles of comparability

48. The OECD TPG provides a comprehensive description of this, while PN7 simply refers to this.

49. Furthermore, the OECD's view has shifted, with a nine-step process being introduced, which is not referred to in PN7 but is nevertheless accepted as the approach to be taken when undertaking a comparability analysis.

50. Submission: This paragraph is therefore no longer necessary. This also applies to the comparability factors contained in paragraphs 8.2, 8.4 and 8.5.

e. Paragraph 8.3 – Functional analysis

51. The OECD TPG provides a comprehensive description of this.

52. Submission: Furthermore, the OECD's view has shifted, notably with greater guidance on assessing the risks assumed by the parties to the transaction. On the assumption SARS follows the more comprehensive guidance contained in the OECD TPG, it is considered that this paragraph is no longer necessary.

f. Paragraph 9 – Acceptable methods for determining an arm's length price

53. The OECD TPG provides comprehensive guidance in Chapter II and Chapter III.

54. Furthermore, as the OECD TPG follows an ambulatory approach, there is a risk some of the guidance in PN7 varies from the OECD's current view.

55. Submission It is therefore considered that this paragraph is no longer necessary.

g. Paragraph 10 – Documentation

56. The approach adopted by SARS has changed since PN7 was issued, making much of this paragraph irrelevant.

57. The changes to Chapter V of the OECD TPG, together with the adoption of specific transfer pricing documentation requirements in Section 25 and Section 29 of the TAA, as well as publishing supporting gazettes and a BRS make this paragraph unnecessary.

58. While the SARS Briefing Note suggests that the new documentation requirements should replace the old documentation requirements in PN7, the extent of this is not clear, and the fact that the Briefing Note constitutes a separate Public Notice that is not necessarily known to the general public, not updating PN7 may be misleading.

h. Paragraphs 11 – Practical considerations

59. The content of this paragraph considers practice issues in undertaking a transfer pricing analysis, notably undertaking a comparability analysis, and determining an arm's length range.

60. The OECD TPG provides comprehensive guidance in Chapter III. Furthermore, as the OECD TPG follows an ambulatory approach, there is a risk some of the guidance in PN7 varies from the OECD current view.

61. Submission: It is therefore considered that this paragraph is no longer necessary in its current form.

62. Where SARS includes a guidance not in the OECD TPG which it still considers relevant, it is recommended that this be included in updated guidance.

i. Paragraphs 17 to 19 – Intangible property, Intra-group services and Cost contribution arrangements

63. The OECD TPG provides a comprehensive guidance in Chapter VI, VII and IX.

64. Furthermore, as the OECD TPG follows an ambulatory approach, there is a risk that some of the guidance in PN7 varies from the OECD's current view. It is therefore considered that these paragraphs are no longer necessary.

65. Submission: Any updated guidance note should include a blanket statement that the OECD TPG should be followed as the principal guidance and only areas that SARS takes a different view be included in the guidance note.

66. This provides comfort to taxpayers that the OECD TPG can be followed but also clarifies areas where SARS takes a different view.

67. It should also be considered that any such guidance will need constant updating for changes in view and the impact of judicial outcomes.

Section 3 – Sections of the PN still relevant where additional guidance is required

a. Controlled Foreign Company ("CFC") inclusion in section 31(1)

68. Section 31(1) of the Act currently extends the application of the transfer pricing rules to transactions between CFC's and non-resident connected persons.
69. Section 9D also provides the rules for the imputation of net income of a CFC to the parent company to the extent that none of the exemptions apply.
70. Where a CFC transacts with a connected person non-resident entity and that transaction is deemed to be non-arm's length in SARS' view, section 31(2) requires SARS to adjust the consideration in respect of that non-arm's length transaction of the CFC for the purposes of section 9D(9)(b). This results in the Foreign Business Establishment Exemption being denied in respect of the net income attributable to the non-arm's length transaction.

71. Submission: We recommend guidance be issued relating to how the provisions of section 31(1), section 31(2), and section 9D interplay in respect of transactions entered into by CFCs with non-resident connected persons. This will make the provisions easier to understand.

b. Exclusions in section 31(6) and section 31(7)

72. Section 31 contains two specific exemptions; section 31(6) and section 31(7).
73. Section 31(6) applies where the transaction is the granting of financial assistance or the use on intellectual property to a CFC which has a foreign business establishment ("FBE"), and the tax payable by that CFC amounts to 67.5% of the tax that would be paid in South Africa if that CFC were subject to tax in South Africa.
74. Section 31(7) provides an exemption for loan funding made to a foreign group company where the loan is interest free, is for a minimum period of 30 years, and certain other conditions are met.
75. The purpose of this exemption is to allow resident companies to extend loan funding, which is in economic substance equity, to group companies without risk of an adjustment.
76. Both of the above provisions only relate to transactions between separate legal entities, where one is a South African resident entity and the other is a non-resident entity.
77. The sections do not seem to cater for similar transactions between a South African resident and a foreign permanent establishment of another South African resident.

78. Submission: New guidance should make it clear that the two exemptions apply to all potentially affected transactions listed in section 31(1)(a).

c. Section 31 application to Permanent Establishments

79. Section 31 only applies to transactions between separate legal entities.
80. Article 7 of South African Double Tax Conventions ("DTCs") applies to the attribution of profits to permanent establishments ("PEs"). Article 7, however, only addresses the attribution of profits to two separate parts of the same legal entity.
81. Section 31(1)(a) includes transactions between two residents where the transaction is in favour of a foreign PE of one of the residents; and to transactions between two non-residents where the transaction is in terms of a transaction with a South African PE of one of the non-residents.
82. In effect, this allows SARS to adjust the consideration paid or received in respect of a South African resident and a foreign PE of another South African resident, or between a South African PE and a non-resident entity.
83. In the event SARS makes an adjustment to a South African PE of a foreign resident under section 31(2), it is adjusting the attribution of profit to that PE where such transaction is with a different foreign resident entity. This could result in double taxation for the foreign resident entities.

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| <ol style="list-style-type: none">84. <u>Submission</u>: Guidance should be included which makes it clear that any adjustment to the profits of the South African PE are made within the context of Article 7 on the basis that SARS is of the view that the profit attributed to the PE is in contravention of this Article.85. This will ensure that the non-resident entity is able to resolve any double taxation incidence through a Mutual Agreement Procedure ("MAP") on the application of Article 7. |
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d. Adoption of Article 7 of the MTC

86. The MTC introduced an updated Article 7 and accompanying commentary in July 2010.
87. South Africa has reserved the right to use the version of Article 7 and the commentary to this Article applicable prior to the introduction of the revised Article and commentary.
88. It is understood that the reservation results in the non-adoption of notional charges between two separate parts of the same legal entity which may impact the overall profit position of the legal entity.
89. This could apply if the PE operates as a limited risk entity or service provider and applying the transfer pricing principles by hypothesis results in the arm's length amount being attributed to the PE as a profit where the entity as a whole suffered losses.
90. The OECD issued an updated version of the guidance for applying Article 7 and its commentary in 2010. This represents the OECD Authorised Approach to the attribution of profits to PE's ("AOA").

91. As with the OECD TPG, the AOA is intended to be ambulatory guidance.

92. Submission: Due to the uncertainty taxpayers face as to the appropriate guidance to use when considering the application of Article 7 in South Africa's DTCs, it would be beneficial for guidance to be provided on SARS' views.

e. Section 31 – Tax Benefit test

93. Section 31 requires the taxpayer to have received a tax benefit as a result of the pricing policy in respect of which SARS may seek to adjust under section 31(2).

94. The concept of a tax benefit is not addressed specifically in the OECD TPG.

95. Instances occur whereby a taxpayer may have entered into a transaction which is arguably not arm's length, but has not resulted in a tax benefit.

96. For instance, the taxpayer may be in receipt of a loan on which interest is charged but has not claimed the interest as a tax deduction. SARS will still have received the withholding tax on the interest paid so there is no loss to the fiscus.

97. Submission: The proposed guidance should consider instances where a transaction results in an expense to the taxpayer which is not claimed for tax purposes and define why this either does or does not confer a tax benefit on the taxpayer for the purposes of section 31.

f. Chapter VII – Intra-group services

98. The OECD TPG introduced the concept of Low Value-Added services in Chapter VII of the 2017 edition of the TPG. This guidance allows for a simplified approach to support the arm's length nature of non-core routine services typically found within a multinational group.

99. SARS has verbally stated it does not intend adopting this guidance.

100. As indicated PN7 is outdated as it currently endorses the OECD TPG approach in the absence of specific guidance from SARS.

101. Submission: Due to the fact that there is a discrepancy in SARS' view and that of the OECD TPG, SARS should clarify its view on this in separate guidance. This guidance should provide clarity on SARS' view on the simplified approach to low value added services and in the event that this is not to be adopted, provide alternative guidance relating to services.

102. Should alternative guidance be considered, this should give comprehensive guidance on satisfying the requirements of the arm's length test from both the perspective of the service provider as well as the service recipient. Furthermore, this guidance should encourage the analysis to be considered from both perspectives.

g. Chapter X – Financial transactions

103. SAICA has raised concerns relating to the interaction of Article 11 of the MTC and Section 31 in relation to interest bearing loans.
104. Article 11(6), which is present in most of South Africa's DTCs, removes the reduced withholding tax provision on the non-arm's length interest paid to the non-resident lender.
105. The result is that there is economic double withholding tax on the non-arm's length interest as a result of the impact of Article 11(6) and section 31(3). SARS is in effect charging the non-arm's length interest to withholding tax at 15% on the non-resident lender and 20% withholding tax on the South African borrower as well as denying the deduction under section 31(2).
106. This has been raised with SARS previously and SARS has commented that they would consider the submission and revert.

107. Submission: SARS is requested to consider the interplay between Article 11(6) and section 31(3) on the non-arm's length interest and advise on the double withholding tax issue.

h. Paragraph 15 - Burden of proof

108. PN7 followed the previous (pre-2012) version of section 31, which was applied at the Commissioner's discretion and therefore resulted in the initial burden of proof resting with the Commissioner.
109. The current version of section 31 requires a taxpayer to file its tax return on the basis that all potentially affected transactions are conducted at arm's length. This results in the initial burden of proof resting with the taxpayer.
110. International precedent suggests that when a tax authority (i.e., SARS) conducts an audit and issues a finalisation of audit letter and an assessment resulting in a primary adjustment to the transfer price, the burden of proof shifts to the tax authority to support its position.

111. Submission: Guidance should state clearly where the burden of proof rests and at what stage it changes to SARS. The guidance should also provide supporting evidence for this view.

i. Chapter IV - Mutual Agreement Procedure ("MAP")

112. The OECD TPG contains guidance on resolving transfer pricing disputes.
113. In addition, SARS has issued a number of guidance documents relating to MAP. The MAP guidance also provides for SARS to seek a unilateral solution, if possible, prior to

entering into MAP negotiations. This suggests that contrary to the OECD view, SARS has a preference to resolving transfer pricing disputes as opposed to pursuing the MAP.

114. Where cases are settled, SARS also requires that the taxpayer gives up its right to seeking relief from double taxation through the MAP process, resulting in double taxation being suffered.
115. As transfer pricing audits increase, which result in more frequent adjustments, the incidence of double taxation also increases.
116. Whilst currently most transfer pricing matters are resolved through the alternative dispute resolution process, this cannot continue as Multinational Enterprises will not continue to bear the cost of double taxation.

117. Submission: The proposed new guidance should provide greater certainty to taxpayers that SARS is adopting its own guidance relating to the MAP process.
118. SARS should therefore provide updates of cases (and those resolved), which would also provide comfort to taxpayers that the MAP works in transfer pricing disputes.
119. SARS should also not prohibit a taxpayer from seeking relief from double taxation as a result of settling a transfer pricing matter.

General - Transfer pricing auditors and Competent Authority ("CA") roles

120. The concern raised by SARS regarding limited transfer pricing resources has raised concerns that there is a lack of independence between the audit teams and the CA.
121. Our concerns in this regard have already been raised in terms of our previous submission in response to this document. It is important to bear in mind that an APA process and a MAP process is a negotiation which will inevitably result in some compromise on the taxing rights of South Africa from the position they may have had, if or when the matter was under audit.
122. Thus, it is impossible for the auditors to be impartial in such negotiations.
123. International support is available to SARS through Tax Inspectors Without Borders ("TIWB"), amongst others, which should be able to ensure complete independence. Our concern is that without that independence, the entire MAP and APA program is at risk of failing.

124. Submission: SARS should maintain independence between the transfer pricing auditors and the competent authority/specialists dealing with APAs and MAPs. Guidance from SARS should emphasise this to reassure taxpayers.
125. Where resources are scarce, SARS should consider using international resources to ensure independence.

END.