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SAICA COMMENTS ON THE DRAFT PUBLIC NOTICE PRESCRIBING THE INFORMATION TO BE CONTAINED IN THE SECTION 18A CERTIFICATE OF EXAMINATION

The South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make a submission to the South African Revenue Service (SARS) on the draft public notice prescribing the information to be contained in the certificate of examination contemplated in section 18A of the Income Tax Act, 58 of 1962.

SAICA supports the objective of ensuring that section 18A-approved entities maintain appropriate records and that donations for which section 18A receipts are issued are applied in the manner contemplated by the legislation.

However, in SAICA's view, the draft notice would benefit from further clarification to ensure that the certificate operates as a practical statutory compliance certificate, and does not unintentionally create uncertainty regarding assurance obligations, prescribed procedures, internal controls, independence, timing, third-party reporting alignment and the treatment of "funding Public Benefit Organisations" (PBOs). It does however confirm SAICA's longstanding concern that the SARS expectation in respect of these certificates has all along been a lot more than mere cursory confirmation as some commentators stated.

This submission is intended to support the development of clear, administratively workable requirements that can be applied consistently by approved entities, accounting officers, accounting authorities, registered tax practitioners and SARS.

We thank SARS for the opportunity to provide constructive comments on this matter. Should you wish to clarify any of the matters raised in this submission, please do not hesitate to contact us.

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ANNEXURE A

THE CREATION OF A QUASI-ASSURANCE ENGAGEMENT

1. Paragraph 2.11.2 of the draft notice states that the examination is restricted to assessing compliance with the specific statutory requirements applicable to section 18A and does not constitute an audit, review or assurance engagement.

2. SAICA supports this statement as the policy intent.

3. However, the balance of the draft notice seems to require confirmations that are commonly associated with assurance-style reporting.

4. These include confirmations that procedures performed were sufficient and appropriate, that evidence was obtained, that internal controls were implemented, that all relevant donations were applied solely in accordance with section 18A(2A), and that nothing has come to the attention of the person issuing the certificate to suggest non-compliance.

5. The phrase “nothing has come to the attention”, which appears throughout the notice, is generally associated with limited assurance-style conclusions.

6. If SARS does not intend the certificate to constitute an assurance engagement as opposed to a factual validation on a sample test basis, the final notice should avoid language that creates the opposite impression or exposes practitioners to uncertainty as to the standard expected.

7. Submission: SARS should clarify that the certificate is a statutory compliance certificate based on prescribed or reasonable procedures, and not an audit, review, assurance engagement or assurance report. If SARS intends the certificate to impose an assurance-type obligation, the applicable professional standard should be expressly identified or provided.

8. Should SARS be of the view that such quasi-audit process is unavoidable to achieve the desired comfort level, we would, similar to our previous submissions, recommend that SARS create a de minimus threshold so that a lesser, less onerous procedure is applied to smaller PBO’s where the fiscal risk is less.

THE NEED FOR PRESCRIBED MINIMUM PROCEDURES

9. Paragraph 2.18.1 of the draft notice requires the registered tax practitioner, accounting officer/authority to confirm that the procedures performed were sufficient and appropriate to support the confirmations made in the certificate.

10. However, the draft notice does not prescribe the minimum procedures that must be performed.

11. This creates a practical uncertainty because different tax practitioners, accounting officers/authorities may apply materially different procedures that seek to confirm the exact same assurance, which could result in inconsistent certificates, increased costs for approved entities, and retrospective disputes with SARS regarding the adequacy of those procedures.

12. This uncertainty is particularly problematic because the person issuing the certificate may later be required to substantiate the basis on which it was issued.

13. Submission: It is submitted that SARS should either prescribe a standard form certificate with defined scope limitations, or publish an interpretation note or guide setting out the minimum procedures expected for purposes of section 18A(2B) and section 18A(2C).

14. At a minimum, SARS should clarify whether the examination is expected to include inspection of records, sample testing, full reconciliation, verification of donor details, tracing of funds to expenditure, review of recipient organisations in the case of funding PBOs, or only consideration of records and information made available by the approved entity.

15. The lack of a minimum standard, together with the fact that this transfer of compliance risk to the tax practitioner rather the PBO, also creates a perverse incentive for PBOs to seek the tax practitioners who will conduct the least onerous enquiry, as failure is on the tax practitioner.

CONFIRMATION OF INTERNAL CONTROLS

16. Paragraph 2.12.4 requires confirmation that the section 18A-approved entity implemented internal controls to ensure that section 18A receipts were issued only for qualifying donations.

17. This requirement is broad and may imply that the person issuing the certificate has tested the design and operating effectiveness of the entity’s internal controls.

18. Many registered tax practitioners and accounting officers do not perform audit or assurance procedures and may not have been engaged to evaluate internal control systems.

19. Requiring a confirmation on internal controls may therefore exceed the appropriate scope of a non-assurance statutory certificate of examination and may materially increase the cost of compliance for PBOs.

20. Submission: Should SARS persist with this scope expansion, paragraph 2.12.4 should be narrowed to require confirmation that, based on the procedures performed and the information made available, the entity maintained records and processes relevant to the issuing of section 18A receipts.

21. The following wording is suggested in this regard: “*Based on the procedures performed and information made available, the entity maintained records and processes relevant to identifying, recording and issuing section 18A receipts for qualifying donations*.”

CONFIRMATION OF THE ABSOLUTE TRACING OF DONATIONS RECEIVED

22. Paragraph 2.14 requires confirmation that donations received or accrued in respect of which section 18A receipts were issued were utilised solely for the relevant public benefit activities contemplated in section 18A(2A).

23. SAICA recognises that this is central to the purpose of the certificate.

24. In practice, however, donations may be pooled in general bank accounts, used across multiple approved projects, or applied over time. A donation received in one period may no longer be separately identifiable once deposited.

25. Requiring the person issuing the certificate to trace every rand donated to specific qualifying expenditure may therefore be impractical, uneconomical and, in some cases, impossible. In addition the person would have to validate that the face value application of the money was in fact objectively a PART II qualifying Public Benefit Activity that the PBO is registered for.

26. This concern is heightened where a PBO conducts both Part I and Part II public benefit activities, or where the PBO's SARS approval letter does not clearly align with all activities undertaken in practice.

27. It is also relevant where section 18A receipts state that donations will be used for section 18A purposes generally, rather than allocating donations to a specific approved project at receipt stage.

28. Submission: The confirmation should be framed by reference to reasonable procedures, records and information made available, and should not require absolute tracing of every donation.

29. The following wording is suggested:

30. *"Based on the procedures performed and the information and records made available, nothing has come to the attention of the person issuing the certificate to indicate that donations in respect of which section 18A receipts were issued were applied otherwise than in the manner contemplated in section 18A(2A)."*

FUNDING PBOs – ORGANISATIONS APPROVED UNDER SECTION 18A(1)(*b*)

31. The draft notice[1] requires that the tax practitioner or accounting officer/authority of a "funding PBO[2]" should confirm that a recipient organisation applied the donation received[3] solely for public benefit activities.

32. While a funding PBO may be able to verify the approved PBO status of recipient organisations, the transfer of funds or assets to those organisations, and written undertakings from those organisations that the funds received will be applied to public benefit activities, it will not be able to objectively and independently verify that all expenditure incurred by the recipient PBO was in fact used for a PART II Public Benefit Activity.

33. Requiring the tax practitioner or accounting officer/authority issuing the certificate for the funding PBO to certify facts outside the funding PBO's records and control is impractical.

[1] Paragraph 2.14.2(b)

[2] An organisation approved under section 18A(1)(*b*)

[3] Or accrued

34. Submission: It is submitted the certificate of examination should instead focus on whether the funding PBO retained evidence of (a) the recipient organisation's approval status, (b) transfer of funds or assets to the recipient, and (c) written undertakings.

REFINEMENENT OF INDEPENDENCE AND OBJECTIVITY REQUIREMENTS

35. Paragraph 2.17 requires a registered tax practitioner to declare that he or she is independent of the section 18A-approved entity; is not an employee, trustee, director, member, office bearer, or involved in governance or management; did not participate in the receipt, management, allocation or application of the donations examined; and has no personal or financial interest that may impair objectivity.

36. SAICA supports the principle of objectivity and agrees that the person issuing the certificate should not have a conflict of interest or be directly involved in the receipt, allocation or application of the donations examined.

37. As this is not an audit, we believe that the independence requirement is not intended to extend to independent professional service providers and that SARS is not concerned with prior professional services that may impede objectivity, as it remains independent.

38. A PBO may therefore not need to appoint two separate independent tax practitioners, one for general tax compliance/advisory and another for the certificate of examination, thereby increasing its tax compliance costs.

39. It is also unclear why the imposition of the independence restriction is only on registered tax practitioners, and not on accounting officers, as the same risk applies in the public sector.

40. Submission: It is submitted that SARS expressly clarifies how the independence and objectivity applies where an individual is involved with the PBO in an ongoing independent professional services relationship and whether SARS perceives this as impairing objectivity.

COMPETENCE REQUIREMENTS AND THE NATURE OF THE CERTIFICATE

41. Paragraph 2.18.1 requires confirmation that the registered tax practitioner, accounting officer or accounting authority possesses the appropriate knowledge, experience and professional standing to perform the examination.

42. SAICA supports a competence requirement that matches the expected work to be performed. However, SARS should clarify the nature of the competence expected.

43. If the certificate is not an audit, review or assurance engagement, the competence requirement should not imply expertise in audit, assurance or internal control testing.

44. Submission: It is submitted that the relevant competence should relate to knowledge of section 18A, the Income Tax Act, the entity's approval category, recordkeeping requirements, third-party reporting requirements, and the ability to perform a reasonable statutory compliance examination.

45. SARS should therefore clarify that the competence requirement is aligned with the performance of a statutory compliance examination and does not impose an audit or assurance competence requirement unless SARS expressly intends the certificate to be an assurance engagement.

ALIGNMENT WITH THIRD-PARTY REPORTING

46. The draft notice requires confirmation that donation, receipt and donor information retained by the approved entity is sufficient to meet SARS third-party reporting requirements[4].

47. This represents an expansion of the scope of this provision beyond that the money was applied for a qualifying purpose. In essence the tax practitioner must confirm that the PBO has met all the relevant BRS information requirements. The latter which is in law is merely a guide (i.e. the taxpayer can choose to comply with it) but in practice used by SARS as an official publication i.e. the taxpayer is compelled to comply.

48. SAICA in principle supports alignment between the certificate requirements and SARS' third-party reporting obligations.

49. However paragraph 2.14.1 states that confirmation must be done that all donations received or accrued during the year of assessment **were** utilised (i.e. past tense) solely for PBA activities. This disregards the fact that the donations were not utilised (i.e. cash in bank) and the requirement in section 18A(2A)(a) is that it will be utilised (i.e. future use). It is therefore a multiyear test not all inclusive year of assessment test.

50. Submission: To give practical effect to this alignment, however, it is submitted that SARS should publish, align and cross-reference the relevant annual third-party reporting data requirements in the final notice (or accompanying guidance) to those of the certificate of examination.

51. BRS Guide data changes at different times, which means that the BRS requirements could have changed whilst the certification process was done.

52. This will prevent discrepancies between the information required for the certificate and the information required for third-party reporting submissions. Without this alignment, approved entities may face potential disputes with SARS, unnecessary administrative burden and added system complexity.

53. Furthermore, the requirement in paragraph 2.14.1 should apply to s18A donations **that were utilised during the year of assessment,** i.e. confirmation of qualifying purpose can only happen if funds were in fact utilised.

NEED FOR CLARITY ON TIMING, RETENTION AND SUBMISSION REQUIREMENTS

[4] Paragraph 2.12.3

54. The draft notice refers to the year of assessment or financial year to which the certificate applies, but does not clearly state when the certificate must be issued, retained or submitted.

55. Uncertainty regarding timing may create practical difficulty, particularly where the certificate is linked to the completion of annual financial statements, third-party reporting deadlines, or the availability of records from recipient organisations in the case of "funding PBOs".

56. Submission: It is submitted that SARS should clarify whether the certificate must be submitted automatically upon completion, or retained and produced upon request.

57. Further clarity is also required with regards to the deadline for its issuance; particularly with regards to whether it must be issued before or after third-party reporting submissions; whether different timing applies to PBOs, funding PBOs and government departments; and what consequence follows if a certificate cannot be issued due to incomplete records.

PROPOSED ALTERNATIVE WORDING FOR KEY CONFIRMATION

58. Submission: SAICA proposes that the statutory conclusion in the certificate – as noted in paragraph 2.19 – be framed along the following lines:

59. *"Based on the procedures performed and the information and records made available, nothing has come to the attention of the person issuing the certificate to indicate that donations in respect of which section 18A receipts were issued during the relevant year of assessment or financial year were applied otherwise than in the manner contemplated in section 18A(2A) of the Income Tax Act."*

60. SAICA further recommends that the certificate include a statement that the examination was performed within a statutory compliance framework, that it does not constitute an audit, review or assurance engagement, and that no audit or assurance opinion is expressed.

END.