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Submission File

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South African Revenue Service  
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0001

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Dear Ms Collins

**COMMENTS ON THE DISCUSSION PAPER ON THE PROPOSED MODEL FOR ESTABLISHING AN ADVANCE PRICING AGREEMENT PROGRAMME IN SOUTH AFRICA AND RELEASE OF DRAFT LEGISLATION**

The National Tax Committee and the Transfer Pricing Sub-Committee, on behalf of the South African Institute of Chartered Accountants (SAICA), welcomes the opportunity to make a submission to the South African Revenue Service (SARS) on the Discussion Paper on the Proposed Model for establishing an Advance Pricing Agreement (APA) Programme in South Africa and release of draft legislation that provides a high-level model and draft legislative framework for an APA unit and associated processes at SARS and the introduction of an APA programme in South Africa.

We set out below our comments in this regard.

**COMMENTS**

**General**

1. We commend SARS on releasing this document as APAs are definitely needed in South Africa. Although it is agreed that the implementation of the APAs will not be easy taking into consideration the lack of expertise in this area in the country, the sooner the process is started the better. SAICA remains committed to consult and engage with SARS to make APAs a success.
2. Various parts of the legislation refer to a specified number of days for specific steps by SARS and/or the applicant, but it is not clear whether this reference is to business or calendar days. The applicable sections referred to are:
  - a. Section 90F (2) and (4)
  - b. Section 90G(1) and (2)(b)
  - c. Section 90K(2) and (4)
  - d. Section 90M(1)



- e. Section 90N(1)
- f. Section 90P(2) and (3)

3. Submission: These sections should refer to 'business days' as defined in the TAA.

4. The confidentiality of agreed APAs has not been discussed in the document.

5. Submission: SARS should explain how it will ensure that agreed APAs will be kept confidential and it should also clarify in what instances the tax authorities can obtain external industry experts to assist with the APA process.

6. The proposed implementation outline also does not address instances where an APA between the tax authorities is not reached.

7. Submission: This aspect should be addressed in the legislation.

### **Paragraph 3 – Discussion**

8. On page 1 it is mentioned that although the APA unit will require independence from the transfer pricing unit, it is envisaged that in the APA unit's early stages of development the relationship between the units will be relatively fluid, necessitating the exchange of expertise and personnel between the units.

9. Submission: SARS should inform taxpayers how it will implement Chinese walls to prevent rejected APA matters from being audited. This is important in light of the fact that SARS requires significant information to be provided before deciding on the merits of the application.

10. Furthermore, if the application is rejected, SARS should indicate how it will assure taxpayers that the information will not be used to audit the relevant transaction.

11. It is imperative that conflicts of interest are managed effectively.

12. A pilot project for APA implementation is planned as soon as possible after the legislative framework has been put in place. It is further stated that the APA pilot will only accept bilateral APA applications.

13. Whilst we understand the approach to roll this out on a pilot project is to only accept bilateral applications, it is uncertain why SARS has not considered unilateral APAs at this time as this will assist taxpayers in obtaining tax certainty for companies transacting with a jurisdiction where there is no treaty with South Africa. Furthermore, unilateral APAs do not require MAP involvement and therefore should be quicker and simpler to achieve. Taxpayers should be given the opportunity to decide if they would like to apply for a unilateral APA.

14. Submission: We submit that the simpler process of implementing a unilateral APA should be provided together with bilateral APAs and then followed by multilateral APAs.

15. Despite the above submission, practically speaking most transfer pricing (TP) transactions involve various tax jurisdictions so this may limit, quite significantly, the number of persons applying for an APA during the pilot phase.

16. Submission: Consideration should be given to expanding the pilot to include multiple tax jurisdictions. In this regard, it appears that SARS rejects many Mutual Agreement Procedure (MAP) applications, notably when these are with African jurisdictions.

17. It would be good to get SARS' views on negotiating bilateral APAs with African jurisdictions or whether SARS intends their pilot cases to be with OECD countries.

### **Section 90A – Definitions**

18. The definition of 'affected transaction' in section 90A is an "affected transaction" as defined in section 31 of the Income Tax Act.

19. Submission: This definition should be limited to the part (a) of the 'affected transaction' definition only, as contained in section 31 of the Income Tax Act as part (b) requires that the transaction etc. is not at arm's length and that is why the Public Notice refers to potentially affected transactions.

20. Furthermore, the definition implies that international related party dealings between a permanent establishment and its head office or between two permanent establishments of the same entity, should not fall within the scope of the 'affected transaction' definition.

21. Submission: SARS should clarify if this is intentional or not.

22. 'Critical assumptions' are defined in section 90A as meaning the fundamental factors that are necessary for each party to an APA to remain bound by the APA.

23. Submission: SARS should provide guidance on what factors will be included in these critical assumptions.

### **Section 90E – Fees for APAs**

24. The Commissioner may, by public notice, prescribe fees payable for an APA by an applicant. Included in these fees is a cost recovery fee for processing an application.

25. Submission: SARS should give some indication of the proposed fee structure. The fact that there are fee levels could create some concern without knowing the proposed amounts.

26. We also suggest that SARS considers international best practice on fees. Our understanding is that pre-filing fees are uncommon, and a once-off fee at the time of formal application seems to be the norm.
27. SARS should also clarify whether the cost recovery fees will include international travel of SARS officials and/or other indirect costs and if the taxpayer will be consulted on this.

### **Section 90F(1) – Pre-application consultation**

28. After an application is submitted by an applicant, SARS has 60 days to arrange a pre-application consultation meeting with the prospective applicant (section 90G(2)). SARS then has 90 days from the last pre-application meeting to notify the applicant if the applicant may submit an APA (section 90G(4)).
29. The number of days afforded to SARS above appear skewed in favour of SARS. If the 60 days is business days then that's approximately 3 months, and the 90 days will be four and a half months that a taxpayer is required to wait.

30. Submission: Consideration should be given to shortening the time periods to 30 and 60 business days respectively.

### **Section 90G – Application for an APA**

31. Section 90G(2)(a) and (b) provide that an APA application may not be made in respect of a tax period that (a) ended before the date on which the application is submitted or (b) is due to end within 180 days from the date on which the application is submitted.
32. It is our understanding that APAs will be operative for specified periods as soon as the APA is in force as set out in the arrangement. APAs, however, can take a considerable length of time to negotiate and to reach agreement. This may lead to a situation where some of the years for which the arrangement is sought will have already passed and the taxpayer may have already needed to submit its return for those years.
33. Accordingly, taxpayers may also want to be able to “roll-back” the arrangement as an appropriate means of resolving a TP issue in earlier years although, in bilateral or multilateral cases, the possibility of doing so will depend on the ability or willingness of the tax authority of the other country or countries involved to do so.

34. Submission: It is recommended that the draft legislation allows (where the tax authority of the other country or countries permit) the “roll-back” of an APA. This could be a useful settlement tool and provide certainty prospectively for taxpayers and should be afforded consideration in the proposals.

35. Section 90G(2)(c) provides that an APA application may not be made in respect of a tax period that is subject to inspection, verification or audit under Chapter 5.



36. Submission: The scope of this provision is too wide. Ideally transactions should not be excluded where it makes sense to roll the audit findings/settlement into an APA as mentioned in point 34 above.

### **Section 90J – Rejection of an application**

37. This section provides that SARS may reject an application if the application does not meet the requirements in the legislation including, *inter alia*, if the value of the affected transaction is less than an *amount prescribed by the Commissioner* by public notice or if the application is in respect of a *frivolous or vexatious issue*.

38. Submission: SARS should give some indication of the "minimal value of affected transactions" it proposes introducing. We suggest that this aligns to the Master File/Local File thresholds.

39. SARS should also provide clarity on how it will determine if an application is in respect of a frivolous or vexatious issue.

40. Section 90J does not explain what the process is if an applicant disagrees with SARS' rejection of its APA application.

41. Submission: We suggest that before issuing a formal rejection notice, an opportunity is provided to the taxpayer to explain/present its case of why an APA should be allowed.

42. Clarity should be provided on what the process is if an application is rejected by SARS and the applicant disagrees with this, for instance, who can this be escalated to and would the disagreement be covered by a review process under section 9 of the TAA.

43. Clarity on whether SARS can still use the factual information that was disclosed as part of the APA application process should also be provided.

### **Section 90K – Processing an application**

44. SARS is afforded 90-day intervals to inform the applicant of the progress of its application (section 90K(2)).

45. We are of the view that this period is too long.

46. No clarity is provided on what happens if this time period is not adhered to by SARS.

47. Submission: The period for SARS to provide an applicant with progress on an application should be reduced to 60 days.

48. Clarity should be provided on what happens if SARS does not adhere to the 60/90 days.

49. Section 90K(3) states that SARS must prepare a preliminary APA based on the information provided in the accepted application. This provision does not seem to empower the Commissioner / competent person to enter into an APA drawn up by a foreign Revenue Authority and not SARS.

50. Submission: This situation should be catered for in the legislation.

### **Section 90L – Finalisation of an APA**

51. Section 90L(4) provides that an APA will not come into effect until subsections 1), 2) and 3) of section 90L are met.
52. These subsections deal with signing of an APA by the applicant, SARS officials and the competent authority

53. Submission: Time limits should be inserted in respect of these processes.

### **Section 90M – Compliance report**

54. Section 90M requires an applicant to submit a compliance report to SARS within 60 days from the end of a tax period that falls within the duration of an APA or from the date on which the APA is terminated.
55. To make such a compliance burden a requisite for qualification of the APA programme is counter intuitive considering the Headquarter Company regime also has a similar requirement for annual reporting to the Minister of Finance and there has been little to no uptake of that regime, yet the taxpayers have a heavy compliance burden in this regard.
56. At point 4.6 on page 2, it states that after the APA holder submits an APA compliance report, the *"APA unit conducts a compliance review and, if necessary, audit after receipt of the compliance report"*. A taxpayer may hold the view that its risk of a TP audit is higher where it enters into an APA (which might be rejected) resulting in additional compliance costs for the taxpayer (ie. if approved the taxpayer would be subjected each year to a review and possible audit).
57. This additional compliance burden may deter taxpayers from entering into the APA programme.

58. Submission: SARS can audit or raise a TP query whether there is an APA or not to confirm that the APA is being complied with. We therefore submit that the need for this extra layer of compliance is not necessary.

59. The time frame provided for the applicant to submit a compliance report is only 60 days from the end of a tax period. This period is too short as the applicant would also be preparing for the year end audit etc immediately after the entity's year end, and whilst this



would form part of that preparation, the time frame is considered too short to collate all the information required.

60. Submission: It is recommended that the compliance report is submitted to SARS within 12 months after the financial year end, in line with other TP submission deadlines.

61. It not clear if or how the proposed compliance reports will be shared with the other tax jurisdiction(s).

62. Submission: It should be clarified whether SARS will share the compliance reports with the other jurisdictions or whether the taxpayer must submit it separately.

### **Section 90N(2) – Extension of an APA**

63. Section 90(2) provides that where the facts and circumstances have not changed materially from the APA application, an applicant may request SARS to extend the APA not less than 60 days before the date on which the agreement is due to expire.

64. SAICA welcomes the fact that this extension is possible, but subsection (2) simply states that SARS may grant the extension, it does not make provision as to whether SARS will obtain the necessary authority from the Competent Authority in the other tax jurisdiction for instance.

65. Submission: The wording of this subsection should be amended to state that “*Subject to SARS obtaining the approval from the competent authority as noted in section 90L(3), SARS may grant the extension ...*”

66. Section 90N(6) stipulates that SARS may reject a request to extend an APA and may direct the applicant to submit a new application under section 90G.

67. Submission: SARS should stipulate what safeguards it will implement to prevent extensions being declined in favour of new applications in order to secure higher fees.

### **Section 90O – Termination of an APA**

68. In terms of section 90O(3)(b) a court can overturn or modify an interpretation of the legislation on which an APA is based in which case the APA will cease to be effective from the date of judgment unless—

(i) the decision is under appeal;

(ii) the decision is fact-specific and the general interpretation upon which the agreement was based is unaffected; or

(iii) the reference to the interpretation upon which the agreement was based was *obiter dicta*.



69. Submission: Section 90O should be deleted as in our view SARS is simply seeking to align this with section 85 of the TAA which applies to Advance Tax Rulings (ATR). Section 85 would make sense in the context of an ATR as the ATR relates to *an interpretation of law* that is sought by the taxpayer.
70. However, in the case of an APA the taxpayer is not seeking an interpretation of law but rather an *agreement on the price* of an affected transaction which does not heavily rely on the interpretation of the legislation but rather the application of the OECD transfer pricing methodology.

### **Section 90P (2) – Record retention**

71. This section only affords the applicant 30 days from receipt of written request from SARS to submit information to confirm compliance with the APA.
72. This information can be extensive and may result in additional time being required by a taxpayer.
73. Only ONE extension is available to the taxpayer which may be problematic where for example the initial request is sent to an incorrect address or is misplaced and does not reach the relevant person timeously. The final demand may then not be sufficient time for the applicant to collate and submit all information required.

74. Submission: The timeframe to submit additional information to SARS should be extended from 30 days to 60 days and there should be at least 2 extensions granted to taxpayers considering the current practical challenges with the delivery of SARS' communication to taxpayers.

### **Conclusion**

75. We once again thank 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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*The South African Institute of Chartered Accountants*