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Submission File

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South African Revenue Service

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

Dear SARS

COMMENTS ON THE DISCUSSION DOCUMENT ON ADVANCE PRICING AGREEMENTS

1. We herewith take an opportunity to 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 discussion document entitled "Advance Pricing Agreements" released on 12 November 2020 proposing the gradual phased implementation of an Advance Pricing Agreements (APA) system in South Africa but only after other priorities, like curtailing BEPS, and precursors, like building transfer pricing capacity, have been addressed. This system will aid in promoting certainty with regard to transfer pricing for Multinational Enterprises (MNEs) operating in South Africa.
2. Our submission includes a discussion of some of the most pertinent matters, which we believe require the most attention at this stage.

Effectiveness of Mutual Agreement Procedures

3. In order for South Africa to maintain its status as a leader on the African continent and its position as a gateway for foreign investment into the rest of Africa, SARS acknowledges that an APA program would be useful in improving its working relationships with the country's main trading partners and states that its gate-way-to-Africa incentives can be enhanced by an APA program.
4. Before commenting on the introduction of an APA program, the effectiveness of mutual agreement procedures (MAP) undertaken by SARS would be useful as it would provide an indication of the probability of a bilateral APA program being effective.

5. According to the OECD, the minimum standards for Action 14 of the BEPS Action Plan require a MAP to be closed within 24 months of receipt on average. The 2019 data¹ on the number of MAPs concluded by SARS indicates that it takes on average 41.42 months (49: 2018) to complete transfer pricing MAPS started before 1 January 2016 and 20.68 (15.42: 2018) months for those started from 1 January 2016.
6. If the most recent cases (those started from 1 January 2016) are used to judge the effectiveness of the SARS MAP procedures, it would appear that despite the time period taken to close a MAP having increased from 2018 to 2019, SARS is still within the acceptable timelines of 24 months as recommended by the OECD.
7. Submission: It is encouraging that SARS is within the international guidelines for completion of MAP and this bodes well for the proposed APA program.
8. The discussion document mentions the importance of making dispute resolution mechanisms more effective, however, South Africa does not have mandatory arbitration clauses in its double taxation agreements (DTAs). Notwithstanding the more recent reduction of time it takes to conclude MAPs as set out in the statistics, MAPs can be long and drawn out and taxpayers would thus welcome an APA program but only if this can be negotiated within a reasonable time period.
9. This is particularly relevant in light of the fact that the usefulness of APAs is being questioned by many taxpayers and some have even indicated that they would prefer to opt for joint international audits instead.
10. Submission: The introduction of an APA program with its bilateral nature would to some extent require SARS to operate more effectively and invest its scarce resources into this program which might affect other services.
11. An APA program that will not be effective in resolving disputes timeously would ultimately not be used by taxpayers and would divert scarce resources away from other areas requiring SARS' attention.

Capacity and funding constraints

12. SARS raises the lack of sufficient skilled individuals in transfer pricing as a key inhibitor to an APA program. We understand that SARS would not necessarily be amenable to working with advisory/law firms due to potential conflicts of interest but note that the skills issue will either make the proposed APA programme successful, or, if this is not overcome, it will derail any attempt to introduce it.
13. A further concern with regard to skills is that it is not only the lack of sufficient skilled individuals within SARS that can deal with these types of matters that is of concern but

¹ <https://www.oecd.org/tax/dispute/2019-map-statistics-south-africa.pdf>

also ensuring the independence of the APA team from the SARS audit team. The audit team should not be the same team deciding an APA matter.

14. Submission: Until such time as SARS has managed to establish its own APA team (independent from its audit team) it could, like other African countries and as was suggested by the Davis Committee, outsource the APA work to external firms. SARS could consider accrediting certain independent specialists and/or tax inspectors without borders to assist with the APA process.
15. SARS could then also consider offering assistance to other (developing) countries with setting up an APA programme and providing skilled professionals to do training etc.
16. SAICA acknowledges the funding constraints SARS is currently faced with but hopes that the Commissioner's plea to the Minister of Finance and Parliament in October 2020 for further funding is heard in order to *inter alia* upskill more SARS staff in this important area of taxation.

17. SARS refers to a draft 2012 OECD paper that stated whilst the OECD maintains that an APA program will not generate revenue due to it only attracting compliant taxpayers, it is important to acknowledge that taxpayers require certainty. In addition, with tax certainty having become one of the critical tax related aspects for businesses in recent times² and with transfer pricing outside the scope of the advance tax ruling program, an APA is the best route to follow.

18. Submission: SARS should take into consideration that it should cost them less in time and resources to negotiate an APA than to undertake an audit. An APA will also relieve a large amount of taxpayers from the risk review process and SARS specialists could focus on risk reviews in respect of taxpayers not involved in APAs. It is also noted that many audits result in ADR/Court proceedings, which are again costly to both SARS as well as taxpayers. Going the APA route would help reduce this cost.
19. Furthermore, many taxpayers would be open to a pilot program and would be happy to pay a fee for the APA in order to obtain certainty and reduce the time period in which to obtain this.

Bilateral versus unilateral and multilateral

20. From the discussion document it is apparent that SARS' preference is to initially roll out bilateral APAs after which it will consider multilateral and unilateral APAs. During the settlement process, many taxpayers often request that the later years after the audit period are included in the settlement agreement.

21. Submission: All three African Revenue Authorities mentioned in the discussion document have included multilateral and unilateral APAs in their legislation in addition to bilateral

² Refer OECD and IMF progress report on tax certainty 2019: <http://www.oecd.org/tax/g20-report-on-tax-certainty.htm>

APAs. Taking this into account and the general request by taxpayers to include later years post the audit into settlement agreements, SARS should consider allowing at least a unilateral APA as a dispute resolution tool (roll back) initially too.

Customs and Excise

22. SARS mentions that an area for consideration is the impact of an APA for customs and excise purposes. The methods used to reach an agreement on disputes regarding income tax matters and customs and excise matters are not dissimilar, so if an agreement is found it should provide certainty for both income tax, and customs and excise purposes.

23. Submission: APAs should also be applicable to customs and excise levies because there cannot be a disparity between the treatment of the different taxes by SARS as this would undermine an APA program.

Procedural requirements

24. SARS appears to be leveraging from international precedent when setting the procedural requirements and information to be provided for an APA.

25. Submission: We fully support SARS using the vast amount of international precedent with regard to procedural requirements especially with regard to ensuring that both jurisdictions involved in an APA are privy to the same information and that the adoption of "critical assumptions" in the APA are aligned.

Binding effect of APAs

26. SARS states that a taxpayer that is not party to an APA should not be able to rely on the APA.

27. Submission: APAs should be kept confidential and should not be given the same status as binding private rulings (BPR). APAs are very fact specific and subjective and do not generally explain the interpretation of a point of law, therefore we agree that a taxpayer not party to an APA cannot rely on it in the same way as for a binding private ruling.

General

28. If South Africa is serious about implementing an APA programme then the buy-in of MNEs is needed. The release of this discussion paper and the request for comment, signals a proactive approach by SARS, which will very likely result in a more positive response from MNEs and will encourage them to embrace the proposed APA system.

29. Drafting a simple, but efficient framework of APA regulations and ensuring appropriate enabling legislation will be important as a first step in this process. SARS acknowledges that it will take a few years to implement an APA system so it is important to start with the process as soon as is practical and this should commence as soon as possible. The urgency of this matter cannot be underestimated, especially considering the economic situation South Africa finds itself in, and it should thus be given undivided attention by



SARS to ensure that the President's call for more foreign businesses to invest in South Africa is actually realised.

Yours sincerely

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**Chair: SAICA Transfer Pricing
Committee**

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The South African Institute of Chartered Accountants