Ref #: 620966
Submission File

7 July 2017

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), and the external Business Requirements Specification document on CbC and Financial Data Reporting (BRS: CbC and FDR) released by the South African Revenue Service (SARS).

2. We would also like to thank you for the extension to submit these comments to 7 July 2017.

OBSERVATIONS

The information required to be submitted in "the return"

The Draft CbC Notice

3. 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 Regulations[1], to have the meaning so assigned.

4. Paragraph 2.1 of the CbC Draft Notice refers to "*information specified in the BRS … in relation to the CbC Report…*".

[1] 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

5. 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 13[2]. This Annex provides very detailed and clear guidance in relation to the CbC Report which is required.

6. 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.

7. 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".

8. 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.

9. Further, the heading of the Draft CbC Notice states that SARS will require "*the submission of … master file and local file returns*." Further, in paragraph 2 of the Draft CbC Notice, SARS again reiterates that certain persons "*must submit a return in the form and containing the information specified in the BRS … relating to master file and local file*." However, after reviewing the BRS: CbC and FDR, it is clear that SARS in fact requires the submission of Master File and Local File *documents* (as referred to on page 21 of the BRS: CbC and FDR) in line with OECD guidelines contained in Annex I and II to Chapter V of OECD's Final Report on Action 13, *and not a return per se*.

10. Submission: To avoid confusion, we recommend that SARS defines the terms Mater file and Local File in the Draft CbC Notice and explicitly states therein that in relation the Master File and Local File no return is required to be submitted but rather the Master File and Local File documents, which should comply with Annex I and II to Chapter V contained in OECD's Final Report on Action 13, is required to be uploaded.

11. Therefore, throughout the Draft CbC Notice which only refers to a "return", should be corrected to make reference to the Master File and Local File documents too.

The BRS: CbC and FDR

Definitions

12. The following recommendations apply in relation to the definition of an "MNE Entity" (page 5 of the BRS: CbC and FDR) –

12.1 It is suggested that the "and" at the end of paragraph (b) of the definition of an "MNE Entity" be substituted with an "or";

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

12.2 In paragraph (b) and (c) of "MNE Entity", it is not clear as to what "law" is referred to, which obligates an MNE Group or other Entity of an MNE to submit a Master File and Local File and we will appreciate it if SARS would clarify this; and

12.3 Paragraph (b) of "MNE Entity" refers to a Constituent Entity of an "MNE Group". This creates confusion as this would effectively mean that a Constituent Entity which does not meet the criteria of consolidated revenue of R10 billion or EUR750 million would not be an "MNE Entity", as it is currently defined, and we will appreciate it if SARS would clarify this.

13. A CbC "Reporting Entity" is defined on page 6 of the BRS: CbC FDR. However, the reference to "Reporting Entities" (pages 11, 12, 17, top of page 18 of the BRS: CbC and FDR) raises the question as to why SARS would refer to the CbC Reporting Entity in the plural sense since there is only one Reporting Entity per MNE. It also raises the question as to how SARS will consolidate the reports if there will only be one Reporting Entity. Accordingly, it is submitted that this may have been an unintended use of the word "Entities", instead of referring to a "Reporting Entity" and we will appreciate it if SARS would either clarify this or amend the BRS: CbC FDR by substituting the word "Entity" for "Entities".

14. Submission: We submit that SARS should consider the above recommendations in relation to the required corrections and clarifications in the BRS: CbC FDR.

Master File

15. It would appear in clause 7 of the BRS: CbC and FDR that SARS assumes that each entity of an MNE has access to the Group's Master File. In our experience, this is not the case and is not always practical. We request that SARS indicates other means of being compliant when an entity within the Group does not have access to the Master File.

16. It is indicated on page 11 of the BRS: CbC and FDR, that the OECD indicated in Action Plan 13 that –

"any MNE must prepare the master file and local file and make this available if so obliged under the domestic law of the relevant jurisdiction. Under South African law, the SARS Commissioner may require the filing of the master file and the local file from any MNE Entity by way of public notices under section 25 of the TAA."

Paragraph 2.2 of the Draft CbC Notice currently requires that "a person" whose aggregate potentially affected transactions exceed R100 million must submit the information in relation to the Master and Local File. We suggest that this "person" be specified in the BRS: CbC and FDR by establishing a definition of which MNE Entities would be required to file a Master File and Local File.

17. It is indicated on page 11 of the BRS: CbC and FDR, that there is a difference between the meaning of the term "MNE Group" under CbC Regulations and the term "Group of Companies" as defined in section 1 read with section 31 of the Income Tax Act.

For CbC Regulations, "MNE Groups" means only those groups with total consolidated turnover of more than R10 billion / Euro 750m. An "SA MNE Group of companies", with group consolidated turnover below the R10 billion may also be referred to as an "MNE" but does not constitute an "MNE Group" in the CbC Regulations. For purposes of the BRS: CbC and FDR, the term "MNE" will be used collectively unless otherwise indicated (in the middle paragraph of page 10).

This can create confusion, but we assume this is done for Master File and Local File purposes where SARS would expect to see an MNE's Master File and Local File but not necessarily the CbC report.

18. Submission: We request that SARS takes the above points into account when assessing taxpayer's compliance with the Draft CbC Notice.

Local file

19. Clause 7 of the BRS: CbC and FDR stipulates (on page 15) that Local Files for all MNE Entities must be compiled and kept. As the definition of an "MNE Entity" is ambiguous, it is still unclear who must compile and file, or compile and keep a local file (as part of record keeping requirements). Thereafter, a reference is made to "material" transfer pricing positions affecting a specific jurisdiction.

    As stated above in point 12, paragraph 2.2 of the Draft CbC Notice currently requires that "a person" whose aggregate potentially affected transactions exceeds R100 million must submit the information in relation to the Master and Local File. We suggest that SARS should clarify what "material" means in the BRS: CbC FDR in relation to the filing of a Local File, rather than requiring taxpayers to refer to paragraph 2.2 of the Draft CbC Notice.

20. Appendix 3 of the BRS: CbC and FDR (on pages 32 and 33) summarises information to be supplied in the Local File, in line with the OECD's Final Report on Action 13. That said, paragraph 8.3 of the BRS: CbC and DRF does not refer to Appendix 3 of the BRS document and it is therefore unclear when Appendix 3 should be taken into account. SARS should clearly stipulate what Local File information is need to be submitted on eFiling.

21. Submission: We submit that SARS should clarify what "material" means in the BRS: CbC FDR in relation to the filing of a Local File and clearly stipulate what Local File information is need to be submitted on eFiling.

CbC Reporting

22. Clause 8.1 of the BRS: CbC and FDR (on page 17) makes reference to *"the functions performed, assets owned"* to be included in the CbC Report*, "as highlighted in the Action 13 (2015) Final Report"*. However, this is not prescribed in the CbCR template issued by the OECD as contained in Action Plan 13, since the template refers to "Main Business Activities" and "Tangible Assets other than Cash and Cash Equivalents", as opposed to "functions performed" and "assets owned" as referred to in the BRS: CbC FDR. We

would appreciate that this be clarified, alternatively corrected, as *"the functions performed, assets owned"* relate to information that would typically be contained in the Master File or Local File, as opposed to the CbC Report.

23. Appendix I, 4, 5 and 6 of the BRS: CbC FDR (on pages 24 to 29) require additional mandatory fields, in the CbC Report, such as "TIN", "Country Code", "Res Country Code", "Address", "Currency Code" and "Business Activity Code", which are not referred to in the prescribed in the CbCR template issued by the OECD as contained in Action Plan 13. Given that not all taxpayers have had the benefit of accessing the Country-by-Country Reporting XML Schema: User Guide for Tax Administrations and Taxpayers (which is referred to in the definitions section of the BRS: CbC FDR, and which refers to such additional mandatory fields), and such taxpayers may have already incurred costs to ensure that their CbC Report conforms to the CbCR template issued by the OECD as contained in Action Plan 13, these additional requirements will require further investment in resources by such taxpayers in order to have these additional fields added to the reporting systems already developed to comply with the OECD criteria. This requirement cannot be complied with overnight from a systems perspective.

24. Submission: We recommend that taxpayers should be allowed to submit their first CbC Report as an upload in the OECD format (which represents the original requirement that was communicated in the CbC Regulations) for years of assessment commencing on or after 1 January 2016. The additional fields required by SARS should only be a requirement for years of assessment commencing on or after 1 January 2017.

25. We request that SARS clarifies what is meant by "*the functions performed, assets owned*" to be included in the CbC Report, as referred to in the BRS: CbC FDR, given that it is not consistent with what is required by the OECD to be included in the CbC Report.

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

26. We note that the Reporting Entity will be required to enter the required CbC Report data in the CbC01. Given that the CbC01 form cannot yet be accessed on eFiling, in order to test the application from a taxpayer's perspective, on the face of it, it appears that it will be a manually intensive task, especially where the taxpayer is a multinational and has operations in a number of jurisdictions.

27. Submission: We recommend that SARS expedite the publication of the required eFiling return forms in order to provide taxpayers adequate time to understand the CbC XML Schema format.

28. Certain Reporting Entities have already developed in-house systems which will automatically produce the originally proposed OECD CbC Report. However, such efforts and investment by taxpayers appears to be "in vain" if there is no option to upload the OECD compliant CbC01 Report on the eFiling system, especially if the information is required to be replicated, manually.

29. Submission: As recommended above, taxpayers should be allowed to submit their first CbC Report as an upload in the OECD format (which represents the original requirement that was communicated in the CbC Regulations) for years of assessment commencing on or after 1 January 2016. The additional fields required by SARS should only be a requirement for years of assessment commencing on or after 1 January 2017.

30. Clause 8 of the BRS: CbC and FDR (on page 17) stipulates that there will be no manual branch submissions.

31. Submission: Given that no manual submissions will be allowed, SARS should urgently issue guidance on the form and highlight the mode of notification by the taxpayer where an entity is not required to file the CbC return in South Africa but is required to notify SARS of the entity in the MNE Group filing the CbC return and the jurisdiction where the CbC return is filed.

32. Paragraph 4 of the Draft CbC Notice requires the return to be submitted *"electronically by using the SARS eFiling platform"*. This is further reiterated in the BRS: CbC and FDR (on page 23) where it is confirmed that *"the system will allow the specific user (technical user) to upload multiple types of information (MNE Structures, policies and financials) via e-Filing and the size of the files to be uploaded will be limited to 100 megabytes per individual files…"*

33. Submission: We note that the current issues (and size limitations referred to above) experienced with the e-Filing platform need to be taken into account, in terms of maximum limits for uploading documents, especially given that the Master File and Local File documentation is likely to be quite large.

34. We note that SARS states in items 10 and 11 of section 8.3.1 of the BRS: CbC and FDR (on page 21) that it will "*manually validate the information" and "send immediate response to the user … regarding validation outcomes*" with respect to the Master File and Local File.

35. Submission: We recommend that SARS further explains exactly how it would undertake validating such qualitative information contained in a Master File and Local File and in terms of what criteria it will be validated. Further, SARS should confirm whether taxpayers will be granted the opportunity to re-submit the documents without raising red flags or triggering scrutiny or audits.

36. The Draft CbC Notice has not made it clear whether "the return" is required to be submitted together with the reporting entity's annual income tax return or separately.

37. Submission: The timing of when the CbC Return needs to be submitted in relation to the submission of the reporting entity's annual tax return needs to be clarified, 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, reporting entities may be in the process of

finalising their tax return, which will be submitted before the Draft CbC Notice is issued in final form.

38. It is further submitted that if the CbC Return is required to be submitted together with the reporting entity's annual income tax return, then transitional arrangements are required for taxpayers which have submitted their income tax returns before the Draft CbC Notice is finalised.

39. Clause 6 of the BRS: CbC and FDR refers to *"master files and/or local files"* (on page 14). This is ambiguous and creates uncertainty as throughout both the Draft CbC Notice and the BRS: CbC and FDR, given that the reference is to the requirement to submit both Master File and Local Files and there is no mention of where it is one or the other.

40. Submission: SARS is requested to clarify whether it seeks to always receive both Master File and Local File, especially in the event that the CbC Report is not required.

41. Clause 8 of the BRS: CbC and FDR (in last paragraph on page 16) refers to instances where *"the user is uploading financial data relating to the master file and the local file (policies, diagrams and transactions)…"*, and thereafter clause 8.3.1 refers to the submission of *"financial information"*. The inclusion of the word "financial" crates confusion, as not all of the data contained in a Master File and Local File is numerical in nature, which is what "financial" is commonly understood to mean.

42. Submission: We submit that the word "financial" should be deleted, so as to avoid the confusion, which has been created regarding exactly what information is required and whether it is limited to numerical information or not.

The date by which the return is to be submitted

43. 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.

44. 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.

45. 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.

46. Paragraph 3.2 of the Draft CbC Notice requires that a return (however after reading the BRS: CBC and FDR, this appears to be a *document*) 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.

47. Therefore, paragraph 3.2 of the Draft CbC Notice has created a new reporting requirement in relation to the "master file" and "local file", which was never contemplated in the CbC Regulations.

48. Therefore, issuing a draft notice and applicable BRS in June 2017, requiring such information 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.

49. 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 information by 31 December 2017, in respect of its previous financial year ending 31 December 2016, i.e. it will only be afforded 6 months' notice from the date of release of a *draft* notice. The period may even be less given that taxpayers are sometimes constrained by internal processes from acting on any draft legislation and will be obliged to wait for the final notice until such time as they are provided the financial resources to comply.

50. It is important to defer to case law when considering retrospective legislation, since this has been the topic of some debate and judicial enquiry of late, i.e. when is retrospective legislation allowed and when is it unacceptable.

51. In the case of *President of the Republic of South Africa v Hugo* 1997 (4)(SA 1 (CC) the following was stated:

"The need for accessibility, precision and general application flows from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law."[3]

52. In a recent judgement in the High Court (*Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue and Another* (GNP), unreported case no 87760/2014 of 29 May 2017, ("the Pienaar case") Judge Fabricius confirmed that the South African Constitution does not have the constraint that knowledge of the proposed retrospective amendment to the law is fundamental to the rule of law[4]. In this regard, Judge Fabricius held specifically that he was not aware of any authority or legislative provision that provides that a fairly precise warning needed to be given before the legislature could pass retrospective legislation, whether in general, or in the case of a tax statute. In the latter instance, economic demands must be considered in the context of the purpose

[3] http://www.thesait.org.za/news/95939/Unconstitutionality-of-retrospective-or-retroactive-tax-legislation-.htm

[4] At para 97, p140

and effect of an intended statute. If the tax statute is rationally connected to a legitimate purpose, no precise warning is required, if one at all.[5]

53. In the Pienaar case, the retrospective amendment was required, without clear warning, to ensure that taxpayers were not provided with an opportunity to enter into these type of avoidance transactions in the event of the legislation only having been amended prospectively, by giving taxpayers due warning.

54. However, it is submitted that the current proposed obligation to submit a Master file and Local file to SARS within the 12 month period referred to above, applicable to all taxpayers with a year of assessment commencing on or after 1 January 2016, should be distinguished from the Pienaar case above. The Pienaar case dealt with the legislature addressing a loophole, i.e. the avoidance of paying tax. The current proposed amendment (applicable retrospectively) is purely of a compliance nature. These documents could simply be provided to SARS upon request.

55. The Draft CbC Notice, in essence, provides taxpayers with a warning, i.e. submission of a Master file and Local file is obligatory for companies with years of assessment commencing on or after 1 January 2016. It is stressed however, that this is only a 6 month warning, and the warning is still in draft.

56. Providing taxpayers with only 6 months to comply is not reasonable. The sheer volume of information that is required to compile a Local file and Master file would not make a warning period of 6 months sufficient. All the required information is also not readily available and would take time to obtain and prepare.

57. Taxpayers should be in a position to "know of the law" in order to "confirm his or her conduct to the law". Taxpayers only became aware of the law, i.e. the submission requirement, after the end of the reporting period in question, and 6 months prior to the submission deadline, which is insufficient notice to put them in a position to "confirm his or her conduct to the law".

58. Even though the Briefing Note, which accompanied the Final Notice on Document Retention[6], stated that *"master file and local file returns will be submitted under section 25 of the Tax Administration Act, 2011"* (the TAA), the period to which such Master file and Local file should be prepared was not provided, nor was a due date for such submission provide in the Briefing Note. In addition, given that this statement was contained in the Briefing Note, which accompanied the Final Notice on Document Retention, and the applicable date for the retention of documentation in terms thereof was years of assessment commencing on or after 1 October 2016, it is reasonable to expect that the submission requirement for Master and Local files referred to would at least coincide with that date. No one could have predicted that the submission of Master and Local files would be required for a period earlier than that!

[5] At para 63, p94. Also https://www.cliffedekkerhofmeyr.com/en/news/publications/2017/Tax/tax-alert-9-june-Important-judgment-on-the-constitutionality-of-retrospective-legislation.html

[6] 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

59. SARS may argue that the non-submission of Master and Local files may result in it failing in its obligations in terms of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (MCAA), signed by South Africa in January 2016, as stated on page 13 of the BRS: CbC and FDR, which indicates that such failure will result in a "*public non-compliant rating of SA"* which "*may have an adverse impact on other international ratings*". However, we submit that there is no evident loss to the fiscus due to the non-submission of a taxpayer's Master and Local file (which may be the only reason to warrant such retrospectivity of application), since SARS is not required to exchange the Master and Local file as part of its mutual exchange of information commitment; it is only obliged to submit the CbC Report, as stipulated on page 11 of the BRS: CbC FDR, as follows –

"Current regulation stipulates that the filing of the CbC Report is compulsory for MNE Groups meeting the threshold. However the Action 13 (2015) Final Report provides that any MNE must prepare the master file and the local file and make this available ***if so obliged under the domestic law*** *of the relevant jurisdiction. Under SA law, the SARS Commissioner* ***may require*** *the filing of the master file and the local file from any MNE Entity by way of public notices under section 25 of the TAA."* (Underlining and bold text indicates own emphasis).

60. Therefore, arguably, SARS will not face any adverse international consequences if it does not oblige taxpayers to submit Master and Local files for years of assessment commencing on or after 1 January 2016, since the requirement to submit such files is purely dependant on SARS' discretion, as it is not a current internationally required regulation.

61. Therefore, SARS' obligation to exchange the Master and Local file, on request, is purely dependant on South Africa's legislation requiring taxpayers to submit such information. The implementation of such legislation is purely at SARS' discretion.

62. As mentioned above in relation to the Briefing Note, SARS could have made its intention clear at that point in time to require the submission of Master and Local files, in compliance with the OECD's requirements, for years of assessment which coincide with the period applicable for the submission of the CbC Report, i.e. for years of assessment commencing on or after 1 January 2016. It is submitted that even if SARS had made its intention clear at that point in time, i.e. on 28 December 2016, it still would have been very late for taxpayers to comply for years of assessment commencing on or after 1 January 2016, but they would at least have had 12 months' notice, as opposed to the current 6 months' notice.

63. We submit that the delay in making this requirement publicly known was not caused by taxpayers and it is unreasonable for SARS to expect taxpayers to have to incur the burdensome costs of additional compliance with requirements which SARS has chosen to legislate retrospectively.

64. We also submit that SARS has ensured that it will meet its obligations to automatically exchange the CbC Report, which is foundational to its international commitments

entered into in January 2016 in terms of the MCAA. Therefore, it should be incumbent on SARS to manage international expectations in relation to the exchange of Master and Local files for the same period as the CbC Report, purely upon request, given that SARS has not provided taxpayers with sufficient notice in this regard.

65. Given that the OECD guidelines for Master File and Local Files are to be followed, and the information required by the Draft CbC Notice would, in our view, substantially overlap the information required by the record keeping requirements in the Final Notice on Document Retention, it would make more sense to align the date of the submission of a Master and Local file with these record keeping requirements. Therefore, the earliest that the Master File and Local File submission requirements should possibly be is in respect of years of assessment commencing on or after 1 October 2016, however even this effective date is arguably punitive towards taxpayers, given the extent of the information required.

66. Submission: It is submitted that since this reporting requirement was not in effect for years of assessment commencing on/after 1 January 2016 ending prior to the publication of the Draft CbC Notice, 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.

67. Furthermore, we submit that the filing date for a return required in terms of paragraph 2.2 of the Draft CbC Notice, in accordance with the requirements stipulated in the BRS: CbC FDR (which relates to Master and Local files in accordance with the OECD's Action 13) should be amended to years of assessment commencing on or after 1 January 2018 in order to allow taxpayers sufficient time to prepare such detailed documentation in the prescribed format.

68. Given that SARS may face requests from Tax Authorities in other jurisdictions for a Master or Local file, following the exchange of a Reporting Entity's CbC Report (for periods commencing on or after 1 January 2016), we submit that SARS could possibly request taxpayers who meet the requirements of paragraph 2.1 and 2.2 of the Draft CbC Notice to voluntarily submit their TP documentation which they currently have in place, and which they have voluntarily prepared (given that South Africa only introduced mandatory record keeping in accordance with the Final Notice on Document Retention for years of assessment commencing on or after 1 October 2016, and which documentation was not in accordance with the OECD's requirement for Master and Local files, as required in Annexures 2 and 3 of the BRS: CbC FDR) together with their annual corporate income tax return for years of assessment commencing on or after 1 January 2016.

Duplicate reporting

69. Paragraph 2.2 of the Draft CbC Notice requires that a person who meets the set threshold must file the *BRS: CbC and FDR relating to the master file and local file*.

70. 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.

71. In these instances, there may be some duplication in the filing of the Master File information by the two taxpayers to SARS.

72. Further, paragraph 2.1 and 2.2 of the Draft CbC Notice may lead to duplication in the filing of the same Local File information by two taxpayers (i.e. Reporting Entity and the SA operating entity) to SARS. We propose that the Local File be submitted by the relevant SA operating entity to which paragraph 2.2 of the Draft Notice will apply. It needs to be made clear who is required by law to submit the Local File and which Local Files need to be submitted by law.

73. Furthermore, paragraph 2.1 of the Draft CbC Notice states that a Reporting Entity must submit a return containing information specified in the BRS, which includes the Local File. The Reporting Entity may not be the entity that enters into the cross-border transactions with connected persons. The extent or scope of the Local File submission obligation is therefore unclear, i.e. whether it also applies to Local Files compiled by all entities forming part of the MNE Group. Confirmation is requested that the Local File submission requirements are limited to SA tax resident MNE entities that enter into transactions with offshore connected persons.

74. 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

75. 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 exceeds or is reasonably expected to exceed R100 million. 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.

76. 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.

77. Further, there could be instances where the consolidated group revenue is R10 billion or more and hence the MNE Group is required to file the CbC Report. However, the

potentially affected transactions for that entity may be less than R100 million and hence there may be no requirement to prepare and file a Master File and/or Local File.

78. Accordingly, the wording in paragraph 2.1 of the Draft CbC Notice seems to assume that an MNE Group that meets the threshold for the CbC Reporting automatically meets the criteria for the Master File and Local File, which may not be true.

79. Likewise, the BRS: CbC and FDR, in paragraph 2.1 (on page 12), assumes that MNE Groups that meet the CbC reporting threshold would also have significant potentially affected transactions exceeding or reasonably expected to exceed R100 million. This assumption may not always be true and hence the wording should clearly stipulate this.

80. The BRS: CbC and FDR further indicates that it is likely that the CbC threshold is likely to be considerably higher than that for the Master File and Local File (on page 11) and we agree with this statement. SARS then indicates at the bottom of page 11 that this threshold has not yet been finally determined, but that a possible minimum threshold for requiring Master File and Local File by MNE Entities could be "*the aggregate of the person's potentially affected transactions for the year of assessment, without offsetting any potentially affected transactions against one another, exceeds or is reasonably expected to exceed R100million.*"

81. We recommend that SARS makes a final decision as to what the threshold for the Master File and Local File returns would be, and then amend both the Draft CbC Notice as well as the BRS: CbC and FDR to ensure alignment, especially in light of the above proposed change in the effective date of 1 January 2016.

82. 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 Retention, which notice has not been referred to in the Draft CbC Notice; it is only referred to in the BRS: CbC FDR.

83. 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 person[7], where the threshold is R100 million, and in relation to specific transactions[8], where the threshold is R5 million), by whom[9] 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.

84. 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

[7] Paragraph 3 of the Final Notice on Document Retention (referred to in footnote 5 above)
[8] Paragraph 4 of the Final Notice on Document Retention (referred to in footnote 5 above)
[9] Paragraph 2 of the Final Notice on Document Retention (referred to in footnote 5 above)

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.

85. 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 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".*

86. Submission: We suggest that minimum thresholds be put in place in order to provide more certainty to South African Group members with "potentially affected transactions" falling far below the R100 million threshold, for example, where the aggregate potentially affected transactions amount to R10 million.

87. We also suggest that there is a minimum threshold where the aggregate of "potentially affected transactions" is less than R5 million, which states that affected taxpayers will not have to compile and keep a Local file. This will create more certainty for South African taxpayers and lessen their compliance burden.

88. Further, we note that the requirement to submit a CbC Return is based on a consolidated turnover of R10 billion in a taxpayer's prior reporting period. However, the requirement to file the Master File and Local File returns under paragraph 2.2 of the Draft CbC Notice is based on R100 million aggregate value of potentially affected transactions as assessed in the current reporting period. We submit that it would be preferable for the assessment periods to be aligned.

89. As non-resident surrogates would never fall within the ambit of the SARS filing requirements, the reference to Surrogate Parent Entity in paragraph 2.1 of the Draft CbC Notice can only be read as a reference to resident surrogates. The CbC Regulations recognise surrogate filings but do not specifically provide for surrogate filings in South Africa. The exclusion of surrogate filings in paragraph 2.1 of the Draft CbC Notice would be consistent with the intention not to support such filings in South Africa.

90. Submission: We would, however, recommend that SARS clarify the above position in this regard.

91. Furthermore, given that the proposed threshold for preparation of the Master File is significantly lower than previously anticipated, it is questionable whether SARS is effectively endeavouring to transfer the burden of preparation of the Master File to the relevant South African entity, as opposed to the Ultimate Parent of the MNE (assuming it's a non-South African entity). For example, if the Group consolidated turnover is less than R10 billion, we previously understood that the Ultimate Parent would have no obligation to prepare a Master File. As such, assuming the Ultimate Parent is non-South African, SARS on a standalone basis appears to be endeavouring to increase the compliance burden on non-South African entities to prepare a Master File for the Group based solely on their South African operations (aggregate transactions exceeding R100

million). Also, SARS appears to be transferring this onus onto the South African entity regardless of whether it is the Ultimate Parent or not.

92. Submission: We strongly suggest SARS provide clarity on the above point.

93. Further, given that the document retention and related reporting requirements (referred to 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

94. Submission: We submit that SARS should consider the following practical implications when finalising the Draft CbC Notice:

94.1 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;

94.2 The information required in paragraph 2.2 of the Draft CbC Notice, as discussed in clauses 43 to 68 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;

94.3 The Draft CbC Notice provides no indication of whether non-compliance with the requirement to submit the returns would attract penalties. SARS should indicate what repercussions non-compliance with the notice will have, e.g. increased transfer pricing risk classification which may result in SARS queries, financial penalties, etc.;

94.4 It is not clear whether it would be mandatory for taxpayers to refresh the data forming the basis of the information in the Master File and Local File returns on an annual basis. We suggest that the Draft CbC Notice or Interpretation Note provide clear guidance on SARS' requirement in this regard;

94.5 It is our understanding, that the FDR system will be accessed via a link on the eFiling system. This may be problematic due to the use of firewalls for security purposes, which may not allow these sites to be accessed as a pop-up screen. Furthermore, it is unclear whether the FDR system will operate as a stand-alone system with its own login details or whether it can only be accessed via eFiling. It is proposed that these details be clarified;

94.6 It is unclear how the ITR14 will change to reflect the CbC Reporting, Master File and Local File requirements. Currently, the ITR14 already requires the taxpayer to submit a substantial amount of related party information representative of the Local File requirements to some extent. Therefore, we expect and accordingly request that the submission of the Local File should eliminate the need for completion of the ITR14 financial information requirements given more detailed information will be submitted in the Local File. SARS should provide clarity in this regard.

CONCLUSION

95. We would like to thank SARS for the opportunity to provide constructive comments in relation to the Draft CbC Notice and BRS: CbC and FDR. 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 read together with the BRS: CbC and FDR.

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

Yours sincerely

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