

Briefing Note: Draft Notice in terms of section 29 of the Tax Administration Act, 2011, requiring the persons specified in the Schedule to keep and retain the records, books of account or documents prescribed in the Schedule.

The draft notice sets out additional record-keeping requirements for transfer pricing transactions.

Comments on the draft Public Notice must be submitted before or on **5 February 2016** to Adele Collins at acollins@sars.gov.za.

SOUTH AFRICAN REVENUE SERVICE

No.

December 2015

DUTY TO KEEP THE RECORDS, BOOKS OF ACCOUNT OR DOCUMENTS IN TERMS OF SECTION 29 OF THE TAX ADMINISTRATION ACT, 2011 (ACT NO. 28 OF 2011)

In terms of sections 29 of the Tax Administration Act, 2011, I, Thomas Swabihi Moyane, Commissioner for the South African Revenue Service, hereby require that the persons specified in the attached Schedule must keep and retain the records, books of account or documents prescribed in the Schedule.

T S MOYANE
COMMISSIONER: SOUTH AFRICAN REVENUE SERVICE

SCHEDULE

1. General

Any term or expression contained in this notice to which a meaning has been assigned in a “tax Act” as defined in section 1 of the Tax Administration Act, 2011, has the meaning so assigned, unless the context indicates otherwise and the following terms have the following meaning—

“consolidated South African turnover” means the total consolidated turnover of a group that is subject to normal tax in the Republic;

“group” means “group of companies” as defined in the Income Tax Act with the replacement of the expression “at least 70 per cent of the equity shares in” in paragraphs (a) and (b) of the definition by the expression “more than 50 per cent of the equity shares or voting rights in”;

“potentially affected transaction” means an “affected transaction”, as defined in section 31 of the Income Tax Act, without regard to paragraph (b) of the definition;

“tested party” means the party to a potentially affected transaction that has been selected for the application of a transfer pricing method.

2. Persons required to keep specified records, books of account or documents

A person must keep and maintain the information and documents specified in paragraph 3 if the person—

- (a) is a member of a group with a consolidated South African turnover of R1 billion and above; and
- (b) has entered into a potentially affected transaction.

3. Records, books of account or documents to be kept

A person referred to in paragraph 2 must keep and retain the following information and documents:

- (a) A description of the person’s ownership structure, with details of shares or ownership interest held therein by other persons;
- (b) The name, address, legal status and country of tax residence of each of the connected persons in the group with whom a potentially affected transaction has been entered into by the person and the ownership linkage amongst them;
- (c) The person's business operation summary, including—
 - (i) major economic and legal issues affecting the person and the industry;
 - (ii) a detailed description of the business and business strategy pursued by the person
 - (iii) an indication whether the person has been involved in or affected by business restructurings or intangibles transfers in the present or immediately past year and an explanation of those aspects of such transactions affecting the person;
 - (iv) the person’s position within the industry, analysis of relevant market competition environment and key competitors;

- (v) the key value drivers supported by independent industry research findings or reports;
 - (vi) industry policy or industry incentives or restrictions affecting the person's business;
 - (vii) the position of the person, as well as the connected persons referred to in subparagraph (b), in the group's supply chain;
- (d) The nature and terms (including prices) of the potentially affected transactions entered into by the person with each connected person;
 - (e) Copies of contracts or agreements related to the potentially affected transactions entered into by the person with each connected person;
 - (f) An indication of which party to the potentially affected transaction is the tested party, if applicable, and an explanation of the reasons for the party's selection.
 - (g) Where a tested party is tax resident outside the Republic the following documentation—
 - (i) contracts between the tested party and its customers and suppliers;
 - (ii) commercial invoices between the tested party and its customers and suppliers; and
 - (iii) segmented financial information per potentially affected transaction.
 - (h) A description of the functions performed, risks assumed and assets employed by the person and the connected persons involved in the potentially affected transactions;
 - (i) A description of the intangible assets involved in the potentially affected transactions, and their influence on the pricing of the potentially affected transactions;
 - (j) Operational flows including information flow, product flow, and cash flow of the potentially affected transactions and a comparison to the flows in independent person transactions;
 - (k) With respect to the tested party, a detailed allocation of revenues, costs, expenses and profits between its connected person transactions and independent person transactions, including records of the application of the transfer pricing policy and information showing how the financial data used in applying the transfer pricing method reconciles to the annual financial statements;
 - (l) If the financial data for the purposes of subparagraph (k) cannot be directly allocated, an explanation supporting the allocation rationale and documentation that demonstrates how the allocation was carried out;
 - (m) The comparable data and methods considered and used for determining the arm's length return and the analysis performed to determine the transfer prices or the allocations of profits or losses or contributions to costs, as the case may be, in respect of the potentially affected transactions, including:
 - (i) A list and description of selected comparable uncontrolled transactions (internal or external), if any, and information on relevant financial indicators for independent enterprises, if any, relied on in the analysis, including a description of the comparable search methodology;
 - (ii) Summary schedules of relevant financial data for any other comparables used in the analysis and the sources from which the data was obtained;
 - (iii) If relevant, an explanation of the reasons for performing a multi-year analysis;

- (iv) Any comparability adjustments made and the reasons for making such adjustments;
- (n) The assumptions, strategies, policies and price negotiations, if any, that influenced the determination of the transfer prices or the allocations of profits or losses or contributions to costs, as the case may be, in respect of the potentially affected transactions;
- (o) Details of the adjustments, if any, made to transfer prices to align them with the arm's length return determined under section 31(2) of the Income Tax Act and consequent adjustment made to the total income or expenses for tax purposes;
- (p) With respect to potentially affected transactions that are financial assistance transactions, the following additional information:
 - (i) A description of the funding structure which has been or is in the process of being put in place, including the dates of transactions, a clear statement of the source of the funds (immediate and ultimate), reasons for obtaining the funds, how the funds were or will be applied (the purpose of the financial assistance) and the repayment terms;
 - (ii) A description of the business (including the type of business, details of the specific business, details regarding the senior management team and external market conditions) and the plans of the principal trading operations (including the business strategy);
 - (iii) Copies of relevant financial assistance agreements and other relevant documents, such as complete board minutes relevant to the financial assistance, South African Reserve Bank applications and approvals and copies of related financial assistance applications;
 - (iv) An analysis of the financial strategy of the business, including how capital is allocated and the relationship between capital and cash flows from operations and any changes relating to the financial assistance transactions and details regarding principal cash flows and the sources of repayment of debt;
 - (v) A group structure covering all relevant companies and clearly setting out any changes to the structure taking place over the course of the financial assistance transactions;
 - (vi) Copies of the financial statements and management accounts just before the point in time the financial assistance is obtained and after the financial assistance transactions;
- (q) A summary of financial forecasts which are contemporaneous with the financial assistance transactions in question, projected as far as is meaningful in relation to the period of the funding transactions, including a clear picture of the expected levels of interest cover, gearing or other relevant measures over the forecast period;
- (r) Copies of existing unilateral, bilateral and multilateral APAs and other tax rulings to which SARS is not a party and which are related to the potentially affected transactions.
- (s) Any other information, data or document, including or data relating to a connected person, which may be relevant for the determination of the arm's length return under section 31(2) of the Income Tax Act.

4. Persons required to keep records, books of account or documents

If a person is not a member of a group with a consolidated South African turnover of R1 billion and above, the person must keep and retain the records, books of account or documents that enable the person to ensure and SARS to be satisfied that the person's potentially affected transactions are conducted at arm's length.