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REPORTABLE ARRANGEMENT

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1 SUMMARY

a) This guide explains how reportable arrangements must be identified, disclosed and managed under sections 34 to 39 of the Tax Administration Act No. 28 of 2011 (TAA).

b) If this guide conflicts with applicable legislation, the legislation takes precedence.

c) The reportable arrangement provisions give SARS early notice of arrangements that may create an undue tax benefit or avoid, postpone or reduce a tax liability. Early disclosure enables SARS to review the arrangement from an anti-avoidance perspective and supports voluntary compliance and tax-risk management.

d) The guide covers the relevant definitions, reportable and excluded arrangements, disclosure requirements, promoter and participant obligations, supporting documents, penalties and practical examples.

2 BACKGROUND

a) A reportable arrangement is a transaction, operation, scheme, agreement or understanding that must be disclosed to SARS when it falls within section 35 of the TAA or a Public Notice issued by the Commissioner.

b) Sections 34 to 39 of the TAA establish the framework for identifying and disclosing reportable arrangements. Sections 37 and 38 require each participant who derives or expects to derive a tax benefit from a reportable arrangement to disclose it to the Commissioner.

c) Disclosure must be made within 45 business days after the arrangement becomes reportable, or within 45 business days after a person becomes a participant in an existing reportable arrangement.

d) A participant does not have to make a separate disclosure if the participant obtains a written statement from another participant confirming that the arrangement has been disclosed.

e) SARS may allow a further 45 business days where reasonable grounds for an extension exist.

f) Disclosure does not mean that the Commissioner approves the arrangement. It allows SARS to assess the arrangement at an early stage. The legislation does not prescribe a period within which SARS must complete the review.

g) The Commissioner may request further information from a participant under section 46 of the TAA. Failure to disclose the required information may result in a penalty under section 212.

h) Businesses and individuals involved in complex financial or commercial transactions should consider the reportable arrangement rules and obtain professional tax advice where necessary.

3 RELEVANT PROVISIONS OF THE ACT

3.1 Introduction

a) Section 34(1) contains the definitions that apply to reportable arrangements. The definitions must be read together when deciding whether an arrangement must be reported.

3.2 What is an ‘arrangement’?

b) An ‘arrangement’ is any transaction, operation, scheme, agreement or understanding, whether legally enforceable or not.

3.3 What is a 'financial benefit'?

a) A 'financial benefit' is a reduction in the cost of finance, including interest, finance charges, costs, fees and discounts on a redemption amount.

3.4 What is a 'tax benefit'?

a) A tax benefit includes avoiding, postponing or reducing a tax liability, or increasing a tax refund.

3.5 What is 'pre-tax profit'?

a) 'Pre-tax profit is the profit that a participant expects to earn from the arrangement before normal tax. It must be determined in accordance with financial reporting standards after considering all costs and expenditure connected with the arrangement and deducting foreign tax paid or payable in connection with the arrangement

3.6 What is a 'participant'?

a) A 'participant' means:

i) a 'promoter';
ii) a person who directly or indirectly will derive or assumes that the person will derive a 'tax benefit' or 'financial benefit' by virtue of an 'arrangement'; or
iii) any other person who is party to an 'arrangement' listed in a public notice referred to in section 35(2) of the TAA.

3.7 What is a 'promoter'?

a) A person principally responsible for organising, designing, selling, financing, or managing the arrangement.

3.8 What is a 'reportable arrangement'?

a) An arrangement is reportable if it meets section 35(1) of the TAA or is listed by the Commissioner in a Public Notice under section 35(2). Under section 35(1), an arrangement is reportable if it:

i) calculates interest as defined in section 24J of the Income Tax Act No. 58 of 1962, finance costs, fees or other charges by using assumptions about the tax treatment of the arrangement;

ii) has characteristics described in section 80C(2)(b) of the Income Tax Act, or substantially similar characteristics;

iii) results in an amount that a participant claims as a deduction for income tax purposes but does not recognise as an expense under financial reporting standards;

iv) results in an amount that a participant recognises as revenue under financial reporting standards but not as gross income for income tax purposes;

v) does not give any participant a reasonable expectation of a pre-tax profit; or

vi) gives a participant a reasonable expectation of a pre-tax profit that is less than the value of the participant's tax benefit, when both amounts are discounted to present value at the end of the first year of assessment using consistent assumptions and a reasonable discount rate.

b) The current Public Notice referred to in the source guide is Notice 140, published in Government Gazette No. 39650 on 3 February 2016.

3.9 What is an 'excluded arrangement'?

a) Section 36 of the TAA and a Public Notice may exclude an arrangement from reporting. The following may qualify as excluded arrangements:

   i) a loan, advance or debt where the borrower receives cash and agrees to repay at least the same amount at a determinable future date;

   ii) a loan of a fungible asset where the borrower agrees to return an asset of the same kind and the same or equivalent quantity and quality at a determinable future date;

   iii) a lease;

   iv) a transaction undertaken through an exchange regulated under the Financial Markets Act No. 19 of 2012; and

   v) a transaction in participatory interests in a scheme regulated under the Collective Investment Schemes Control Act No. 45 of 2002.

b) An 'excluded arrangement' applies only where the arrangement is undertaken on a stand-alone basis and is independent of other transactions. It may remain excluded where the only connected arrangement provides security and that security does not create or enhance a tax benefit.

c) An arrangement is not excluded if it is entered into mainly, or partly, to obtain or enhance a tax benefit, or if its manner or form enhances or will enhance a tax benefit.

d) The Public Notice exclusion applies where the aggregate tax benefit derived by all participants does not exceed R5 million. It also applies to an arrangement referred to in section 35(1)(c) where the tax benefit is not the main benefit or one of the main benefits of the arrangement.

4 APPLICATION OF THE ACT

4.1 Who must report the arrangement?

a) Each participant who receives, or will receive, a tax benefit from the arrangement must report it, unless the participant has obtained written confirmation from another participant that the arrangement has already been reported.

4.2 When must the arrangement be reported?

a) In terms of section 37 of the TAA, a participant must report the arrangement within 45 business days after:

   i) the arrangement becomes a reportable arrangement; or
   ii) the person becomes a participant in an existing reportable arrangement.

b) SARS may grant a further 45 business days where reasonable grounds for an extension exist.

Example 1:

XYZ Bank enters into an agreement with Company Y whereby it is agreed that a capital amount of R400,000,000 will be advanced to Company Y on 1 May 2025. If the agreement falls within the definition of 'reportable arrangement' as defined in section 35 of the TAA it must be reported to the Commissioner by not later than 7July 2025, being 45 business days after the date that an amount is first received as envisaged by this section.

4.3 How must the arrangement be reported?

a) Taxpayers must submit the Reportable Arrangement form (RA01) and supporting documents via eFiling. Manual submissions are not recommended.

b) The RA01 form can be found on the SARS website on eFiling. Refer to IT-ELEC-03-G01 – Guide to complete the Company Income Tax Return ITR14 eFiling – External Guide for more information on how to access and complete the RA01 form.

4.4 What happens after reporting?

a) Upon receipt of RA01 on eFiling and supporting documentation, SARS will issue a 'reportable arrangement' reference number linked to the 'reportable arrangement' submitted. This allocated number will be forwarded to the person reporting the arrangement. SARS maintains a database system for the management of this information.

4.5 What documentation must be provided to SARS?

a) Section 38 requires the prescribed information to be submitted in the prescribed form, manner and time. The 'reportable arrangement' (RA01) form should be submitted with the following supporting documents:

i) a detailed description of all its steps and key features, including, in the case of an 'arrangement' that is a step or part of a larger 'arrangement', all the steps and key features of the larger 'arrangement';

ii) a detailed description of the assumed 'tax benefits' for all 'participants', including, but not limited to, tax deductions and deferred income;

iii) the names, registration numbers, and registered addresses of all 'participants';

iv) a list of all its agreements; and

v) any financial model that embodies its projected tax treatment.

4.6 Who must report where more than one company or trust or person derives a tax benefit?

a) If one participant has reported the arrangement, another participant with the same duty does not have to report it again, provided that the other participant obtains a written statement confirming that the arrangement has been reported.

4.7 Tax benefit application

a) Before an arrangement is reportable under section 35 of the TAA, a participant must derive, will derive, or be assumed to derive a 'tax benefit' from the arrangement. A 'tax benefit' includes the avoidance, postponement or reduction of a tax liability, or an increase in a tax refund. A 'tax benefit' is defined as any reduction or postponement of the liability of a person for any tax, duty, levy, charge or other amount in terms of any of Acts administered by SARS. Such Acts include the Income Tax Act No. 58 of 1962, Value-Added Tax Act No. 89 of 1991, Estate Duty Act No. 45 of 1955 and Securities Transfer Tax Act No. 25 of 2007.

b) This definition does not create any new concepts and is substantially in conformity with the interpretation given by the Supreme Court of Appeal (CIR v Louw, 45 SATC 113, Hicklin v SIR, 41, SATC 179) to the words "has the effect of avoiding or postponing liability for the payment of any tax, or of reducing the amount thereof" as used in the predecessor of the current section 103 of ITA In Hicklin, supra at 193 it was held that the word "liability" in section 103 as it then read "does not refer to an accrued or existing one, for such a liability cannot be avoided by any transaction (see CIR v King 1947(2) SA 196(AD)." In Smith v CIR 1964 (1) SA 324 (A) it was held that liability means an anticipated liability. Clearly there

may be more than one 'anticipated tax treatment' of an arrangement. This is because the Commissioner may have a different interpretation of the Act or may apply the principles contained in the Act differently than the taxpayer does.

4.8 Penalty provisions

a) In terms of section 212 of the TAA, a person referred to in paragraph (a) or (b) of the definition of 'participant' in section 34 of the TAA who fails to report a 'reportable arrangement', or to disclose the information in respect of the 'reportable arrangement' as required by sections 37 and 38 of the TAA, or information that must be disclosed under the regulations is liable to a penalty, for each month that the failure continues (up to 12 months), for an amount of:

i) R50 000, in the case of a 'participant' or 'intermediary', other than the 'promoter', or
ii) R100 000, in the case of the 'promoter'.
iii) The above penalty amount is:
   A) Doubled where the amount of anticipated tax benefit as defined in section 34 of the TAA, for the 'participant' by reason of the arrangement exceeds R5 000 000; and
   B) Tripled where the amount of anticipated tax benefit by reason of the arrangement exceeds R10 000 000.

b) A person referred to in paragraph (c) of the definition of 'participant' in section 34 of the TAA, who fails to disclose the information in respect of a 'reportable arrangement' as required by section 37 of the TAA is liable to a penalty in the amount of R50 000.

c) In terms of section 217 of the Act, SARS may remit a penalty of up to an amount of R100 000 imposed as per section 212 of the Act, where reasonable grounds for the non-compliance exist.

d) In terms of section 218 of the Act, SARS may remit a penalty or a portion thereof where exceptional circumstances for the non-compliance exist.

5 OPERATIONAL IMPLEMENTATION

5.1 Inclusions

5.1.1 Category 1 – Reportable arrangements in terms of Section 35 of the TAA

a) A 'category 1' arrangement is a 'reportable arrangement' which complies with the following requirements:

i) The calculation of interest as defined in section 24J of the Income Tax Act, finance costs, fees or any other charges (finance charges) are wholly or partly dependent on the tax treatment of that arrangement.

ii) Provision must have been made for the variation of such finance charges should the 'actual tax treatment' differ from the 'anticipated tax treatment. It is not a requirement that an assessment must have been issued for the 'actual tax treatment' to be determined. The requirement is only for such a provision to be present in that arrangement. The variation is a difference in finance charges between the 'actual tax treatment' and the 'anticipated tax treatment' by the 'promoters' or 'participants' in the arrangement.

iii) The use of the word 'anticipated' is a clear indication that 'the actual tax treatment' should not be interpreted to mean that some form of assessment would be required or that a challenge by the Commissioner is needed before the 'variation' can be determined. The anticipated variation should be determinable with reference to a comparison of the position where the tax benefit is allowed to the position where the tax benefit is not allowed. This refers to the anticipated 'actual tax treatment' i.e. the anticipated application of the Act by the Commissioner versus the taxpayer's anticipation of the tax liability.

iv) The arrangement has any characteristics contemplated in section 80C(2)(b). This includes round trip financing, accommodating or tax indifferent parties or elements that have the effect of offsetting or cancelling each other.

v) The arrangement results in a deduction for income tax purposes but not for purposes of 'financial reporting standards'.

vi) The arrangement results in revenue for 'financial reporting standards' but not for tax purposes.

vii) There is no reasonable expectation of a 'pre-tax profit' for any person.

viii) There is a reasonable expectation of a 'pre-tax profit' but the present value benefit of the aggregated anticipated pre-tax profits over the term is less than the present value benefit of the aggregated anticipated tax benefits over the term using consistent assumptions and discount rates.

b) As there is no dispute between SARS and the taxpayer at this stage the two positions that should be compared to each other are the objective tax position of all parties in the 'reportable arrangement'. This would be the position as envisaged by the taxpayer e.g. in its financial model or tax analysis of the arrangement, and the objective tax position should all tax benefits created in the arrangement be disallowed.

c) This comparison is only for purposes of determining the value of the anticipated amount of the variation of the tax benefit. The adjustment caused by the disallowance will indicate whether the anticipated amount of the variation exceeds R5 million. Below are examples of how the variations of finance charges and tax benefits are calculated.

Example 1: Variation in finance charges

The Facts

The anticipated tax benefits created by the implementation of an arrangement by ABC Bank with a capital value of R50,000,000 amounts to R10,000,000. Of this amount, R7,500,000 is passed on to Company XYZ in the form of a reduced interest rate on the loan of R50,000,00 on the condition that Company XYZ takes the tax risk incurred by ABC Bank. ABC Bank is therefore able to advance the funds at an interest rate of 8%. The term of the arrangement is 5 years. Assume that the 8% interest rate would be increased to 11% if the actual tax treatment differs from the anticipated tax treatment.

Calculation of variation in finance costs, etc.

To determine whether the arrangement is reportable or not, eliminate the tax benefit of R10,000,000. This will result in the adjustment in the interest rate charged to Company XYZ from 8,00% nominal annual compounded semi-annually (nacs) to 11,00% nacs. The difference in the finance costs over the five-year term will be R7,500,000 (finance cost calculated at an interest rate of 11,00% will be R27,500,000 and the finance costs calculated at an interest rate of 8,00% will be R20,000,000).

Summary

The arrangement falls within the definition of 'reportable arrangement' as:

i) The transaction fits into the definition of an 'arrangement'; and
ii) The arrangement's calculation of interest is dependent on the tax treatment, as ABC Bank agreed to reduce the interest rate from 11,00% nacs to 8,00% nacs; and
iii) The potential amount of the variation in the interest cost of the anticipated tax treatment and the actual potential tax treatment of this arrangement is R7,500,000. As the anticipated amount of variation exceeds the minimum R5,000,000 specified in the Government Gazette, (see below), the arrangement will be reportable.

Example 2: Convertible loan arrangement

The facts

Financing company lends R220,000,000 to a company in terms of a convertible loan. Interest is serviced by semi-annual payments, and the loan capital will be repayable by means of a single payment at the end of the 5-year term. The loan repayment takes the form of a conversion to ordinary shares. The company makes a payment to its holding company of R100,000,000. The holding company pays the financing company for the shares to be issued by the subsidiary company.

Tax benefit

According to the company's view of the transaction:

- It received a loan of R220,000,000 and it deducted inflated interest on the inflated loan amount.

In respect of the holding company:

- The inflated interest is offset by an unrealised gain on the equity conversion right.

The actual tax treatment

From SARS' point of view, section 24J applies to the transaction and the subsidiary company may only deduct interest on the 'true loan' of R120,000,000. The definition of 'yield to maturity' and the definition of 'adjusted initial amount' both consider all payments made by any connected person in relation to the issuer in respect of a financial arrangement. Alternatively, the Commissioner may assert that the substance over form doctrine may be applicable to the arrangement.

d) Any preference shares redeemable within a period not exceeding three (3) years must be reported in terms of Section 35 of the TAA, provided it is not listed on an exchange regulated in terms of the Financial Market. Should an arrangement be entered into for a period exceeding 3 years it will be reportable to the extent that it meets the requirements of section 35 of the TAA.

5.1.2 Category 2 – Identified by the Commissioner in a Public Notice

a) This category of 'reportable arrangements' consists of arrangements identified by the Commissioner by Public Notice in the Gazette because they have characteristics that may avoid, postpone or reduce tax on income. These arrangements include:

i) Any arrangement which would have qualified as a hybrid equity instrument as defined in section 8E of the Income Tax Act, if the prescribed period in that section was ten (10) years. However, the arrangement listed on an exchange regulated in terms of the Financial Markets Act No.19 of 2012, is excluded.

Section 8E of the Income Tax Act contains provisions to counter tax avoidance schemes, i.e. schemes involving hybrid equity instruments. As these provisions do not cover arrangements exceeding three years, the implementation of such arrangements exceeding this period may still lead to aggressive tax planning. It is therefore deemed necessary to identify these arrangements as containing characteristics which are likely to lead to an undue tax benefit. The reporting of such arrangements will assist SARS and National Treasury to evaluate these arrangements at an early stage of implementation, from an anti-avoidance point of view and to assess the ambit thereof, the impact on the tax base and what, if necessary, appropriate steps need to be taken.

ii) Any arrangement in terms of which a company buys back its shares from one or more shareholders for an aggregate amount of R10 million or more, and, within a period of 12 months thereafter, the company issued or is required to issue any shares;

iii) Any arrangement in terms of which a person contributes of an amount exceeding R10 million to a foreign trust and has or acquires a beneficial interest in that trust. It excludes any investments in foreign collective investment schemes or foreign investment entities;

iv) Any arrangement in terms of which a company acquires a controlling interest in a company with an assessed loss exceeding R50 million;

v) Any arrangement in terms of which a resident person makes a payment to a foreign insurer where the payment exceeds R5 million and any beneficiary in terms of that arrangement is entitled to an amount payable determined with reference to the value of assets or categories of assets; and

vi) Any arrangement in terms of which any resident or any permanent establishment of a person that is not a resident pays expenditure exceeding R10 million to a non-resident, for consultancy, construction, engineering, installation, logistical, managerial, supervisory, technical or training services to a non-resident.

5.2 Exclusions

a) These are the exclusions from the reporting requirements for arrangements in terms of section 36(1) of the TAA and in terms of Notice 140 of the Government Gazette Notice.

b) An arrangement is an excluded arrangement if the aggregate tax benefits of the arrangement by all participants to that arrangement does not exceed R5 million.

c) In addition, for the further exclusions from reporting to apply, the transaction or arrangement must be implemented on a stand-alone basis and not be connected to any other arrangement.

d) If the transaction requires arrangements for the provision of security, provided that the security arrangements do not create or enhance a 'tax benefit', the provision of security will not disqualify the transaction from being an excluded arrangement. However, even if the requirements for exclusion from reporting are met, if at any time the arrangements are entered into for the main purpose or one of the main purposes of obtaining a tax benefit, they are then reportable provided that the tax benefits are greater that R5 million. In addition, if they are entered into in a specific manner or form that enhances a tax benefit, they will also then become reportable if the R5 million threshold is met.

e) If the above conditions are met, the specific exclusions from reporting are listed below.

5.2.1 Loan or debt

a) The word 'debt' is not defined in the Act. SARS looks at its ordinary meaning. The following definitions may serve as guidelines to the ordinary meaning of the word, according to the Concise Oxford Dictionary of Current English, Clarendon Press, Oxford, 1990 are:

b) A '*debt*' is that which is owed or due; anything (as money, goods or service) which one person is under obligation to pay or render to another; a liability to pay or render something'.

Therefore, a debt includes, *inter alia*, a liability or obligation in the form of bonds, deposits, loan notes, or mortgages, or instalment credit transactions owed to another person or persons and required to be paid by a specified maturity date. The requirements of such a debt are:

i) That the borrower will receive an amount of cash and agrees to repay at least the same amount of cash to the lender at a determinable future date.

Example 1: Bank lends R100 to a client and it is agreed that the client should only repay the bank R90 due to certain tax benefits claimed by the bank on entering the arrangement. This arrangement will **not** be an 'excluded arrangement'.

ii) That the borrower receives a fungible asset and agrees to return an asset of the same kind and the same or equivalent quantity and quality to the lender at a determinable future date.

Example 2: Borrower receives 1000 ABC Limited shares and returns an equivalent 1000 ABC Limited shares to the lender at a future date. This will qualify as an 'excluded arrangement'.

5.2.2 A lease

a) In the context of 'reportable arrangement', a lease can be considered a financial or contractual agreement that may need to be disclosed to tax authorities. These types of leases are typically those that have significant tax implications or are designed to achieve specific tax benefits. These leases have certain characteristics or conditions that can trigger reporting requirements, such as undue tax benefits. If the lease is structured in a way that provides significant tax advantages to one or both parties, it may need to be reported.

Example: Company A enters into a finance lease agreement with Bank A. It is agreed that the ownership of the plant and machinery leased will pass to Company A at its election at the end of the term on fulfilment of all the terms and conditions. This finance lease is entered into on the condition that Company XYZ, the holding company of Company A guarantees the obligations of Company A.

The arrangement **will be excluded** if it has been identified as an arrangement which is unlikely to lead to any undue tax benefits; and

i) is undertaken on a "stand-alone" basis and is not directly or indirectly connected to, or directly or indirectly dependent upon, any other arrangement; or
ii) is an arrangement that would have qualified as having been undertaken on a stand-alone basis, were it not for a connected arrangement that is entered into for the sole purpose of providing security and no tax benefit is obtained or enhanced by entering into such security arrangement.

A lease has been identified as an 'excluded arrangement'. In the case of this finance lease the arrangement further meets the requirements set out in the proviso to the exclusion list and remains excluded. This is illustrated by the fact that the lease is only accompanied with a guarantee for the sole purpose of providing security. Bank A can proof that the main purpose of entering into the arrangement was to provide funding or was not concluded in a manner or form for the main purpose of obtaining or enhancing a tax benefit.

The arrangement **will not be excluded** if:

i) The finance lease was entered into in a specific manner or form for the purpose of obtaining or enhancing a tax benefit. For example, the finance lease contains abnormal terms and conditions if compared with other finance leases. The main purposes of inserting those terms and conditions into the finance lease were to enable Bank A to increase the tax benefits of this arrangement. Such an arrangement will therefore not be excluded.

5.2.3 Transactions undertaken through an Exchange

a) Transaction referred to are transactions undertaken through an exchange regulated in terms of the Financial Markets Act No. 19 of 2012. This Act ensures that these transactions are conducted in a fair, transparent, and orderly manner, protecting investors and maintaining market integrity. These transactions include selling and buying of shares traded on a securities exchange, commodities trading, derivatives trading, preference shares traded on the JSE Securities Exchange.

5.2.4 Transactions in participatory interests in a Collective Investment Scheme

a) These are transactions in participatory interests in a scheme regulated in terms of the Collective Investment Schemes Control Act, Act No. 45 of 2002.

6 DEFINITIONS, ACRONYMS AND ABBREVIATIONS

The definitions, acronyms and abbreviations can be accessed via the following link: Glossary A-M | South African Revenue Service (sars.gov.za)

DISCLAIMER

The information contained in this guide is intended as guidance only and is not considered to be a legal reference, nor is it a binding ruling. The information does not take the place of legislation and readers who are in doubt regarding any aspect of the information displayed in the guide should refer to the relevant legislation or seek a formal opinion from a suitably qualified individual.

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- Visit the SARS website at www.sars.gov.za;
- Make a booking to visit the nearest SARS branch;
- Contact your own tax advisor / tax practitioner;
- If calling from within South Africa, contact the SARS Contact Centre on 0800 00 SARS (7277); or
- If calling from outside South Africa, contact the SARS Contact Centre on +27 11 602 2093 (only between 8am and 4pm South African time).