

DRAFT

Briefing Note: Draft regulations for purposes of paragraph (b) of the definition of “international tax standard” in section 1 of the Tax Administration Act, 2011

General Background

1. Greater transparency and the automatic exchange of information (AEOI) between tax administrations is an important step forward in countering cross border tax evasion, aggressive tax avoidance and base erosion and profit shifting.
2. Action 13 of the Base Erosion and Profit Shifting (BEPS) Action Plan, which was endorsed by G20 Leaders in September 2013, proposed the development of “rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNE’s provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template.”
3. Guidance on Transfer Pricing Documentation and Country-by-Country (CbC) Reporting, Action 13: 2014 Deliverable of the OECD/G20 BEPS Project was published on 16 September 2014.
4. The Transfer Pricing Documentation and CbC Reporting, Action 13: 2015 Final Report of the OECD/G20 BEPS Project was published on 5 October 2015.
5. The Competent Authority of South Africa signed the Multilateral Competent Authority Agreement on the Exchange of CbC Reports on 27 January 2016.

Domestic Legislation

1. One of the building blocks that needs to be in place for a jurisdiction to implement CbC reporting is the enactment or amendment of primary or secondary legislation.
2. Legislative amendments to the Tax Administration Act, 2011, were effected during 2015 in order to implement CbC reporting.
3. Amongst others, a new definition of an “international tax standard” was inserted in section 1 of the Act, which includes the CbC Reporting Standard for Multinational Enterprises, subject to such changes as specified by the Minister of Finance in regulations issued under section 257 of the Act.
4. The draft regulations are closely modelled on the model legislation related to CbC reporting published in the 2015 Final Report. The reporting period commences for reporting fiscal years (years of assessment) commencing on or after 1 January 2016. The first CbC reports will be required to be filed with SARS from 31 December 2017.
5. Although to a lesser extent than the master file and local file referred to in the 2014 Guidance and 2015 Final Report, a multinational enterprise’s CbC report filed with SARS is informed by the transfer pricing records maintained by the multinational enterprise. A draft public notice on the keeping of transfer pricing records was published for public comment on 15 December 2015.

Comments on the draft regulations must be submitted before or on **3 May 2016 to Adele Collins at acollins@sars.gov.za**

DRAFT

SOUTH AFRICAN REVENUE SERVICE

R. No.

? 2016

REGULATIONS FOR PURPOSES OF PARAGRAPH (b) OF THE DEFINITION OF “INTERNATIONAL TAX STANDARD” IN SECTION 1 OF THE TAX ADMINISTRATION ACT, 2011 (ACT NO. 28 OF 2011), PROMULGATED UNDER SECTION 257 OF THE ACT, SPECIFYING THE CHANGES TO THE COUNTRY-BY-COUNTRY REPORTING STANDARD FOR MULTINATIONAL ENTERPRISES

For purposes of paragraph (b) of the definition of “**international tax standard**” in section 1 and under section 257 of the Tax Administration Act, 2011, I, Pravin Jamnadas Gordhan, the Minister of Finance, hereby specify in the Schedule hereto, the changes to the Country-by-Country Reporting Standard for Multinational Enterprises.

P J GORDHAN

MINISTER OF FINANCE

DRAFT

SCHEDULE

**REGULATIONS SPECIFYING THE COUNTRY-BY-COUNTRY REPORTING
STANDARD FOR MULTINATIONAL ENTERPRISES**

PREAMBLE

- A. The Republic of South Africa (“South Africa”) has agreed to participate in the joint Base Erosion and Profit Shifting Action Project of the Group of 20 (“G20”) and Organisation for Economic Co-operation and Development (“OECD”);
- B. The *OECD/G20 Base Erosion and Profit Shifting Project Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 — 2015 Final Report*, which includes the Country-by-Country Reporting Standard, was published on 5 October 2015; and
- C. The Competent Authority of South Africa signed the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports on 27 January 2016;

These Regulations specify the changes to the Country-by-Country Reporting Standard for Multinational Enterprises required for South Africa’s circumstances.

Article 1

Definitions

For purposes of these Regulations the following terms have the following meanings:

1. The term “**Group**” means a collection of enterprises related through ownership or control such that it is either required to prepare Consolidated Financial Statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange.
2. The term “**MNE Group**” means any Group that:
 - (i) includes two or more enterprises the tax residence for which is in different jurisdictions, or includes an enterprise that is resident for tax purposes in one

DRAFT

jurisdiction and is subject to tax with respect to the business carried out through a permanent establishment in another jurisdiction; and

(ii) is not an Excluded MNE Group.

3. The term “**Excluded MNE Group**” means, with respect to any Fiscal Year of the Group, a Group having total consolidated group revenue of less than R10 billion (or if paragraph 2 of Article 2 applies 750 million Euro) during the Fiscal Year immediately preceding the Reporting Fiscal Year as reflected in its Consolidated Financial Statements for such preceding Fiscal Year.

4. The term “**Constituent Entity**” means:

(i) any separate business unit of an MNE Group that is included in the Consolidated Financial Statements of the MNE Group for financial reporting purposes, or would be so included if equity interests in such business unit of an MNE Group were traded on a public securities exchange;

(ii) any such business unit that is excluded from the MNE Group’s Consolidated Financial Statements solely on size or materiality grounds; and

(iii) any permanent establishment of any separate business unit of the MNE Group included in (i) or (ii) above provided the business unit prepares a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes.

5. The term “**Reporting Entity**” means the Constituent Entity that is required to file a country-by-country report conforming to the requirements in Article 4 in its jurisdiction of tax residence on behalf of the MNE Group. The Reporting Entity may be the Ultimate Parent Entity, the Surrogate Parent Entity, or any entity described in paragraph 2 of Article 2.

6. The term “**Ultimate Parent Entity**” means a Constituent Entity of an MNE Group that meets the following criteria:

(i) it owns directly or indirectly a sufficient interest in one or more other Constituent Entities of such MNE Group such that it is required to prepare Consolidated

DRAFT

Financial Statements under accounting principles generally applied in its jurisdiction of tax residence, or would be so required if its equity interests were traded on a public securities exchange in its jurisdiction of tax residence; and

- (ii) there is no other Constituent Entity of such MNE Group that owns directly or indirectly an interest described in subsection (i) above in the first mentioned Constituent Entity.

7. The term “**Surrogate Parent Entity**” means one Constituent Entity of the MNE Group that has been appointed by such MNE Group, as a sole substitute for the Ultimate Parent Entity, to file the Country-by-Country Report in that Constituent Entity’s jurisdiction of tax residence, on behalf of such MNE Group, when one or more of the conditions set out in subsection (ii) of paragraph 2 of Article 2 applies.

8. The term “**Fiscal Year**” means an annual accounting period with respect to which the Ultimate Parent Entity of the MNE Group prepares its financial statements.

9. The term “**Reporting Fiscal Year**” means that Fiscal Year the financial and operational results of which are reflected in the Country-by-Country Report defined in Article 4.

10. The term “**Qualifying Competent Authority Agreement**” means an agreement that:

- (i) is between authorised representatives of those jurisdictions that are parties to an International Agreement; and
- (ii) requires the automatic exchange of Country-by-Country Reports between the party jurisdictions.

11. The term “**International Agreement**” means the Multilateral Convention for Mutual Administrative Assistance in Tax Matters, any bilateral or multilateral Tax Convention, or any Tax Information Exchange Agreement to which South Africa is a party, and that by its terms provides legal authority for the exchange of tax information between jurisdictions, including automatic exchange of such information.

DRAFT

12. The term “**Consolidated Financial Statements**” means the financial statements of an MNE Group in which the assets, liabilities, income, expenses and cash flows of the Ultimate Parent Entity and the Constituent Entities are presented as those of a single economic entity.

13. The term “**Systemic Failure**” with respect to a jurisdiction means that a jurisdiction has a Qualifying Competent Authority Agreement in effect with South Africa, but has suspended automatic exchange (for reasons other than those that are in accordance with the terms of that Agreement) or otherwise persistently failed to automatically provide to South Africa Country-by-Country Reports in its possession of MNE Groups that have Constituent Entities in South Africa.

Article 2 **Filing Obligation**

1. Each Ultimate Parent Entity of an MNE Group that is resident for tax purposes in South Africa must file a Country-by-Country Report conforming to the requirements of Article 4 with the South African Revenue Service (“SARS”) with respect to its Reporting Fiscal Year on or before the date specified in Article 5.

2. A Constituent Entity which is not the Ultimate Parent Entity of an MNE Group must file a Country-by-Country Report conforming to the requirements of Article 4 with SARS with respect to the Reporting Fiscal Year of an MNE Group of which it is a Constituent Entity, on or before the date specified in Article 5, if the following criteria are satisfied:

- (i) the entity is resident for tax purposes in South Africa; and
- (ii) one of the following conditions applies:
 - (a) the Ultimate Parent Entity of the MNE Group is not obligated to file a Country-by-Country Report in its jurisdiction of tax residence; or
 - (b) the jurisdiction in which the Ultimate Parent Entity is resident for tax purposes has a current International Agreement to which South Africa is a party but does not have a Qualifying Competent Authority Agreement in

DRAFT

effect to which South Africa is a party by the time specified in Article 5 for filing the Country-by-Country Report for the Reporting Fiscal Year; or

- (c) there has been a Systemic Failure of the jurisdiction of tax residence of the Ultimate Parent Entity that has been notified by SARS to the Constituent Entity resident for tax purposes in South Africa.

Where there are more than one Constituent Entities of the same MNE Group that are resident for tax purposes in South Africa and one or more of the conditions set out in subsection (ii) above apply, the MNE Group may designate one of such Constituent Entities to file the Country-by-Country Report conforming to the requirements of Article 4 with SARS with respect to any Reporting Fiscal Year on or before the date specified in Article 5 and to notify SARS that the filing is intended to satisfy the filing requirement of all the Constituent Entities of such MNE Group that are resident for tax purposes in South Africa.

3. Notwithstanding the provisions of paragraph 2 of Article 2, when one or more of the conditions set out in subsection (ii) of paragraph 2 of Article 2 apply, an entity described in paragraph 2 of Article 2 is not required to file a Country-by-Country Report with SARS with respect to any Reporting Fiscal Year if:

- (i) the MNE Group of which it is a Constituent Entity has made available a Country-by-Country Report conforming to the requirements of Article 4 with respect to such Fiscal Year through a Surrogate Parent Entity that files that Country-by-Country Report with the tax authority of its jurisdiction of tax residence on or before the date specified in Article 5; and
- (ii) the following conditions are satisfied:
 - (a) the jurisdiction of tax residence of the Surrogate Parent Entity requires filing of Country-by-Country Reports conforming to the requirements of Article 4;
 - (b) the jurisdiction of tax residence of the Surrogate Parent Entity has a Qualifying Competent Authority Agreement in effect to which South Africa

DRAFT

is a party by the time specified in Article 5 for filing the Country-by-Country Report for the Reporting Fiscal Year;

- (c) the jurisdiction of tax residence of the Surrogate Parent Entity has not notified SARS of a Systemic Failure;
- (d) the jurisdiction of tax residence of the Surrogate Parent Entity has been notified in accordance with paragraph 1 of Article 3 by the Constituent Entity resident for tax purposes in its jurisdiction that it is the Surrogate Parent Entity; and
- (e) a notification has been provided to SARS in accordance with paragraph 2 of Article 3.

4. SARS must publish a list of jurisdictions contemplated in item (b) of subsection (ii) of paragraph 2 of Article 2 and may fulfil its obligation under item (c) of that subsection by publishing a list of jurisdictions contemplated in that item.

Article 3

Notification

1. Any Constituent Entity of an MNE Group that is resident for tax purposes in South Africa must notify SARS if it is the Ultimate Parent Entity or the Surrogate Parent Entity, no later than 12 months after the last day of the Reporting Fiscal Year of such MNE Group.

2. Where a Constituent Entity of an MNE Group that is resident for tax purposes in South Africa is not the Ultimate Parent Entity nor the Surrogate Parent Entity, it must notify SARS of the identity and tax residence of the Reporting Entity, no later than 12 months after the last day of the Reporting Fiscal Year of such MNE Group.

DRAFT

Article 4

Country-by-Country Report

1. For purposes of these Regulations, a Country-by-Country Report with respect to an MNE Group is a report containing:

- (i) Aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE Group operates;
- (ii) An identification of each Constituent Entity of the MNE Group setting out the jurisdiction of tax residence of such Constituent Entity, and where different from such jurisdiction of tax residence, the jurisdiction under the laws of which such Constituent Entity is organised, and the nature of the main business activity or activities of such Constituent Entity.

2. The Country-by-Country Report must contain the information set out in, and apply the definitions and instructions contained in, the standard template set out in “Annex III to Chapter V” set out in the *OECD/G20 Base Erosion and Profit Shifting Project Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report*.

Article 5

Time for filing

The Country-by-Country Report required by these Regulations must be filed no later than 12 months after the last day of the Reporting Fiscal Year of the MNE Group.

Article 6

Use and Confidentiality of Country-by-Country Report Information

1. SARS must only use the Country-by-Country Report for purposes of assessing high-level transfer pricing risks and other base erosion and profit shifting related risks in South Africa, including assessing the risk of non-compliance by members of the MNE Group with applicable transfer pricing rules, and where appropriate for

DRAFT

economic and statistical analysis. Transfer pricing adjustments by SARS may not be based on the Country-by-Country Report.

2. SARS must preserve the confidentiality of the information contained in the Country-by-Country Report at least to the same extent that would apply if such information were provided to it under the provisions of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

Article 7

Effective Date

These Regulations are effective for Reporting Fiscal Years of MNE Groups beginning on or after 1 January 2016.