

**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, setting out additional record-keeping requirements for transfer pricing transactions, is hereby published for a final round of public comment.

Comments on the draft Public Notice must be submitted before or on **19 August 2016** to Adele Collins at [acollins@sars.gov.za](mailto:acollins@sars.gov.za).

DRAFT

**SOUTH AFRICAN REVENUE SERVICE**

**No.**

**July 2016**

**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 section 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 the records, books of account or documents prescribed in the Schedule.

This public notice applies to years of assessment commencing on or after 1 July 2016.

**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—

“**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, but excludes any transaction, operation, scheme, agreement or understanding contemplated in section 31(5), (6) or (7) of the Income Tax Act;

“**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 the records specified in paragraph 3 and 4 if the person—

- (a) has entered into a potentially affected transaction; and
- (b) the aggregate of the person’s potentially affected transactions for the year of assessment exceeds or is reasonably expected to exceed the higher of—
  - (i) 5 per cent of the person’s gross income; or
  - (ii) R50 million.

### 3. Records, books of account or documents to be kept in respect of structure and operations

A person referred to in paragraph 2 must keep the following records:

- (a) A description of the person’s ownership structure, with details of shares or ownership interest in excess of 10 per cent held by the person or therein by other persons as well as a description of all foreign connected persons with which that person is transacting and the details of the nature of the connection;
- (b) The name, address of the principal office, legal form and jurisdiction of tax residence of each of the connected persons with which a potentially affected transaction has been entered into by the person; and
- (c) The person's business operation summary, including—
  - (i) a description of the business (including the type of business, details of the specific business and external market conditions) and the plans of the principal trading operations (including the business strategy);
  - (ii) an organogram showing the title and location of the senior management team members;
  - (iii) major economic and legal issues affecting the profitability of the person and the industry;

- (iv) a description of any business restructurings or intangibles transfers that the person has been affected by or involved in;
- (v) the person's market share within the industry, analysis of relevant market competition environment and key competitors;
- (vi) the key value drivers identified by available industry research findings or reports;
- (vii) industry policy or industry incentives or restrictions affecting the person's business;
- (viii) the role of the person, as well as the connected persons referred to in subparagraph (b), in the group's supply chain.

#### **4. Records, books of account or documents to be kept in respect of transactions**

A person referred to in paragraph 2 must keep the following records in respect of any potentially affected transaction that exceeds or is reasonably expected to exceed R1 million in value:

- (a) The nature and terms (including pricing policy) of the potentially affected transactions entered into by the person with each connected person;
- (b) Copies of any contracts or agreements related to the potentially affected transactions entered into by the person with each connected person, if such contracts or agreements were prepared in the ordinary course of business;
- (c) Any other governance and regulatory documents, such as complete board minutes and South African Reserve Bank applications and approvals, relevant to the potentially affected transactions;
- (d) 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;
- (e) Where a tested party is tax resident outside the Republic, such documents as evidence the functional and risk classification of the tested party, which includes—
  - (i) a description of the business (including the type of business, details of the specific business, an organogram showing the title and location of all staff involved in the affected transaction and external market conditions) and the plans of the principal trading operations (including the business strategy);
  - (ii) contracts between the tested party and its customers and suppliers; and
  - (iii) commercial invoices between the tested party and its customers and suppliers; that are relevant to the potentially affected transaction;
- (f) A description of the functions performed, risks assumed and assets employed by the person and the connected persons involved in the potentially affected transaction;
- (g) A description of the intangible assets involved in the potentially affected transaction, and their influence on the functional and risk classification of the tested party;
- (h) Operational flows including information flow, product flow, and cash flow of the potentially affected transactions;
- (i) 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

documents showing how the financial data used in applying the transfer pricing method reconciles to the annual financial statements;

- (j) If the financial data for the purposes of subparagraph (i) cannot be directly allocated, an explanation supporting the allocation rationale and documentation that demonstrates how the allocation was carried out;
- (k) 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;
- (l) 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;
- (m) 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;
- (n) With respect to potentially affected transactions that are financial assistance transactions, the following records:
  - (i) 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;
  - (ii) 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;
- (o) With respect to potentially affected transactions that are financial assistance transactions with a term exceeding 12 months, the following additional records:
  - (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 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;
  - (iii) Copies of the financial statements and management accounts prepared most recently before the point in time the financial assistance is obtained and after the financial assistance has been granted; and
- (p) 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.

## **5. Persons otherwise required to keep records, books of account or documents**

If a person has entered into a potentially affected transaction and paragraph 4 does not apply to the potentially affected transaction, the person must keep the records, books of account or documents that enable the person to ensure and SARS to be satisfied that the person's potentially affected transaction is conducted at arm's length.

## **6. Records kept by connected persons**

Where the records, books of account or documents required to be kept in terms of paragraphs 4 and 5 are kept in the ordinary course of business by a connected person, a person will comply with the requirement to keep the records, books of account or documents provided the requirements under section 31 of the Tax Administration Act are met.