



Section  
75 A  
of the  
Income  
Tax Act  
Section  
75 1962  
(Act No 58  
of 1962)  
(the Act)

# Reportable Arrangement

Guide

## REPORTABLE ARRANGEMENT GUIDE

This guide deals with the introduction and implementation of section 76A of the Income Tax Act, 1962 (Act No. 58 of 1962) ("the Act").

Although fairly comprehensive it does not deal with all the legal detail associated with section 76A of the Act.

It, therefore, serves the purposes of a guide only and should not be used as a legal reference.

The guide is based on the legislation, as at 22 December 2003 and the Notice setting out arrangements for purposes of section 76A(1)(a) and section 76A(1)(b) of the Income Tax Act, 1962 published in Government Gazette No. 27344 dated 1 March 2005.

*Should you require additional information you may:*

- Contact your own advisors
- Contact the SARS Tax Avoidance Unit
- Visit the SARS website <http://www.sars.gov.za>

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**Law Administration**

SARS

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## REPORTABLE ARRANGEMENT GUIDE

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## 1 Introduction

The Revenue Laws Amendment Act (Act No. 45 of 2003), promulgated on 22 December 2003 introduced a new section 76A in the Income Tax Act, 58 of 1962 (“the Act”), to provide for the reporting of certain arrangements as defined. Section 76A will be effective from 1 March 2005.

This section provides that every company or trust which derives or will derive any tax benefit in terms of a reportable arrangement must report that arrangement to the Commissioner within 60 days after the date that any amount is first received by or accrues to any person or is paid or actually incurred by any person in terms of that arrangement. A further extension of 60 days will be granted where reasonable grounds for delay exist.

Reporting of an arrangement in terms of this section does not have the effect that the Commissioner approves of the arrangement. The purpose of reporting arrangements is to enable the Commissioner to evaluate them from an anti-avoidance point of view at an early stage of the implementation thereof.

No time limits are set on the Commissioner in terms of this legislation to review the arrangement, but as the legislation was introduced to enable SARS to be proactive in respect of tax avoidance the arrangements will be dealt with as expediently as capacity allows.

At this stage advance rulings are not given in respect of arrangements, reported in terms of section 76A. Legislation to regulate an advance ruling system was introduced by the Second Revenue Laws Amendment (Act No. 34 of 2004) in terms Part IA of Chapter III. The date of operation will be announced during 2005.

## 2 Background

The Act contains various provisions enabling the Commissioner to request further information or detailed returns with respect to any matter from taxpayers. The information gathering powers are contained in *inter alia* sections 66, 69, 74A, 74B and 74C. These provisions enable the Commissioner to include certain questions in respect of “structured finance” transactions in the current prescribed returns. However, the existing procedures have certain limitations as, firstly, they are not sufficiently proactive due to the fact that the information is only obtained once the taxpayer has filed its return and, secondly, they fail to properly describe what is meant by a “structured finance” transaction. Section 76A was designed, *inter alia* to address these deficiencies and to act as an early warning system to the Commissioner as to the type of tax structuring taking place in the market.

### 3 The International Position

The United Kingdom's disclosure requirements came into effect on 1 August 2004. Promoters and in some instances users of certain tax schemes and arrangements are obliged to disclose details of those arrangements when they are first available for implementation. The rules require disclosure of schemes and arrangements based on employment or financial products that have as a main benefit the obtaining of a tax advantage.

The United States has adopted formalised rules in their tax code which define tax shelters and require the registration of these tax shelters and the maintenance of investor lists by promoters and which also levy penalties for non-compliance.

Canada also has well developed reportable transaction (tax shelter) legislation. Australia and New Zealand are considering introducing similar legislation.

### 4 Interpretation of section 76A

#### 4.1 Introduction

The parameters within which section 76A is applied, are contained in subsection (1) containing the definitions of "arrangement", "reportable arrangement" and "tax benefit". The specific requirements of these definitions, read and interpreted as a whole, must be considered to determine whether a particular arrangement must be reported.

#### 4.2 What is an "arrangement"?

##### Introduction

An "arrangement" is defined as any transaction, operation or scheme. These words also appear in section 103(1) of the Act. As these words are not defined in the Act, SARS has to look at the meaning the courts have ascribed to them or, otherwise, to their ordinary meaning. Although the focus of the legislation is a "reportable arrangement" the following definitions may serve as guidelines to the meaning of the words in the context of section 76A.

*The ordinary meaning of "transaction" according to the:*

- Concise Oxford Dictionary of Current English, Clarendon Press, Oxford, 1990 is:  
*"piece of especially commercial business done; a deal; the management of business."*
- Chambers Twentieth Century Dictionary, Chambers, 1972 as:  
*"(The) act of transacting: an agreement: a piece of business performed."*

The ordinary meaning of "operation" according to the:

- Concise Oxford Dictionary of Current English, Clarendon Press, Oxford, 1990 is:  
*"The action or process or method of working or operating."*

- Chambers Twentieth Century Dictionary, Chambers, 1972 as:  
*"(An) act or process of operating: that which is done or carried out: agency: influence: method of working: action or movements."*

The ordinary meaning of "scheme" according to the:

- Concise Oxford Dictionary of Current English, Clarendon Press, Oxford, 1990 is:  
*"A systematic plan or arrangement for work, action, a proposed or operational systematic arrangement, an artful or deceitful plot."*
- Chambers Twentieth Century Dictionary, Chambers, 1972 as:  
*"A diagram of positions, a table: a system: a plan of purposed action for achieving an end, a project: a programme of action."*

The meaning of "**scheme**" has been interpreted by our courts as a wide term and covers a series of transactions as illustrated in *Meyerowitz v CIR* 1963 (3) SA 863 (25 SATC 184) and ITC 1496 53 SATC 229.

#### 4.3 What is a "reportable arrangement"?

Section 76A provides for two categories of reportable arrangements i.e.:

##### 4.3.1 Category 1:

An arrangement which complies with three requirements qualifies as a reportable arrangement. The requirements are:

- the calculation of interest as defined in section 24J of the Act, finance costs, fees or any other charges ("finance charges") must be wholly or partly dependent on the tax treatment of that arrangement;
- 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. It is important to note that the variation refers to a variation in respect of the finance charges resulting from the potential variation in the taxable amount where the actual tax treatment would differ from the tax treatment anticipated by the promoters of the arrangement; and
- the '**potential**' amount of the variation contemplated in such a provision referred to above must exceed R5 million. The use of the word 'potential' 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 potential 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, i.e. the potential “actual tax treatment” (i.e. the potential application of the Act by the Commissioner as opposed to the taxpayer’s anticipation of the tax liability.) On a proper analysis of section 76A the following terms are used to differentiate between this potential difference in the Commissioner’s interpretation and that of the taxpayer: “**anticipated tax treatment**” refers to the taxpayer’s view of tax treatment and “**actual tax treatment**” refers to the Commissioner’s potential view of tax treatment.

(This interpretation is substantiated by the use of this term in section 76A(1), definition of “reportable arrangement” (a)(ii)).

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 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. This comparison is only for purposes of determining the value of the potential amount of the variation of finance charges. The adjustment caused by the disallowance will indicate whether the potential amount of the variation exceeds R5 million.

The first two of these do not pose problems; whereas the third one may appear more complex and needs to be illustrated with a few examples (see par 4.5 below).

#### Exclusions to Category 1:

A reportable arrangement excludes any arrangement identified by the Minister by notice in the Gazette, which is not likely to lead to any undue tax benefit. A list of such arrangements has been published and currently includes the following:-

- a) Any loan, advance or debt in terms of which
  - (i) the borrower receives an amount of cash and agrees to repay at least the same amount of cash to the lender at a determinable future date; or
  - (ii) the borrower receives a fungible asset and agrees to return an asset of the same kind and of the same or equivalent quantity and quality to the lender at a determinable future date;

#### What is a loan, advance or debt?

As these words are not defined in the Act, SARS has to look at their ordinary meaning.

The following definitions may serve as guidelines to the meaning of the words in the context of Schedule A to the notice:

#### The ordinary meaning of “loan” according to the:

- Concise Oxford Dictionary of Current English, Clarendon Press, Oxford, 1990 is: “a sum of money lent for a time; to be returned in money or money’s worth and usually at interest”
- Chambers Twentieth Century Dictionary, Chambers, 1972 as: “anything lent, especially money at interest.”

#### The ordinary meaning of “advance” according to the:

- Concise Oxford Dictionary of Current English, Clarendon Press, Oxford, 1990 is: “payment in anticipation, or on security; a loan.”
- Chambers Twentieth Century Dictionary, Chambers, 1972 as: “to lend, especially in security; a loan.”

#### The ordinary meaning of “debt” according to the:

- Concise Oxford Dictionary of Current English, Clarendon Press, Oxford, 1990 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”;
- Chambers Twentieth Century Dictionary, Chambers, 1972 as: “what one owes to another; a state of obligation or indebtedness.”

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

Requirements of such a loan, advance or debt is-

- that the borrower receives an amount of cash and agrees to repay at least the same amount of cash to the lender at a determinable future date; or

**Example:** 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 into the arrangement. This arrangement will not be an excluded arrangement.

- 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 1:** Borrower receives 1000 Sanlam Limited shares and returns an equivalent 1000 Sanlam Limited shares to the lender at a future date. This will qualify as an excluded arrangement.

**Example 2:** Bank advance a loan of R100 to the client and it is agreed that the client repays the bank in another form i.e. shares to the value of R100. This will not be an excluded arrangement.

- b) any lease
- c) any transaction undertaken through an exchange regulated in terms of the Securities Services Act, 2004 (Act No. 36 of 2004)

**Example:** Preference shares traded on the JSE Securities Exchange will be an excluded arrangement.

- d) any transaction in participatory interests in a scheme regulated in terms of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002).

A proviso has, however, been added to avoid possible abuse of the identified exclusions.

The proviso, in essence, requires that the identified arrangements-

- (i) should be undertaken on a stand-alone basis, independent of any other transaction; and
- (ii) should not be connected with any other arrangement unless it is for the sole purpose of providing security and no tax benefit is obtained or enhanced by entering into such security arrangement.

Once such an arrangement passes the test as set out in the abovementioned proviso, it will then only be excluded if the arrangement is not entered into-

- with the main purposes of obtaining or enhancing a tax benefit; or
- in a specific manner or form with the main purposes of obtaining and enhancing a tax benefit.

**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 of the terms and conditions. This finance lease is entered into on the condition that Company AB, 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 are not likely to lead to any undue tax benefits; and

- 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
- 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;

Provided that such excluded arrangement is not entered into-

- with the main purposes of obtaining or enhancing a tax benefit; or
- in a specific manner or form with the main purpose of obtaining or enhancing a tax benefit.

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 prove 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-

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.

#### 4.3.2 Category 2: Inclusions

This category of reportable arrangements consists of arrangements identified by the Minister by notice in the Gazette. These arrangements have been identified on the basis of certain characteristics which have the effect of avoiding or postponing liability for or reducing the amount of taxes on income.

These arrangements includes-

- a) any arrangement which would have qualified as a hybrid equity instrument as defined in section 8E of the Act, if the prescribed period in that section was five years;
- b) any arrangement which would have qualified as a hybrid debt instrument as defined in section 8F of the Act, if the prescribed period in that section was five years.

If any of the arrangements listed in (a) or (b) above is listed on an exchange regulated in terms of the Securities Services Act, 2004, it will be excluded from this inclusion list and not be reportable.

Section 8E and 8F of the Act contain provisions to counter tax avoidance schemes, i.e. schemes involving hybrid equity instruments and hybrid debt 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 was therefore regarded necessary to identify these arrangements as containing characteristics which are likely to lead to an undue tax benefits. 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.

### What is a hybrid equity instrument?

Any redeemable preference share which-

- the issuer is obliged to redeem in whole or in part within a period of three years from the date or issue thereof; or
- may at the option of the holder be redeemed in whole or in part within the period of three years from the date of issue thereof; or
- the holder has a right of disposal which may be exercised within the period of three years; or

Any other share, if

- the holder has a right of disposal which may be exercised within a period of three years from the date of issue thereof and the existence of the company issuing that share is to be terminated within a period of three years or is likely to be terminated within such period upon a reasonable consideration of all the facts at the time that share is issued; and
- such share does not rank *pari passu* as regards to its participation in dividends with all other ordinary shares in the capital of the relevant company, or where the ordinary shares in such company are divided into two or more classes, with the shares of at least one such classes, or any dividend payable on such share is to be calculated directly or indirectly with reference to-
  - any specified rate of interest;
  - the amount of capital subscribed for such share; or
  - the amount of any loan or advance made directly or indirectly by the shareholder or by any connected person in relation to the shareholder.

### Example: Redeemable preference share

Any preference share redeemable within a period not exceeding 5 years will have to be reported in terms of Section 76A(1)(b)(refer to Appendix B), provided it is not listed on an exchange regulated in terms of the Securities Services Act, 2004 .

Should an arrangement be entered into for a period exceeding 5 years it will be reportable to the extent that it meets the requirements of section 76A(1)(a). (refer to Appendix A)

### What is a hybrid debt instrument?

- An instrument which is at the option of the issuer convertible into or exchangeable for any share in that issuer or any connected person in relation to that issuer within three years from the date of issue of that instrument;
- The issuer in relation to that instrument is entitled to repay that instrument in whole or in part within three years from the date of issue thereof by the issue of shares by the issuer or any connected person in relation to the issuer to the holder of the instrument;
- The issuer in relation to that instrument is entitled to repay that instrument in whole or in part within a period of three years from the date of issue thereof and is entitled at the time of that repayment to require the holder of that instrument to subscribe for or acquire shares in the issue or any connected person in relation to the issuer; or
- That instrument other than a listed instrument issued by a listed company, is at the option of the holder convertible into or exchangeable for any share in the issuer or any connected person in relation to the issuer within three years from the date of issue and it is determined on the date of issue that the value of that share at the time of conversion or exchange is likely to exceed the value of the instrument by at least 20 percent.

**Example:** Convertible loan arrangements

## 4.4 What is a “tax benefit”?

Before an arrangement needs to be reported in terms of section 76A(2) (refer to Appendix A) a “tax benefit” in terms of a “reportable arrangement” must be derived by a company (or a trust).

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 the Acts *inter alia* the Income Tax Act No. 58 of 1962, Tax on Retirement Funds Act No. 38 of 1996, Value-Added Tax Act No. 89 of 1991, Estate Duty Act No. 45 of 1955 and Uncertificated Securities Tax Act No 31 of 1998) administered by SARS, based on the anticipated tax treatment of the arrangement.

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 the Act. 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 due to the fact that the Commissioner may have a different interpretation of the Act or may apply the principles contained in the Act differently than the taxpayer does.

#### 4.5 How should the variation in finance charges be calculated:

##### Example 1:

###### The Facts

The anticipated tax benefits created by the implementation of an arrangement with a capital value of R50,000,000 amounts to R10,000,000 of which R7,500,000 is passed on to Company XYZ in the form of a reduced interest rate on the condition that Company XYZ takes the tax risk. ABC Bank is therefore able to advance the funds at an interest rate of 8% nacs. 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%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:

- the transaction fits into the definition of arrangement; and
- is a reportable arrangement as the arrangement's calculation of interest is dependant on the tax treatment as ABC Bank is able to reduce the interest rate from 11,00% nacs to 8,00% nacs ; and
- 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 potential amount of variation exceeds the required R5,000,000, the arrangement will be reportable.

##### Example 2: Defeasance Arrangement

###### The Facts

XYZ Bank lends an amount of R400,000,000 to X Bank. 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 loan term. Of this loan, R200,000,000 is advanced by X Bank to Corporate Client as a 5 year fixed rate term loan. The balance of the amount borrowed (R200,000,000) from XYZ Bank is paid to a newly formed company who carries on business as a specialised finance company ("Y") to make payment to XYZ Bank of X Bank's debts in year 5 ("the defeasance payment"). Y will place the R200,000,000 received in exchange for assuming the obligation to make payment of X Bank's debt on deposit with either XYZ Bank or with any acceptable financial institution, which deposit will bear a market related interest and will grow with capitalised interest to at least R400,000,000 in year 5.

At inception of the loan, an interest rate swap agreement will be entered into between XYZ Bank and X Bank, on a notional principal amount of R400,000,000. In terms of this swap, X Bank will through market funding raised for this purpose, make a single upfront fixed rate payment of R200,000,000 to XYZ Bank and XYZ Bank will make semi-annual variable rate payments to X Bank. The variable rate of interest is to be calculated by means of a computer program which relies on assumptions in respect of the tax treatment of the transaction. In the event that this tax treatment does not correspond with the tax treatment applied by SARS, it will be reflected in the variable rate payment. Therefore provision can be made for variation in the finance charges in an interest rate swap agreement between any two parties in a structure and that the corporate client need not necessarily be a party to the agreement containing the variation provision.

###### The anticipated tax treatment

The Corporate Client deducts the interest paid on the R200,000,000 loan in terms of section 11(a) read with section 24J.

XYZ Bank includes the interest it receives from X Bank on the R400,000,000 loan in its gross income on an accrual basis in accordance with section 24J, whilst it deducts the interest expenditure on the deposit in terms of section 11(a) read with section 24J. XYZ Bank will further include the up-front fixed rate swap receipt over the life of the transaction in terms of section 24K, and will deduct the variable swap payment on accrual basis in terms of section 24K.

X Bank will deduct the upfront fixed rate swap payment and include the variable swap payment over the life of the transaction in terms of section 24K and include the interest on the loan to the Corporate Client in its gross income on an accrual basis in accordance with section 24J.

###### Tax Benefit

According to Bank X's view of the transaction:

- it will deduct the interest on the full amount of the loan, i.e. R400,000,000 from XYZ Bank in terms of section 11(a) read with section 24J;
- it will deduct the cost of the defeasance payment in terms of section 11(a);
- the taxpayer therefore maintains that there is no gain or loss on disposal of an instrument as the proceeds equals the present value of the defeasance payment and that section 24J is not applicable thereby creating a mismatch between interest deducted by X Bank and interest accrued by it.

In respect of Y:

- the tax treatment envisaged by the taxpayer is that it acquired an instrument with a R200,000,000 accrual of interest and a R200,000,000 incurral of interest thereby creating a set off with no tax consequences.



### The actual tax treatment

From SARS' point of view, the defeasance payment is not deductible by X Bank as it does not meet the requirements of section 11(a) of the Act.

Alternatively the Commissioner may be of the opinion that section 103(1) or the substance over form doctrine may be applicable to the arrangement.

### Calculation of variation in finance charges

If all the tax benefits that contribute to this amount are disallowed and there will be a variation in the rate of interest that XYZ Bank pays to X Bank. Assume that in terms of the computer model of the arrangement the variable rate is anticipated at 8,5%. Assume that due to the disallowance of all the tax benefits in the arrangement the variable rate is amended to 11,5%. As the nominal amount of the interest rate swap agreement is R400,000,000, the difference of 8,5% of R400,000,000 (R34,000,000) compared to 11,5% of R200,000,000 (R46,000,000) will determine whether the variation in finance charges of R12,000,000 exceeds R5,000,000.

#### Summary:

From the above it is evident that:

- the calculation of finance charges is wholly or partly dependent on the tax treatment of the arrangement;
- that there is a provision contained in the agreements that such finance charges will vary should the tax treatment anticipated by the taxpayer be challenged by the Commissioner;
- the potential amount of the variation between the anticipated tax treatment, i.e. the taxpayer's view of the tax treatment as set out in the Agreements and the computer model and the actual tax treatment, i.e. SARS' potential view of the tax treatment (by ignoring the tax benefits that were structurally created) exceeds R5 million and the transaction will be reportable.

The transaction is therefore reportable.

## 5 Operational Implementation

### 5.1 Who must report the arrangement?

The company or trust that receives or will receive the tax benefit created in terms of the arrangement.

### 5.2 When must the arrangement be reported?

All arrangements entered into on or after 1 March 2005 must be reported to the Commissioner within 60 days after the date that any amount is first received by or accrued to any person or is paid or actually incurred by any person in terms of that arrangement. The period may be extended by no more than 60 days if the Commissioner is satisfied that reasonable grounds exist for the delay in reporting that arrangement.

### Example:

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 2005. If the agreement falls within the definition of reportable arrangement as defined in section 76A(1)(a), it must be reported to the Commissioner by not later than 30 June 2005, being 60 calendar days after the date that an amount is first received as envisaged by this section.

### 5.3 To whom must the arrangement be reported?

All documents relating to the reportable arrangements should be sent either:

- **Manually**

Anti-Tax Avoidance division  
Lehae La SARS  
Block B, First Floor  
299 Bronkhorst Street  
Nieuw Muckleneuk  
Pretoria, 0181

Anti-Tax Avoidance division  
Lehae La SARS  
Block B, First Floor  
Private Bag X923  
Pretoria  
0001

- **Electronically**

Electronic submission of some information will be made possible through SARS' website.

### 5.4 What documentation must be provided to SARS?

- A summary containing a description of the steps and features of the reportable arrangement;
- A list of all the parties to the arrangement;
- Copies of all the signed contracts in respect of the arrangement; and
- The Financial Model of the arrangement in electronic format.

### 5.5 Who must report where more than one company or trust derive a tax benefit?

Where another company or trust has reported an arrangement to the Commissioner, then any other company which also has a duty to report need only to provide to the Commissioner the name and address of the other company or trust that reported the arrangement together with the date on which it was reported.

### 5.6 What happens after reporting?

Upon receipt of the required particulars of a reportable arrangement, a SARS reportable arrangement number will be allocated to the arrangement within 60 calendar days after reporting, provided that all the required information has been submitted. This allocated number will be forwarded to the company or trust reporting the arrangement.

SARS will maintain a proper database system for the management of this information.

## 5.7 What happens in case of failure to report?

The consequences of not reporting are two-fold and depend on whether the failure to report was:

- **Not wilful or reckless**

A company or trust that failed to report a reportable arrangement, shall be deemed to have entered into that arrangement in a manner or by means as contemplated in section 103(1)(b)(i) or to have created rights or obligations as contemplated in section 103(1)(b)(ii) of the Act. This means that the abnormality requirements for the application of the anti-avoidance section will have been met, thereby removing any onus on the Commissioner to prove this requirement; or

- **Wilful or reckless**

Where the failure to report is wilful or reckless, the company or trust concerned shall in addition to the abovementioned consequence also be required to pay, in addition to the tax chargeable in respect of its taxable income, a penalty equal to the tax benefits in terms of that arrangement to which that company or trust is entitled. Examples of such wilfulness will be where the parties to an arrangement enter into an agreement which stipulates that there will be no variation of finance charges if the actual tax treatment differs from the anticipated tax treatment, so as to exclude the application of the section. However a side agreement or any other tacit understanding exists that overturns this effect will be proof of wilfulness with the effect that the penalties equal to the tax benefits shall be levied once the arrangement comes to the knowledge of SARS.

The Commissioner may remit the penalty or part thereof where he or she is satisfied that there were extenuating circumstances.

## 5.8 Operational date of section 76A

Section 76A will be effective from 1 March 2005

The list of inclusions and exclusions in terms of section 76A(1)(a) and (b) will be published on 1 March 2005.

## 5.9 Contact Details

Contact telephone numbers during office hours are

(012) 422 4903

(012) 422 4970

(012) 422 6592

E-mail address: Reportable@sars.gov.za

## Appendix A :

### SECTION 76A: REPORTABLE ARRANGEMENTS

1) For purposes of this section—

‘arrangement’ means any transaction, operation or scheme;

‘reportable arrangement’ means—

a) any arrangement in terms of which—

- i) the calculation of interest as defined in section 24J, finance costs, fees or any other charges is wholly or partly dependent on the tax treatment of that arrangement;
- ii) provision is made for the variation of that interest, finance costs, fees or any other charges should the actual tax treatment differ from the anticipated tax treatment (otherwise than by reason of any change in the provisions of the Act) or should the anticipated tax treatment be challenged by the Commissioner; and
- iii) the potential amount of the variation contemplated in subparagraph (ii) exceeds R5 million, but does not include any arrangement identified by the Minister by notice in the Gazette, which is not likely to lead to any undue tax benefit;

b) any arrangement which has certain characteristics identified by the Minister by notice in the Gazette which are likely to lead to an undue tax benefit;

**‘tax benefit’** means any reduction in or postponement of the liability of a person for any tax, duty, levy, charge or other amount in terms of any Act administered by the Commissioner based on the anticipated tax treatment of the arrangement.

2) Every company or trust which derives or will derive any tax benefit in terms of a reportable arrangement must report that arrangement to the Commissioner at such place as the Commissioner may determine within 60 days after the date that any amount is first received by or accrues to any person or is paid or actually incurred by any person in terms of that arrangement: Provided that the Commissioner may extend the period of 60 days by no more than 60 days where he or she is satisfied that reasonable grounds exist for the delay in reporting that arrangement.

3) The company or trust must in so reporting provide to the Commissioner-

- a) a description of all the steps and key features of the reportable arrangement;
- b) a list of all the parties to that arrangement;
- c) copies of all the signed documents relating to that arrangement; and
- d) any financial model of that arrangement, including any spreadsheet or computer model of the implementation thereof:

Provided that the company or trust may in so reporting, where another company or trust has reported that arrangement to the Commissioner, provide to the Commissioner only the name and address of that other company or trust and the date on which that arrangement was reported.

- 4) a) Where a company or trust fails to report a reportable arrangement as contemplated in subsections (2) and (3), that company or trust shall be deemed to have entered into that arrangement in a manner or by means as contemplated in section 103(1)(b)(i) or to have created rights or obligations as contemplated in section 103(1)(b)(ii).
- b) Where a company or trust willfully or recklessly fails to report a reportable arrangement as contemplated in subsections (2) and (3), that company or trust shall also be required to pay, in addition to the tax chargeable in respect of its taxable income, an amount equal to the tax benefits in terms of that arrangement to which that company or trust is entitled. Provided that the Commissioner may remit the additional charge or any part thereof where he or she is satisfied that there were extenuating circumstances.

## Appendix B:

NOTICE SETTING OUT ARRANGEMENTS FOR PURPOSES OF SECTION 76A(1)(a) AND SECTION 76A(1)(b) OF THE INCOME TAX ACT, 1962 (ACT NO. 58 OF 1962)

By virtue of the power vested in me by paragraphs (a) and (b) of the definition of “reportable arrangement” in section 76A(1) of the Income Tax Act, 1962 (Act No. 58 of 1962), I, Trevor Andrew Manuel, Minister of Finance, hereby give notice in—

- (a) Schedule A hereto, of arrangements which have been identified as not being likely to lead to an undue tax benefit; and
- (b) Schedule B hereto, of arrangements which have certain characteristics that have been identified as being likely to lead to an undue tax benefit.

**T. A. MANUEL**  
MINISTER OF FINANCE

### SCHEDULE A

1. In this Schedule, unless the context otherwise indicates, any word or expression to which a meaning has been assigned in the Income Tax Act, 1962, bears the meaning so assigned.
2. Subject to the provisions of Schedule B and paragraph 3, the following have been identified as arrangements which are not likely to lead to any undue tax benefits (hereinafter referred to as “excluded arrangements”):
  - (a) any loan, advance or debt in terms of which—
    - (i) the borrower receives an amount of cash and agrees to repay at least the same amount of cash to the lender at a determinable future date; or
    - (iii) the borrower receives a fungible asset and agrees to return an asset of the same kind and of the same or equivalent quantity and quality to the lender at a determinable future date;
  - (b) any lease;
  - (c) any transaction undertaken through an exchange regulated in terms of the Securities Services Act, 2004 (Act No. 36 of 2004);
  - (d) any transaction in participatory interests in a scheme regulated in terms of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002).
3. Paragraph 2 applies only to an excluded arrangement referred to in that paragraph which—
  - (a) is undertaken on a stand-alone basis and is not directly or indirectly connected to, or directly or indirectly dependent upon, any other arrangement (whether entered into between the same or different parties); or
  - (b) is an arrangement that would have qualified as having been undertaken on a stand-alone basis in terms of paragraph 3(a), 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, provided such excluded arrangement is not entered into—
    - (i) with the main purpose of obtaining or enhancing a tax benefit; or
    - (ii) in a specific manner or form with the main purposes of obtaining or enhancing a tax benefit.

## SCHEDULE B

- In this Schedule, unless the context otherwise indicates, any word or expression to which a meaning has been assigned in the Income Tax Act, 1962, bears the meaning so assigned.
- The following have been identified as arrangements which have certain characteristics which are likely to lead to an undue tax benefit:
  - any arrangement which would have qualified as a hybrid equity instrument as defined in section 8E of the Income Tax Act, 1962, if the prescribed period in that

section was five years; of

- any arrangement which would have qualified as a hybrid debt instrument as defined in section 8F of the Income Tax Act, 1962, if the prescribed period in that section was five years.

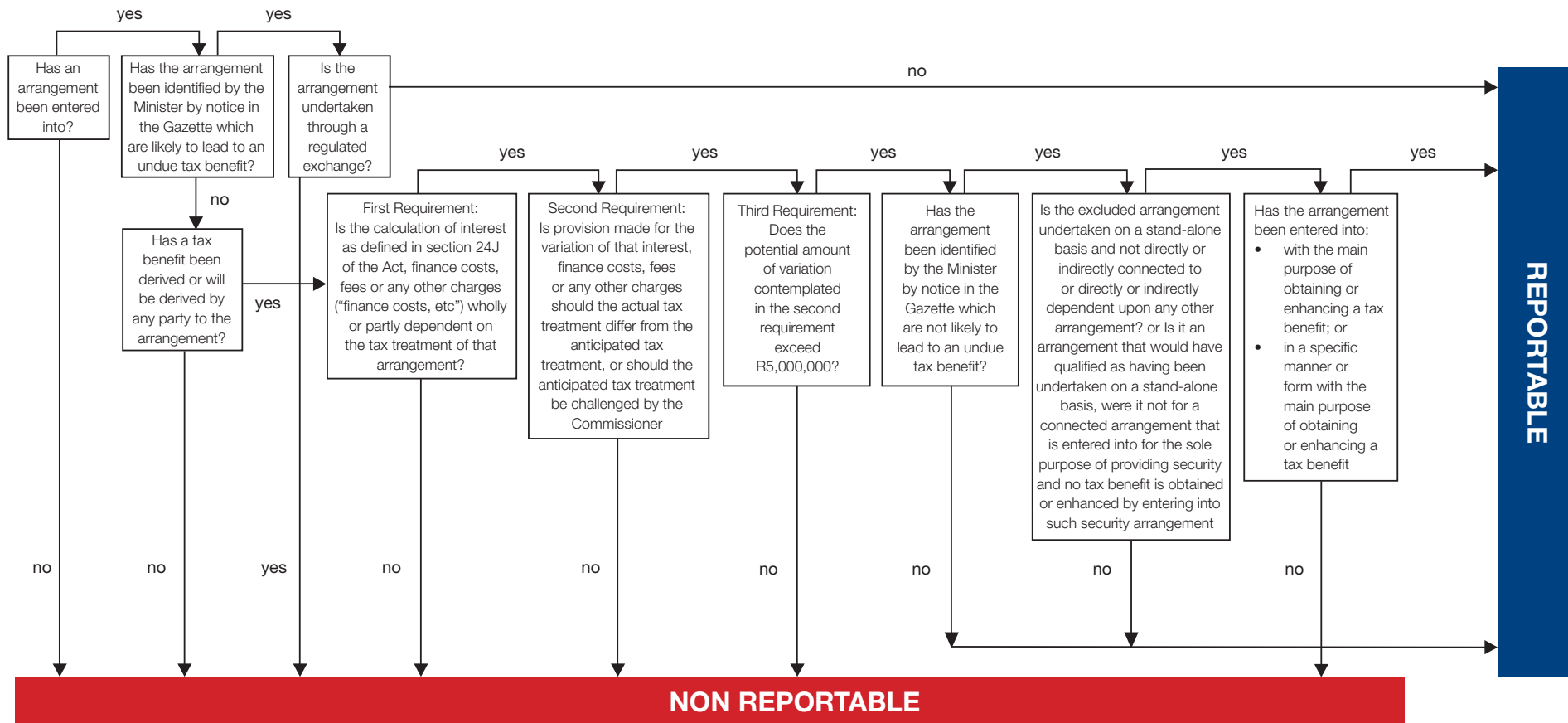
- Paragraph 2 does not apply in respect of any instrument listed on an exchange regulated in terms of the Securities Services Act, 2004 (Act No. 36 of 2004).

## Appendix C:

### DECISION TREE: SECTION 76A

The decision tree is based on the interpretation of section 76A(1)(a) and (b) of the Act.

**Note:** From a practical perspective, the exclusion list can be taken into consideration prior to considering the requirements of section 76A(1)(a)(i),(ii) and (iii) to determine whether an arrangement is reportable or not. It will then only necessary to review the remaining requirements of section 76A(1)(a) if the excluded arrangements identified by the Minister by notice in the Gazette, do not meet the requirements set out in that notice.



Appendix D:



INCOME TAX  
Reportable Arrangements

**Reporting Reportable Arrangement** (Reported in terms of section 76A of the Income Tax Act, 1962 (Act No. 58 of 1962))

RA-01

This form must be completed IN FULL and returned to: **Anti-Tax Avoidance Unit**  
 Lehae la SARS  
 Private Bag X923  
 Pretoria  
 0001

**For office use**  
Reportable arrangement number  
**RA**

If the space provided is insufficient, please attach additional schedules.

**Part 1: Particulars of Company or Trust reporting the arrangement**

Registered name

Registration number

Income Tax reference number

E-mail address

AND

Postal address

Postal code

Registered address

Postal code

Facsimile number  C O D E  N U M B E R

Business telephone number  C O D E  N U M B E R

**Note: If the reportable arrangement has already been reported, only complete part 6.**

**Part 2: Particulars of public officer/trustee/accounting officer/bookkeeper or contact person**

Surname

Name

Postal address

Postal code

Domicilium Citandi et Executandi

Postal code

(Address for legal purposes)

Facsimile number  C O D E  N U M B E R

Business telephone number  C O D E  N U M B E R

**Part 3: Information regarding the reportable arrangement**

Title/name of the reportable arrangement

(Provide the names of the two main parties to the arrangement - financier's followed by the client's name)

Date reportable arrangement was entered into

Date that any amount was first received, accrued, paid or actually incurred by any person to the reportable arrangement)

Brief description of the reportable arrangement (a detailed description (including a diagram) of all the steps and key features of the reportable arrangement must be attached).

Describe the tax benefits created by the implementation of the arrangement, including allowances and exclusions from gross income and how these were derived at.

Provide a separate estimate of the amount of the tax benefits described above for each of the affected tax years.

**Part 4: Particulars of the parties involved in the reportable arrangement**

Name

ID/Registration number  Income Tax reference number

Contact person

E-mail address

AND

Postal address

Postal code

Name

ID/Registration number  Income Tax reference number

Contact person

E-mail address

AND

Postal address

Postal code





INCOME TAX  
Reportable Arrangements

RA-02

**Acknowledgment of receipt of the Reportable Arrangement**

**Anti-Tax Avoidance Unit**  
Lehae la SARS  
Private Bag X923  
Pretoria  
0001

Tel: 012 - 422 5170

Fax: 012 - 422 5193

Contact person

Date

□□□□-□□-□□

Receipt is hereby acknowledged of the reportable arrangement documentation titled:

Reported on   -  -

and consisting of the following:

ISSUED BY THE SOUTH AFRICAN REVENUE SERVICE



INCOME TAX  
Reportable Arrangements

RA-02

**Acknowledgment of receipt of the Reportable Arrangement**

**Anti-Tax Avoidance Unit**  
Lehae la SARS  
Private Bag X923  
Pretoria  
0001

Tel: 012 - 422 5170

Fax: 012 - 422 5193

Contact person

Date

□□□□-□□-□□

Receipt is hereby acknowledged of the reportable arrangement documentation titled:

Reported on   -  -

and consisting of the following:

ISSUED BY THE SOUTH AFRICAN REVENUE SERVICE



INCOME TAX  
Reportable Arrangements

RA-04

**Notification of the Reportable Arrangement number**

**Anti-Tax Avoidance Unit**  
Lehae la SARS  
Private Bag X923  
Pretoria  
0001

Tel: 012 - 422 5170 Fax: 012 - 422 5193

Reported arrangement number RA

Contact person

Date

It is hereby confirmed that the reportable arrangement documentation titled:

was reported on

The following reportable arrangement number was allocated to the said arrangement:

RA

This number should be quoted in the income tax return relating to the year of assessment in which the reportable arrangement took place and in respect of each year that tax benefits are derived therefrom.

This notification has been forwarded to all the parties involved as indicated in the declaration of reportable arrangements submitted to this office.

ISSUED BY THE SOUTH AFRICAN REVENUE SERVICE



INCOME TAX  
Reportable Arrangements

RA-05

**Application for extension to report arrangements**  
(Reported in terms of section 76A of the Income Tax Act, 1962 (Act No. 58 of 1962))

This form must be completed IN FULL and returned to: **Anti-Tax Avoidance Unit**  
Lehae la SARS  
Private Bag X923  
Pretoria  
0001

It may also be submitted by facsimile: 012 - 422 5193

**Part 1: Particulars of Company or Trust requesting extension**

Registered name	<input type="text"/>		
Registration number	<input type="text"/>		
Income Tax reference number	<input type="text"/>		
E-mail address	<input type="text"/>		
AND			
Postal address	<input type="text"/>		
			Postal code <input type="text"/>
Registered address	<input type="text"/>		
Facsimile number	<input type="text"/>	<input type="text"/>	Postal code <input type="text"/>
Business telephone number	<input type="text"/>	<input type="text"/>	

**Part 2: Particulars of the reportable arrangement**

Title/name of the reportable arrangement	<input type="text"/>		
	<small>(Provide the names of the two main parties to the arrangement - financier's followed by the client's name)</small>		
Date that any amount was first received, accrued, paid or actually incurred by any person to the reportable arrangement.	<input type="text"/>		
State reason(s) for this application	<input type="text"/>		

**Part 3: Particulars of the public officer or representative completing this form**

Name	<input type="text"/>		
Capacity	<input type="text"/>		
Postal address	<input type="text"/>		
			Postal code <input type="text"/>
Facsimile number	<input type="text"/>	<input type="text"/>	
Business telephone number	<input type="text"/>	<input type="text"/>	
Signature	<input type="text"/>		Date <input type="text"/>





Lehae La SARS, 299 Bronkhorst Street, Nieuw Muckleneuk 0181, Private Bag X923, Pretoria, 0001, South Africa  
Telephone: +27 12 422 4000, Fax: +27 12 422 5181, Web: [www.sars.gov.za](http://www.sars.gov.za)