
Doubt is unpleasant, but certainty is absurd.

- Voltaire

STEP CAPE TOWN
21 APRIL 2016

REPORTABLE ARRANGEMENTS

IN TERMS OF SECTIONS 34 – 39 AND 212 OF THE TAX ADMINISTRATION ACT
AND PUBLIC NOTICE LISTING ARRANGEMENTS FOR SECTION 35(2) AND 36(4)
OF THE TAX ADMINISTRATION ACT

What is this about?

Sections 34 – 39 of the Tax Administration Act (TAA) provides that certain transactions are reportable to SARS within 45 business days, failing which the promotor or participant can be liable for penalties, imposed for each month of non-compliance, up to 12 months.

Layout of the legislation - TAA

- Section 34: Definitions
- Section 35: List of reportable arrangements – subsection(1) contains a list of reportable arrangements, **subsection (2) provides that an arrangement is reportable if listed in a public notice**
- Section 36: Excluded arrangements – subsections (1) - (3) set out the exclusions, and subsection (4) provides for further exclusions to be listed in a public notice
- Section 37: Disclosure Obligation
- Section 38: Information to be submitted
- Section 39: Reportable Arrangements reference number
- Section 212: Penalties

Flight Plan

1. What is a reportable arrangement?
2. What is excluded?
3. When must it be reported?
4. By whom must it be reported?
5. What must be disclosed?
6. What are the penalties for non-compliance?
7. Contentious issues / Discussion
8. Fall-back positions

1. What is a reportable arrangement?

Definitions in sec 34:

'arrangement' means any transaction, operation, scheme, agreement or understanding (whether enforceable or not);

'reportable arrangement' means an 'arrangement' referred to in section 35(1) or 35(2) that is not an excluded 'arrangement' referred to in section 36

Sec 35(1) – 5 types of reportable arrangements

Section 35(1): An ‘arrangement’ is a ‘reportable arrangement’ if a person is a ‘participant’ in the ‘arrangement’ and the ‘arrangement’

- (a) contains provisions in terms of which the calculation of ‘interest’ as defined in section 24J of the Income Tax Act, finance costs, fees or any other charges is wholly or partly dependent on the assumptions relating to the tax treatment of that ‘arrangement’ (otherwise than by reason of any change in the provisions of a tax Act) **(calculation of interest, finance costs fees or charges dependent on tax treatment of arrangement)**;
- (b) has any of the characteristics contemplated in section 80C (2) (b) of the Income Tax Act, or substantially similar characteristics **(an avoidance arrangement lacking commercial substance)**;
- (c) gives rise to an amount that is or will be disclosed by any ‘participant’ in any year of assessment or over the term of the ‘arrangement’ as—
 - (i) a deduction for purposes of the Income Tax Act but not as an expense for purposes of ‘financial reporting standards’; or
 - (ii) revenue for purposes of ‘financial reporting standards’ but not as gross income for purposes of the Income Tax Act;**(giving rise to reporting variation)**
- (d) does not result in a reasonable expectation of a ‘pre-tax profit’ for any ‘participant’ **(no pre-tax profit)**; or
- (e) results in a reasonable expectation of a ‘pre-tax profit’ for any ‘participant’ that is less than the value of that ‘tax benefit’ to that ‘participant’ if both are discounted to a present value at the end of the first year of assessment when that ‘tax benefit’ is or will be derived or is assumed to be derived, using consistent assumptions and a reasonable discount rate for that ‘participant’ **(pre-tax profit smaller than tax benefit)**.

Sec 35(2) – List ito Public Notice

An ‘arrangement’ is a ‘reportable arrangement’ if the Commissioner has listed the ‘arrangement’ in a public notice.

The Public Notice (published 3rd February 2016) lists 6 reportable arrangements:

- (1) Hybrid Equity Instruments
- (2) Shares buy-back by a company
- (3) Resident contributing to offshore trust
- (4) Acquisition of a company with assessed loss
- (5) Arrangement with an offshore insurer
- (6) Non-resident rendering services in SA

Resident contributes to offshore trust

Item 2.3 of the Public Notice:

2.3. An arrangement in terms of which—

- (a) a person that is a resident makes any contribution or payment on or after 16 March 2015 to a trust that is not a resident and has or acquires a beneficial interest in that trust and
- (b) the amount of all contributions or payments, whether made before or after 16 March 2015, or the value of that interest exceeds or is reasonably expected to exceed R10 million, excluding any contributions or payments made to or beneficial interest acquired in any—
- (i) portfolio comprised in any investment scheme contemplated in paragraph (e)(ii) of the definition of “company” in section 1(1) of the Income Tax Act, 1962; or
 - (ii) foreign investment entity as defined in section 1(1) of the Income Tax Act, 1962

Contribution to offshore trust

2 Requirements:

1. Contribution or payment to non-resident trust, on or after 16th March 2015, by a resident who has or acquires a beneficial interest in that trust, AND
2. The amount of all contributions or payments, regardless of when it was made, or the value of that interest exceeds or is expected to exceed R10 million
 - excluding contribution, payment or interest in any investment scheme or foreign investment entity

2. Exclusions

Section 36 contains the exclusions – subsections (1) – (3) set out the exclusions, subsection (4) makes provision for exclusions to be listed in a Public Notice

Subsections (1) – (3) apply, but are not applicable and / or relevant to typical contributions to offshore trusts (*note that no arrangement with the main purpose of obtaining or enhancing a 'tax benefit' can be excluded from being reportable*)

Subsection (4) provides for exclusions listed in a Public Notice - Item 3 of the Public Notice:

- 3.1. An arrangement referred to in section 35(1) of the Tax Administration Act, 2011, is an excluded arrangement if the aggregate tax benefit which is or may be derived from that arrangement by all participants to that arrangement does not exceed R5 million.
- 3.2. An arrangement referred to in section 35(1)(c) of the Tax Administration Act, 2011, is an excluded arrangement if the tax benefit which is or will be derived or is assumed to be derived from that arrangement is not the main or one of the main benefits of that arrangement.

Therefore, if a resident makes a contribution to an offshore trust after 16th March 2015, and the total contribution / interest of that person in the trust exceeds R10 million, it is a reportable arrangement, regardless of the tax benefit.

3. When must the arrangement be reported?

Section 37:

- Within 45 business days after the arrangement qualifies as a reportable arrangement;
→ When all the requirements are met to make the arrangement reportable
- Within 45 business days of becoming a participant (*if becoming a participant after the date that the arrangement qualifies as a reportable arrangement*);
- SARS may grant an extension for a further 45 business days, if reasonable grounds exist for the extension
- No disclosure is necessary if another participant has disclosed the arrangement and provided a written statement thereof to the other participant(s); therefore only one disclosure is necessary per arrangement.

Examples:

1. What happens when your client has not made any contributions since 16th March 2015, but makes a contribution today, and the other requirements of the provision are met?

You have 45 business days after today within which to report the arrangement (9 full weeks).

2. What happens if your client has made a contribution to an offshore trust on or after 16th March 2015, and the other requirements are met?

The arrangement would qualify as reportable on the date that it was listed as a reportable arrangement → 3rd February 2016.

Calculation of days:

The notice was published on 3rd February 2016; that is the date on which existing arrangements qualify as reportable ('Qualification date').

- 45 Business days after 3rd February 2016 = **11th April 2016**
- A further extension of 45 days only can be applied for = **15th June 2016**

Penalties for non-compliance are imposed per month of non-compliance!

4. By whom must the arrangement be reported?

Sec 37: The information in respect of a 'reportable arrangement' must be disclosed by a person who is a 'participant'

Definition (sec 34): 'participant', in relation to an 'arrangement', means—

- (a) a 'promoter';
a person who is principally responsible for organising, designing, selling, financing or managing the 'arrangement';
- (b) 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
'tax benefit' means the avoidance, postponement, reduction or evasion of a liability for tax.
'financial benefit' means a reduction in the cost of finance, including interest, finance charges, costs, fees and discounts on a redemption amount;
- (c) any other person who is party to an 'arrangement' listed in a public notice referred to in section 35 (2);

5. What must be disclosed

38. Information to be submitted.—The following information in relation to a ‘reportable arrangement’, must be submitted in the prescribed form and manner and by the date specified:

- (a) 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’;
- (b) a detailed description of the assumed ‘tax benefits’ for all ‘participants’, including, but not limited to, tax deductions and deferred income;
- (c) the names, registration numbers, and registered addresses of all ‘participants’;
- (d) a list of all its agreements; and
- (e) any financial model that embodies its projected tax treatment.

Prescribed form: RA 01

| | |
|---|--|
| <input type="button" value="Submit by Email"/> <input type="button" value="Print Form"/> | |
|  | INCOME TAX |
| | RA 01 |
| Reporting Reportable Arrangements (Reported in terms of sections 80M - 80T of the Income Tax Act, 1962 (Act No. 58 of 1962)) | |
| This form must be completed IN FULL and returned to: | Tax Avoidance Repealed by the Tax Administration Act, 2011 |
| | Large Business |
| | Private Bag X17 |
| | Rivonia |
| | 2128 |
| Or emailed to: reportable@sars.gov.za - Facsimile: | (011) 602 4889 |
| Is the person reporting the arrangement a promoter or participant to the arrangement? | <input type="checkbox"/> Promoter <input type="checkbox"/> Participant |
| Part 1: Particulars of the promoter of an arrangement | |
| Registered name | |

Lay-out of Form RA 01:

Part 1: Particulars of the promoter of an arrangement

Part 2: Particulars of the reporting participant where no promoter exists

Part 3: Information regarding the reportable arrangement

Part 4: Information to be submitted

Part 4(a): Provide a detailed description of the reportable arrangement

Part 4(b): Describe in detail each step and key features of the arrangement

Part 4(c): Provide a diagram(s) of the arrangement

Part 4(d): Provide a detailed description of the assumed tax benefits for all participants including but not limited to tax deduction, allowances, exemptions and deferred income

Part 4(e): For each of the affected tax years provide an estimate of the tax benefits derived or assumed

Part 4(f): Provide a financial model that projects the tax treatment of the reportable arrangement on a compact disc and send to the SARS address provided on part 1 of this form

Part 5: List of agreements: List all documents and agreements relating to the reportable arrangement

Part 6: Particulars of other participant(s) involved in the arrangement

Part 7: Declaration by the promoter or reporting participant

6. What are the penalties for non-compliance?

212. Reportable arrangement penalty

- (1) A person referred to in paragraph (a) or (b) of the definition of ‘participant’ who fails to disclose the information in respect of a ‘reportable arrangement’ is liable to a ‘penalty’, for each month that the failure continues (up to 12 months), in the amount of—
 - (a) R50 000, in the case of a ‘participant’ other than the ‘promoter’; or
 - (b) R100 000, in the case of the ‘promoter’.
- (2) The amount of ‘penalty’ determined under subsection (1) is doubled if the amount of anticipated ‘tax benefit’ for the ‘participant’ by reason of the arrangement exceeds R5 000 000, and is tripled if the benefit exceeds R10 000 000.
- (3) A person referred to in paragraph (c) of the definition of ‘participant’ who fails to disclose the information in respect of a ‘reportable arrangement’ is liable to a ‘penalty’ in the amount of R50 000.

Penalties summary

| | Benefit equal to or less than R5m | Benefit exceeds R5m | Benefit exceeds R5m |
|--|--|----------------------------|----------------------------|
| Promoter | R100 000 pm* | R200 000 pm* | R300 000 pm* |
| Participant not being promoter, obtaining benefit | R50 000 pm* | R100 000 pm* | R150 000 pm* |
| Any other party to the arrangement (no benefit required) | R50 000** | R50 000** | R50 000** |

* for each month that the failure continues (up to 12 months)

** not per month

7. Contentious issues / Discussion

1. How is the interest of a person in a trust quantified or calculated? (iro the requirement that the contribution or interest should exceed / be expected to exceed R10m?)
2. What is the timeline taken into consideration when calculating the expected interest? How are all the possible and likely contingencies taken into regard?
3. How will the anticipated tax benefit be calculated to determine the penalty? ('tax benefit' means the avoidance, postponement, reduction or evasion of a liability for tax)
4. The penalty clause stipulates that the penalty for failure is R50 000 in the case of the participant, OR R100 000 in the case of the promoter. Only one disclosure is required per reportable arrangement. Who will be held liable, and how will this be decided without being an arbitrary decision?
5. A 'promoter' means a person who is principally responsible for organising, designing, selling, financing or managing the 'arrangement'; what would the implications be if there are different persons principally responsible for the selling and managing, for example?
6. There is no provision for discretion in the Act. If there is failure to comply with the disclosure requirements within the prescribed period, the person IS liable to the prescribed penalty. The only discretion included is the decision to extend the period with 45 days. Bearing in mind the short time periods, possible volume of reportable arrangements per promoter, and the comprehensive information and documentation required, as well as the unsubstantial (if any) prejudice caused to the fiscus, is this fair, reasonable and proportional, and would it stand up in court?

7. Contentious issues / Discussion (continued)

7. It seems like a promoter will be liable for the relevant penalty *per reportable arrangement* that was not disclosed in the required time. (This could potentially amount to more than R1m per month, for only 4 RA's not reported)
8. What will be regarded as 'reasonable grounds' for an extension of a further 45 business days?
9. It is expected that SARS will be inundated with submissions for reportable arrangements, and processing thereof would be very slow. As a practical approach, would it be possible to submit forms that is sufficient but perhaps not as comprehensive as required, just in order to ensure no penalty / a smaller penalty is imposed, and submit further information / documentation subsequent to submission of the form?

8. Fall-back positions:

1. Get a tax ruling
2. Argue that the 'contribution' is not one
3. Argue that 'beneficial interest' is not beneficial and is not an interest
4. Amend, and then argue that the loan has a determinable date of repayment (ito sec 36 exclusion)
5. Report

Opinions are like ar****s, everyone has one.

- Dirty Harry

It is dangerous to be right when the government is wrong

- Voltaire

Thank you for attending this STEP Cape Town seminar.

