

Reportable Arrangements

IN TERMS OF SECTIONS 34 – 39 AND 212 OF THE TAX ADMINISTRATION ACT 28 OF 2011, AND PUBLIC NOTICE 140, PUBLISHED ON 3RD FEBRUARY 2016, LISTING ARRANGEMENTS IN TERMS OF SECTION 35(2) AND EXCLUSIONS IN TERMS OF SECTION 36(4) OF THE TAX ADMINISTRATION ACT

SUMMARY: 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.

Details:

Section 35 of the TAA specifies a number of arrangements that are reportable, and stipulates that the Commissioner of the South African Revenue Services (SARS) may determine in a Public Notice that certain further arrangements are reportable. Such a Public Notice was published on 3rd February 2016, and item 2.3 of the Notice reads as follows:

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*

Any Reportable Arrangement must be reported within 45 business days after the arrangement qualifies as a reportable arrangement, or 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, but no disclosure is necessary if another participant has disclosed the arrangement and has provided a written statement thereof to the other participant(s). Therefore only one disclosure is necessary per arrangement.

As the Notice was published on 3rd February 2016, existing arrangements had to be reported on 11th April 2016, and with an extension, on 15th June 2016 at the latest.

A reportable arrangement must be disclosed by a person who is a participant. A participant is defined as follows:

- (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'; ('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); or*
- (c) any other person who is party to an 'arrangement' listed in a public notice referred to in section 35(2);*

Penalties for non-compliance are imposed per month, up to twelve months, in the amount of R100 000 per month in the case of the promoter, R50 000 per month in the case of a participant other than the promoter, and a once off R50 000 in respect of any other party to the arrangement.

Expected changes to the legislation:

After discussion with a subcommittee of Judge Davis's Tax Committee, the following changes to the legislation are expected:

- 'Contributions' to companies will also be reportable;
- Definitions in the legislation are to be given more clarity, specifically the terms 'contributions or payments', and 'beneficial interest';
- The qualification in respect of the value of the contributions or payments, or of the value of the beneficial interest, is to be amended to the value of the assets in the trust;
- The provision that arrangements are reportable if the specified value is 'reasonably expected to exceed' a certain amount, will be removed and replaced with a provision containing more certainty;
- Penalties to be imposed jointly and severally on the involved parties.

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