

Agenda Item 9-B

PART 3 – PROFESSIONAL ACCOUNTANTS IN PUBLIC PRACTICE

PROPOSED SECTION 380

TAX PLANNING ~~AND RELATED SERVICES~~

Introduction

- 380.1 Professional accountants are required to comply with the fundamental principles and apply the conceptual framework set out in Section 120 to identify, evaluate and address threats.
- 380.2 Providing tax planning ~~and related~~ services might create self-interest, advocacy or intimidation threats to compliance with the fundamental principles, particularly the principles of integrity, objectivity, professional competence and due care, and professional behavior.
- 380.3 This section sets out requirements and application material relevant to applying the conceptual framework in relation to the provision of tax planning ~~and related~~ services. This section also requires a professional accountant to comply with relevant tax laws and regulations when providing such services.

Requirements and Application Material

General

Professional Accountants' Public Interest Role in Relation to Tax Planning Services

- 380.4 A1 Professional accountants play an important role in tax planning by contributing their ~~knowledge, skills, expertise~~ and experience to assist clients in meeting their tax planning goals while complying with tax laws and regulations. In doing so, accountants help to facilitate a more efficient and effective operation of a jurisdiction's tax system, which is in the public interest.
- 380.4 A2 Clients are entitled to organize their affairs for tax planning purposes. While there are a variety of ways to achieve such purposes, clients have a responsibility to pay taxes as determined by the relevant tax laws and regulations. In this regard, professional accountants' role is to ~~use their expertise and experience to assist~~ advise their clients ~~on how best to meet in achieving~~ their tax planning goals ~~and, in addition, accountants play an important role in assisting clients to meeting~~ their tax obligations ~~and not seek to circumvent them through tax evasion~~. However, when accountants provide such assistance, it might involve certain tax minimization arrangements that, although not prohibited by tax laws and regulations, might create threats to compliance with the fundamental principles.
- 380.4 A3 It is ultimately for a court or other appropriate adjudicative body to determine whether a tax planning arrangement complies with the relevant tax laws and regulations.

Description of Tax Planning ~~and Related~~ Services

- 380.5 A1 Tax planning services comprise a broad range of ~~advisory services~~ designed to assist a client, whether an individual or an entity, in ~~planning or~~ structuring the client's affairs in a tax-efficient manner.

Commented [CV1]: To align with proposed definition of expertise from Experts Task Force
Refer to further explanation as per agenda item 9-A paragraph 36

Commented [CV2]: To align with proposed definition of expertise from Experts Task Force

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380.5 A2 Examples of tax planning services include:

- Advising an individual to structure their tax affairs to achieve investment, retirement or estate planning goals.
- Advising an individual business owner on structuring their ownership and income from the business to minimize their overall taxes.
- Advising an entity on structuring its international operations to minimize its overall taxes including through transfer pricing arrangements.
- Advising on transfer pricing arrangements taking into account tax-related transfer pricing guidelines.
- Advising on efficient ways to utilize the utilization of available tax losses in a tax-efficient manner.
- Advising an entity on how to on the structuring of its capital distribution strategy in a tax-efficient manner.
- Advising an entity on structuring its compensation strategy for senior executives to optimize the tax benefits.

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~~380.5 A3 Related services are those that are based on or linked to a tax planning service, whether provided by the professional accountant or another party. Such services include, for example, assisting a client in resolving a dispute with the tax authority on a tax planning position that the accountant or another party recommended to the client, or preparing the client's tax return that reflects the position in the tax planning arrangement.~~

380.5 A3⁴ This section applies regardless of the nature of the client, including whether it is a public interest entity.

Compliance with Laws and Regulations

Anti-avoidance Laws and Regulations

R380.6 This section does not address tax evasion, which is illegal. In some jurisdictions, laws and regulations, including those that are often referred to as anti-avoidance rules, limit or prohibit certain tax planning arrangements. A professional accountant shall obtain an understanding of those laws and regulations and advise the client to comply with them when providing tax planning services.

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Non-compliance with Tax Laws and Regulations

380.7 A1 If, in the course of providing tax planning services, a professional accountant becomes aware of tax evasion or suspected tax evasion, or other non-compliance or suspected non-compliance with tax laws and regulations by a client, management, those charged with governance or other individuals working for or under the direction of the client, the requirements and application material set out in Section 360 apply.

Responsibilities of Management and Those Charged with Governance

380.8 A1 In relation to tax planning, management, with the oversight of those charged with governance, has a number of responsibilities, including:

- Ensuring that the client's tax affairs are conducted in accordance with the relevant tax laws and regulations.
- Maintaining all the books and records and implementing the systems of internal control necessary to enable the client to fulfill its tax compliance obligations.
- Making available all the facts and other relevant information needed to enable the professional accountant to perform the tax planning service.
- Engaging external experts to advise on relevant aspects of the tax planning arrangement.
- Deciding whether to accept and implement the professional accountant's recommendation or advice on a tax planning arrangement.
- Submitting the client's tax returns and dealing with the relevant tax authorities in a timely manner.
- Making such disclosures to the relevant tax authorities as might be required by tax laws and regulations or as might be necessary to support a tax position, including details of any tax planning arrangements.
- Ensuring that the client's tax planning arrangements are consistent with any publicly disclosed tax strategy or policies.

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Responsibilities of All Professional Accountants

R380.9 As part of providing a tax planning service, a professional accountant shall obtain an understanding of the nature of the engagement, including:

- (a) Knowledge and understanding of the client, its owners, management and those charged with governance, and its business activities;
- (b) The purpose, facts and circumstances of the tax planning arrangement; and
- (c) The relevant tax laws and regulations.

380.9 A1 The requirements and application material in Section 320 apply with respect to client and engagement acceptance.

380.9 A2 A professional accountant might be engaged to provide a second opinion on a tax planning arrangement. In addition to the provisions in this section, the requirements and application material in Section 321 also apply in such circumstances.

380.10 A1 A professional accountant is expected to apply knowledge, expertise professional competence and due care in accordance with Subsection 113 when providing a tax planning service. The accountant is also expected to have an inquiring mind and exercise professional judgment in accordance with Section 120 when considering the specific facts and circumstances relating to the tax planning service.

Basis for Recommending or otherwise Advising on a Tax Planning Arrangement

R380.11 A professional accountant shall recommend or otherwise advise on a tax planning arrangement to a client only if the accountant has determined that there is a credible basis in laws and regulations for the arrangement.

~~380.11 A1~~ ~~The determination of whether there is a credible basis involves the exercise of professional judgment by the professional accountant. This determination will vary from jurisdiction to jurisdiction based on the relevant tax laws and regulations at the time.~~

Commented [CV8]: Refer to further explanation as per agenda item 9-A paragraphs 42-44

380.11 A2⁴ If the professional accountant determines that the tax planning arrangement does not have a credible basis in laws and regulations, paragraph R380.11 does not preclude the accountant from explaining to the client the accountant's rationale for the determination or advising on an alternative arrangement that has a credible basis.

~~380.11 A2~~ ~~The determination of whether there is a credible basis involves the exercise of professional judgment by the professional accountant. This determination will vary from jurisdiction to jurisdiction based on the relevant tax laws and regulations at the time.~~

380.11 A3 Examples of Actions that a professional accountant might take to determine that there is a credible basis in relation to a particular tax planning arrangement include:

- Reviewing the relevant facts and circumstances, including the economic purpose and substance of the arrangement.
- Assessing the reasonableness of any assumptions.
- Reviewing the relevant tax legislation.
- Reviewing legislative proceedings that discuss the intent of the relevant tax legislation.
- Reviewing relevant literature such as court decisions, law professional or industry journals, and tax authority rulings or guidance.
- Considering whether the basis used for the proposed arrangement is an established practice that has not been challenged by the relevant tax authorities.
- Considering how likely the proposed arrangement would be accepted by the relevant tax authorities if all the relevant facts and circumstances were disclosed.
- Consulting with legal counsel or other experts within or outside the professional accountant's firm regarding what a reasonable interpretation of the relevant tax laws and regulations might be.
- Consulting with the relevant tax authorities, where applicable.

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R380.12 If, during the course of the engagement, the professional accountant becomes aware of circumstances that might impact the previous determination of the credible basis, the accountant shall re-assess the validity of that basis.

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Consideration of the Overall Tax Planning Recommendation or Advice

R380.12³ In addition to determining that there is a credible basis for the tax planning arrangement, the professional accountant shall exercise professional judgment and consider the reputational,

commercial and wider economic consequences that could arise from the way stakeholders might view the arrangement.

380.123 A1 The reputational and commercial consequences might relate to personal or business implications to the client or implications to the reputation of the client and the profession of a prolonged dispute with the relevant tax or other authorities. The implications to the client might involve adverse publicity, costs, fines or penalties, loss of management time over a significant period, and potential adverse consequences for the client's business.

380.123 A2 An awareness of the wider economic consequences might take into account the professional accountant's general understanding of the current economic environment and the impact of the tax planning arrangement on the tax base of the jurisdiction, or the relative impacts of the arrangement on the tax bases of multiple jurisdictions, where the client operates.

Commented [CV11]: Refer to further explanation as per agenda item 9-A paragraphs 54-59

R380.134 If, having considered the matters set out in paragraph R380.123, the professional accountant decides not to recommend or otherwise advise on a tax planning arrangement that the client would like to pursue, the accountant shall inform the client of this and explain the basis for the accountant's conclusion.

Tax Planning Arrangements Involving Multiple Jurisdictions

380.145 A1 There might be circumstances where a professional accountant becomes aware that a client might is obtaining a tax benefit from accounting for the same transaction in more than one jurisdiction, especially if there is no tax treaty between the jurisdictions. In such circumstances, while the client might be in compliance with the tax laws and regulations of each jurisdiction, the professional accountant might advise the client to disclose to the relevant tax authorities the particular facts and circumstances and the tax benefits derived from the transaction in the different jurisdictions.

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380.145 A2 Relevant factors the professional accountant might consider in determining whether to advise the client to make such disclosure include:

- The significance of the tax benefits in the relevant jurisdictions.
- ~~The likelihood that other entities in a similar circumstance to the client are taking advantage of the tax benefits.~~
- Stakeholders' perceptions of the client if the facts and circumstances were known to the stakeholders.
- Whether there are globally or nationally accepted principles or practices regarding disclosure of similar situations to the tax authorities in the relevant jurisdictions.

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Circumstances of Uncertainty

380.156 A1 In determining whether there is a credible basis for the tax planning arrangement, a professional accountant might encounter circumstances giving rise to uncertainty as to whether a proposed tax planning arrangement will be in compliance with the relevant tax laws and regulations. Such uncertainty makes it more challenging for the accountant to determine that there is a credible basis in laws and regulations for the tax planning arrangement and might, therefore create threats to compliance with the fundamental

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principles.

380.166 A2 Circumstances that might give rise to uncertainty include:

- Difficulty in establishing an adequate factual basis.
- Difficulty in establishing an adequate basis of assumptions.
- Lack of clarity in the tax laws and regulations and their interpretation, including:
 - Gaps in the tax laws and regulations.
 - Challenges to previous court rulings.
 - Conflicting tax laws and regulations in different jurisdictions in circumstances involving cross-border transactions.
 - Innovative business models not addressed by the current tax laws and regulations.
 - Recent court or tax authority rulings or positions that cast doubt on similar tax planning arrangements.
 - Complexity in interpreting or applying the tax laws and regulations from a technical or legal point of view.
 - Lack of a legal precedent, ruling or position.
- Lack of clarity regarding the economic purpose and substance of the tax planning arrangement.
- Lack of clarity about the ultimate beneficiaries of the tax planning arrangement.

R380.167 Where there is uncertainty as to whether a ~~proposed~~-tax planning arrangement is or will be in compliance with the relevant tax laws and regulations, a professional accountant shall discuss the uncertainty with the client.

380.167 A1 The discussion serves a number of purposes, including:

- Explaining the professional accountant's assessment about how likely the relevant tax authorities are to have a view that supports the ~~proposed~~-tax planning arrangement where there is a lack of clarity in the interpretation of the relevant tax laws and regulations.
- Considering any assumptions that ~~might need to be made or changed~~ when establishing the basis on which the tax planning advice is provided.
- Obtaining any additional information from the client that might reduce the uncertainty.
- Discussing any reputational, commercial or wider economic consequences in pursuing the ~~proposed~~-tax planning arrangement.
- Discussing potential courses of action to mitigate the possibility of adverse consequences for the client, including consideration of disclosure to the relevant tax authorities.

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Potential Threats Arising from Providing a Tax Planning Service

380.178 A1 Providing a tax planning service to a client might create a self-review, self-interest, advocacy or intimidation threat. For example:

- A self-review threat might be created when a professional accountant also provides other services to the client, such as a valuation service for tax consolidation purposes, the outcome of which will be relied upon when providing the tax planning service.
- A self-interest threat might be created when a professional accountant has a direct financial interest in a client and the accountant is involved in designing a tax planning arrangement that has an impact on the client's financial situation.
- A self-interest or advocacy threat might be created when a professional accountant actively promotes a particular tax position a client should adopt.
- A self-interest threat might be created when a professional accountant accepts a significant fee that might be perceived to be excessive for an engagement to develop a tax planning arrangement for which the interpretation of the relevant tax laws and regulations is uncertain or unclear.
- Self-interest and advocacy threats might be created when a professional accountant advocates a client's position in a tax planning arrangement which the accountant previously advised on before a tax authority when there are indications that the arrangement might not have a credible basis in laws and regulations.
- Self-interest and intimidation threats might be created when a professional accountant provides services to a client who exerts significant influence over the design of a particular tax arrangement, in a way that might influence the accountant's determination that there is a credible basis for the arrangement in laws and regulations.
- Self-interest and intimidation threats might be created when a professional accountant is threatened with dismissal from the engagement or the accountant's firm concerning the position a client is insisting on pursuing regarding a tax planning arrangement.

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380.178 A2 Factors that are relevant in evaluating the level of such threats include:

- The degree of transparency of the client, including, where applicable, the identity of the ultimate beneficiaries.
- Whether the proposed tax planning arrangement has a clear economic purpose and substance based on the underlying business transaction or circumstances.
- The nature and complexity of the underlying business transaction or circumstances.
- The complexity or clarity of the relevant tax laws and regulations.
- Whether the professional accountant knows, or has reason to believe, that the proposed tax planning arrangement would be contrary to the intent of the relevant tax legislation.
- The number of jurisdictions involved and the nature of their tax regimes.

- The extent of the professional accountant's knowledge, skills expertise and experience in the relevant tax areas.
- The significance of the potential tax savings.
- The nature and amount of the fee for the tax planning service.
- The extent to which the proposed professional accountant is aware that the tax planning arrangement reflects an established practice that has not been challenged by the relevant tax authorities.
- Whether there is pressure being exerted by the client or another party on the professional accountant.
- The degree of urgency in implementing the tax planning arrangement.
- Whether it is a pre-packaged tax planning arrangement that has been modified for the client's specific circumstances.
- The known previous behavior or reputation of the client, including its organizational culture.

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380.178 A3 Examples of actions that might eliminate such threats include:

- Referring the client to an expert outside the professional accountant's firm who has the necessary knowledge, skills expertise and experience to advise the client on the proposed tax planning arrangement.
- Advising the client to structure the tax planning arrangement so that it is consistent with an existing interpretation or ruling issued by the relevant tax authorities.
- Obtaining an advance ruling from the relevant tax or other authorities, where possible.
- Not pursuing, or advising the client not to pursue, the proposed tax planning arrangement.

380.178 A4 Examples of actions that might be safeguards to address such threats include:

- Establishing the identity of the ultimate beneficiaries.
- Advising the client to structure the tax planning arrangement so that it better aligns with the underlying economic purpose and substance.
- Advising the client to structure the tax planning arrangement based on an established practice that is currently not subject to challenge by the relevant tax authorities or is known to have been accepted by the relevant tax authorities.
- Consulting with a legal counsel or other expert within or outside the professional accountant's firm in the relevant tax areas.
- Obtaining an opinion from an appropriately qualified professional (such as legal counsel or another professional accountant) regarding the interpretation of the relevant tax laws and regulations as applied to the particular circumstances.

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- Having an appropriate reviewer, who is not otherwise involved in providing the tax planning service, review any work performed or conclusions reached by the professional accountant with respect to the tax planning arrangement.
- Having the client provide full transparency about the tax planning arrangement to the relevant tax authorities, including the goals, business and legal aspects, and ultimate beneficiaries of the tax planning arrangement.

380.178 A5 Steps a professional accountant might take to establish the identity of the ultimate beneficiaries include, for example:

- Making inquiries of management and others within the client.
- Making inquiries of others within or outside the firm who have dealt with the client, having regard to the principle of confidentiality.
- Reviewing the client's tax records, financial statements and other relevant corporate records.
- Making inquiries of registrars where the client or entities within its legal structure are incorporated concerning the relevant shareholders.
- Researching relevant public records.

Communication of Basis of the Tax Planning Arrangement

R380.189 A professional accountant shall explain the basis on which the accountant recommended or otherwise advised on a tax planning arrangement to the client.

Disagreement with Client

R380.1920 If the professional accountant disagrees that a tax planning arrangement that a client would like to pursue has a credible basis, the accountant shall:

- (a) Inform the client of the basis of the accountant's assessment;
- (b) Communicate to the client the potential consequences of pursuing the arrangement ~~in the event of an adverse ruling~~; and
- (c) Advise the client not to pursue the arrangement.

R380.201 If the client decides to pursue the tax planning arrangement, despite the professional accountant's advice to the contrary, the accountant shall take steps to disassociate from the engagement. In doing so, the accountant shall consider advising the client to:

- (a) Communicate internally to the appropriate level of management the details of the arrangement and the difference of views;
- (b) Make full disclosure of the arrangement to the relevant tax authorities, where applicable; and
- (c) Communicate the details of the arrangement and the difference of views to the external auditor, where applicable.

Commented [CV21]: Refer to further explanation as per agenda item 9-A paragraph 64-66

380.201 A1 As part of communicating the matters set out in paragraphs R380.1920 and R380.201, a professional accountant ~~may~~ might consider it appropriate to raise the relevant matters with those charged with governance of the client.

R380.221 In light of the client's response to the professional accountant's advice, the accountant shall consider ~~whether there is a the~~ need to withdraw from the engagement and the professional relationship.

Tax Planning Products or Arrangements Developed by a Third Party

~~R380.232 A1 There might be circumstance swhere a professional accountant refers a client to a third-party provider of tax planning products or arrangements, or where if a client approaches a the professional accountant for a recommendation or advice on a tax planning product or arrangement developed by a third party, the accountant shall. In both circumstances, the provisions in this section apply~~

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~~(a) Inform the client of any professional or business relationship the professional accountant has with the third-party provider; and~~

~~(b) Apply the provisions in this section with respect to the tax planning product or arrangement.~~

~~R380.24 If a professional accountant recommends or refers a client to a third-party provider of tax planning services, the accountant shall inform the client of any professional or business relationship the accountant has with the third-party provider.~~

~~380.24 A1 Where the professional accountant only recommends or refers a client to a third-party provider of tax planning services, the provisions of this section do not apply. However, the provisions in Section 330 are relevant if the accountant receives a referral fee or commission from the third-party provider.~~

~~Referral Fee or Commission~~

~~380.22 A2 A self-interest threat to compliance with the principles of objectivity and professional competence and due care might be created if a professional accountant receives a referral fee or commission by referring a client to a third-party provider of tax planning products or arrangements. The provisions in paragraphs 330.5 A1 and A2 are relevant in such circumstances.~~

~~380.22 A3 In some jurisdictions, professional accountants are prohibited by law or regulation from receiving referral fees or commissions.~~

Documentation

380.235 A1 When providing a tax planning service, a professional accountant is encouraged to document on a timely basis:

- The purpose, circumstances and substance of the tax planning arrangement.
- The identity of the ultimate beneficiaries.
- The nature of any uncertainties.

- The accountant's analysis, the courses of action considered, the judgments made, and the conclusions reached in advising the client on the proposed tax planning arrangement.
- The results of discussions with the client and other parties.
- The client's response to the accountant's advice.
- Any disagreement with the client.

380.235 A2 Preparing such documentation assists the accountant to:

- Consider the reputational, commercial and wider economic consequences that could arise from the way stakeholders might view the arrangement.
- Develop the accountant's analysis of the facts, circumstances, relevant tax laws and regulations and any assumptions made or changed.
- Record the basis of the professional judgments at the time they were made or changed.
- Support the position if the tax planning arrangement is challenged by the relevant tax authorities.
- Demonstrate that the accountant has complied with the provisions in this section.

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Related Services

380.26 A13 There might be circumstances where a professional accountant is engaged to provide a related service to a client that is based on or linked to a tax planning arrangement developed by the client or a third-party provider. In such circumstances, the provisions of this section apply to the underlying tax planning arrangement.

Related services are those that are based on or linked to a tax planning service, whether provided by the professional accountant or another party.

380.26 A2 Examples of such related services include:

- Assisting the client in resolving a dispute with the tax authority on the tax planning arrangement.
- Representing the client in administrative or court proceedings regarding the tax planning arrangement.
- Implementing the tax planning arrangement for the client.
- Advising the client on an acquisition where the valuation depends on the tax planning arrangement established by the target.
- Advising the client on estate planning based on a tax planning arrangement established for the client's business.

Commented [CV24]: Refer to further explanation as per agenda item 9-A paragraph 23-26