Tax Planning & Related Services

IESBA Meeting, November–December, 2022

Jens Poll, Task Force Chair
Carla Vijian, IESBA Principal
OBJECTIVES OF THE SESSION

• To consider TF responses to matters raised during Sept 2022 IESBA meeting and advance comments on Oct 2022 progressed text;

and

• To consider, with a view to approving for exposure, the proposed Sections 380 and 280 addressing tax planning (TP) and related services and related conforming amendments to the Code
MATTERS RAISED
(SEPTEMBER MEETING & ADVANCE COMMENTS)

- Role of the PA in acting in the public interest
- Credible basis
- Stand-back test
- Multi-jurisdictional tax benefit
- Application of the conceptual framework
- Disagreements
Q4 OUTREACH ACTIVITIES

- Prof. Dr. Stef van Weeghel (Tax partner and Global Tax Policy leader at PwC)
- Representatives of European Commission
- Australian Tax Summit (The Tax Institute)
- Wyman Symposium (ICAEW)
- Accountancy Europe Tax Policy Group and Professional Ethics and Competences Working Party
ROLE OF THE PA IN ACTING IN THE PUBLIC INTEREST
• PAs are expected to exercise their professional judgment

• Should not attempt to define or describe the PI in the abstract in context of TP:
  
  (a) Acknowledge that a large part of acting in the PI is to assist clients or employing organizations comply with tax laws and regulations – PAs play an important role rather than assuming the responsibility of ensuring compliance with tax laws and regulations

  (b) Recognize that clients and employing organizations have a responsibility to pay their legally assessed tax dues

  (c) Reputational risks to clients and employing organizations and to the profession are an important consideration
Requirements and Application Material

General

*Professional Accountants’ Public Interest Role in Relation to Tax Planning Services*

... 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 advise their clients on how best to meet their tax planning goals. In addition, accountants play an important role in assisting clients meet their tax obligations and not seek to avoid it through tax evasion. However, this Code recognizes that 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 which need to be addressed.
Requirements and Application Material

General

*Professional Accountants’ Public Interest Role in Relation to Tax Planning Services*

... 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 advise their clients on how best to meet their tax planning goals. In addition, accountants play an important role in assisting clients meet their tax obligations and not seek to avoid it 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.
Matters for Consideration

IESBA members are asked to share any comments, questions, or reactions to the TF’s proposal on the text describing the role of the PA in acting in the public interest.
CREDIBLE BASIS
• Clarify that a PA to only provide affirmative advice on or recommend a TP arrangement if the PA has concluded that there is a credible basis

  o to avoid misinterpretation that this provision is prohibiting a PA from engaging in any discussion with the client if the PA has determined that there is no credible basis for the TP arrangement

  o application material in paragraph 380.11 A1 complements this change

• Clarify that determining whether there is a credible basis will require the PA to exercise professional judgment based on the tax laws and regulations prevailing at the time of the assessment

  o TF also believes that a credible basis must ultimately be anchored to the relevant tax laws and regulations, hence the phrase "credible basis in laws and regulations"
Basis for **Affirmatively** Advising on or Recommending a Tax Planning Arrangement

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

**380.11 A1** If the *professional accountant determines that the* tax planning arrangement does not have a credible basis in laws and regulations, paragraph R380.11.2 does not preclude the professional accountant from explaining to the client the accountant’s rationale *for the determination*.

**380.11 A2** The determination of what is credible *What is a credible basis will vary from jurisdiction to jurisdiction based on the relevant tax laws and regulations at the time and will be a matter of professional judgment.* Whether a tax planning arrangement will prevail is ultimately a matter to be determined by a court or other appropriate adjudicative body.
Basis for Affirmatively Advising on or Recommending a Tax Planning Arrangement

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

380.11 A1  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.

380.11 A2  The determination of what is credible will vary from jurisdiction to jurisdiction based on the relevant tax laws and regulations at the time and will be a matter of professional judgment.
Matters for Consideration

IESBA members are asked to share any comments, questions, or reactions to the TF’s proposals regarding the concept of credible basis.
STAND-BACK TEST
• Intent of paragraph R380.12: the stand-back provision is a consideration by the PA of the reputational, commercial and wider economic consequences that could arise relative to how stakeholders might perceive the TP arrangement
  
  o This is a good faith consideration based on PA’s knowledge of the context and circumstances at the time
  
  o No expectation that the PA will be subject to hindsight judgment
  
  o It is the PA's (and not someone else's) judgment
  
  o It is not about tax morality or social justice
• Proposed revisions to R380.12:
  o Focus more on the implications for the profession, which is more aligned to fundamental principle of professional behavior (in terms of the PA not doing anything that would bring ill-repute to the profession)
  o Include deletion of the word “potential” as it suggested that PAs are required to perform an extensive forecasting exercise, which is not TF’s intent
• Proposed revision to R380.13 clarifies that requirement to communicate basis of PA’s decision not to proceed with the recommendation only applies when PA is engaged by the client, and the TP arrangement is one the client would like to pursue
**Consideration of the Overall Tax Planning Advice or Recommendation**

**R380.12** In developing the advice or recommendation on In determining that there is a credible basis for the tax planning arrangement, the professional accountant shall exercise professional judgment and consider the potential reputational, commercial and wider economic consequences that might could arise from the way stakeholders would might view the arrangement.

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

**380.12 A2** An awareness of the wider economic risks and consequences might take into account the professional accountant’s understanding of 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.

**R380.134** If, after having considered the matters set out in paragraph R380.123, the professional accountant decides not to proceed with providing the tax planning affirmatively advice or recommend a tax planning arrangement that the client would like to pursue, the accountant shall inform the client of the decision and explain the basis of for that decision.
Consideration of the Overall Tax Planning Advice or Recommendation

R380.12 In 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.

380.12 A1 The reputational and commercial consequences might relate to personal or business implications to the client or implications to the reputation of the profession of a prolonged dispute with the relevant tax or other authorities. These 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.

380.12 A2 An awareness of the wider economic consequences might take into account the professional accountant’s understanding of 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.

R380.13 If, having considered the matters set out in paragraph R380.12, the professional accountant decides not to affirmatively advise or recommend a tax planning arrangement that the client would like to pursue, the accountant shall inform the client of the decision and explain the basis of that decision.
Matters for Consideration

IESBA members are asked to share any comments, questions, or reactions to the TF’s proposed revisions to the provisions relating to the stand back test.
MULTI-JURISDICTIONAL TAX BENEFIT
• Title of section amended to *Tax Planning Arrangements Involving Multiple Jurisdictions*
  
  o Helps to clarify what ethical issue might arise from cross-border TP arrangements vs. when there are tax benefits to the client/employing organization

• Proposed guidance in 380.14 A2 describes:
  
  o Relevant factors PAs might consider in determining whether to make the disclosure noted in paragraph 380.14 A1

  o Examples of factors provided are not meant to be exhaustive

• A question raised about involvement of external experts – out of scope of this project
380.14 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 either one or both jurisdictions.
• The likelihood that the tax benefits will continue to be available to the client if no action is taken in either jurisdiction to address the matter.
• 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.
Matters for Consideration

IESBA members are asked to share any comments, questions, or reactions to the TF’s proposed guidance relating to TP arrangements involving multiple jurisdictions
APPLICATION OF CONCEPTUAL FRAMEWORK
Recap: Broad Spectrum of Tax Planning

- CLEARLY LEGAL
- GRAY ZONE
- CLEARLY ILLEGAL

ETHICAL CONSIDERATIONS

CONCEPTUAL FRAMEWORK APPLIES (PARAGRAPHS 380.17 A1 – 380.17 A5)
• Some clarifications to guidance on types of threats that might be created when providing a TP service
  o Paragraph 380.17 A1

• Some clarifications to guidance providing examples of:
  o Actions that might **eliminate threats** (paragraph 380.17 A3)
  o Actions that might be **safeguards** (paragraph 380.17 A4)
Providing a tax planning service to a client might create a self-interest, advocacy or intimidation threat. For example:

• 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 a material impact on the client’s financial situation.

• A self-interest threat might be created when a professional accountant accepts a significant fee 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 before a tax authority even though there are indications that the arrangement might not have a credible basis in tax laws and regulations.

• Self-interest and intimidation threats might be created when a professional accountant acts for a client provides services to a client who exerts significant influence over the design of a particular tax arrangement, and in a way that might influence the accountant’s determination that there is a credible basis it is doubtful as to whether for the proposed arrangement is consistent with the intent of the relevant tax 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 because of the difference of views on a client is insisting on pursuing regarding a tax planning arrangement.
Examples of actions that might eliminate threats created by circumstances of uncertainty include:

- Referring the client to an expert outside the professional accountant’s firm who has the necessary knowledge, skills and experience to advise the client on the proposed tax planning arrangement.

- Structuring the tax planning arrangement based on common practice that has not been challenged by the relevant tax authorities.

- Structuring 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.
Examples of actions that might be safeguards to address such threats include:

- Establishing the identity of the ultimate beneficiaries.
- Structuring the tax planning arrangement so that it has a clear economic purpose and substance.
- **Structuring the tax planning arrangement based on an established practice that has not been challenged by the relevant tax authorities.**
- Consulting with an expert within or outside the professional accountant’s firm in the relevant tax areas.
- Obtaining an opinion from an *appropriate* independent legal counsel regarding the interpretation of the relevant tax laws and regulations as applied to the particular circumstances.
- Having an appropriate reviewer, who is not otherwise involved in providing the tax planning service, review any work performed or decisions made 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.
Matters for Consideration

IESBA members are asked to share any comments, questions, or reactions to the TF’s proposed refinements to the application material addressing the application of the conceptual framework (paragraphs 380.17 A1 – 380.17 A5)
DISAGREEMENTS
• Revisions to:
  o Clarify sequence of steps PA should take if disagreement with client arises
  o Clarify that the circumstance is about a disagreement over a TP arrangement the client wishes to pursue against PA’s advice
  o Avoid inadvertently limiting the “client” to an entity – the client could be an individual
  o Include guidance for PA to consider communicating the details of the disagreement with TCWG if deemed appropriate
Disagreement with **Client Management**

**R380.198** If the professional accountant disagrees with management that a proposed tax planning arrangement **that a client would like to pursue** has a credible basis in laws and regulations, the accountant shall:

(a) **Inform the client of the basis of the accountant’s assessment;**

(b) Communicate to **the client** management the reputational, commercial and wider economic risks and consequences of pursuing the arrangement in the event of an adverse ruling; and

(bc) Advise **the client** management not to pursue the arrangement.

**R380.2019** If management determines **the client decides** to pursue the tax planning arrangement, **despite the professional accountant’s advice to the contrary**, the professional accountant shall take steps to be disassociated from the arrangement. In doing so, the accountant shall consider **advising the client**:

(a) Advising management **If appropriate,** to communicate **internally** the details of the arrangement and the difference of views with those charged with governance;

(b) Advising management **To make full disclosure of the arrangement to the relevant tax authorities; and**

(c) Advising management **To communicate the details of the arrangement and the difference of views to the external auditor, where applicable; and**

**380.20 A1** As part of communicating the matters set out in paragraphs R380.19 and R380.20, a professional accountant might consider it appropriate to raise the relevant matters with those charged with governance of the client.

**380.20 A2** In light of the client’s response to the professional accountant’s advice, the accountant might also consider the need to withdrawing from the engagement and the professional relationship.
Disagreement with Client

R380.19 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 reputational, commercial and wider economic consequences of pursuing the arrangement in the event of an adverse ruling; and

(c) Advise the client not to pursue the arrangement.

R380.20 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 be disassociated from the arrangement. In doing so, the accountant shall consider advising the client:

(a) If appropriate, to communicate internally the details of the arrangement and the difference of views;

(b) To make full disclosure of the arrangement to the relevant tax authorities; and

(c) To communicate the details of the arrangement and the difference of views to the external auditor, where applicable.

380.20 A1 As part of communicating the matters set out in paragraphs R380.19 and R380.20, a professional accountant might consider it appropriate to raise the relevant matters with those charged with governance of the client.

380.20 A2 In light of the client’s response to the professional accountant’s advice, the accountant might also consider the need to withdraw from the engagement and the professional relationship.
Matters for Consideration

IESBA members are asked to share any comments, questions, or reactions to the TF’s proposed text to address circumstances when disagreement arises.
PARAGRAPH REVIEW OF OTHER CHANGES
TIMELINE

IESBA approval of project proposal
- September 2021

Update to IESBA
- December 2021

Discussion of Issues with IESBA and IESBA CAG
- March 2022

Global Roundtables
- April 2022

Discussion of Issues with IESBA
- June 2022

Approval of final pronouncement
- December 2023

Full review of ED responses
- September 2023

High level update
- June 2023

Approval of Exposure Draft
- December 2022

IESBA: First Read of proposals
- September 2022