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

380.4 A1 Professional accountants play an important role in tax planning by contributing their knowledge, skills and experience to assist clients meet 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 have a responsibility to advise their clients on how best to meet their tax planning goals. Equally, accountants have a responsibility to assist clients in meeting their responsibility to pay taxes and not seek to avoid it through tax evasion or by taking advantage of tax minimization arrangements that, although not prohibited by tax laws and regulations, might still create threats to compliance with the fundamental principles.

Description of Tax Planning and Related Services

380.5 A1 Tax planning comprises a broad range of services designed to assist a client in structuring its affairs in a tax-efficient manner, including taking a position on a current or future tax return.

380.5 A2 Examples of tax planning services include:

- Structuring an individual's 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 optimize their tax position.

- Advising an entity on structuring its international operations to optimize its tax position, including through transfer pricing arrangements.
- Advising on efficient ways to utilize available tax losses.
- Structuring an entity's capital distribution strategy in a tax-efficient manner.
- Advising an entity on structuring its compensation strategy for senior executives to optimize the tax benefits.

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 A4 This section applies regardless of the nature of the client, including whether or not it is a public interest entity.

Compliance with Laws and Regulations

Anti-avoidance Laws and Regulations

R380.6 In some jurisdictions, there are tax laws and regulations that prohibit certain tax planning arrangements. These laws and regulations are often referred to as anti-avoidance rules or measures. A professional accountant shall obtain an understanding of those laws and regulations and comply with them when providing tax planning services.

Non-compliance with Laws and Regulations

380.7 A1 If, in the course of providing a tax planning service, 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.
- 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.

Responsibilities of All Professional Accountants

R380.9 If a professional accountant is requested to provide a tax planning service, the accountant shall obtain an understanding of the nature of the request. This understanding shall include:

(a) The background of the client, its owners, management and those charged with governance, and its business activities;

(b) The goals of the tax planning; 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 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.

R380.11 A professional accountant shall explain the basis on which the accountant advised or recommended a tax planning arrangement to a client.

Basis for Advising on or Recommending a Tax Planning Arrangement

R380.12 If a professional accountant is engaged by a client to advise on or recommend a tax planning arrangement, the accountant shall only do so if the accountant has established a credible basis in laws and regulations for the arrangement.

380.12 A1 If the tax planning arrangement does not have a credible basis in laws and regulations, paragraph R380.12 does not preclude the professional accountant from explaining to the client the accountant's rationale.

380.12 A2 What is a credible basis will vary from jurisdiction to jurisdiction. Whether a tax planning arrangement will prevail is ultimately a matter to be determined by a court or other appropriate adjudicative body. Actions that a professional accountant might take to establish 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 or industry journals, and tax authority rulings or guidance.
- Considering whether the basis used for the proposed arrangement is a common 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 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.

R380.13 In determining whether to proceed with the advice or recommendation on the tax planning arrangement, the professional accountant shall consider the reputational, commercial and wider economic risks and consequences arising from the way stakeholders might view the arrangement.

380.13 A1 The reputational and commercial risks and consequences might relate to personal or business implications to the client 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.

380.13 A2 An awareness of the wider economic risks and consequences might take into account 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.

Multi-jurisdictional Tax Benefit

380.14 A1 A client might obtain 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.

Circumstances of Uncertainty

380.15 A1 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 establish a credible basis for the tax planning arrangement and might therefore create threats to compliance with the fundamental principles.

380.15 A2 Circumstances that might give rise to uncertainty include:

- Difficulty in establishing an adequate factual basis.
- 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.
- Lack of clarity about the ultimate beneficiaries of the tax planning arrangement.

R380.16 Where there is uncertainty as to whether a proposed tax planning arrangement will be in compliance with the relevant tax laws and regulations, a professional accountant shall discuss the nature of the uncertainty with the client.

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

- Sharing the professional accountant's assessment about how likely the relevant tax authorities are to have a view 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.
- Discussing any reputational, commercial or wider economic risks and consequences in pursuing the proposed tax planning arrangement.
- Discussing potential courses of action to mitigate the risks, including consideration of disclosure to the relevant tax authorities.

Potential Threats Arising from Providing a Tax Planning Service

380.17 A1 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 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 unclear.
- A self-interest threat might be created when a professional accountant has a direct financial interest in a client and the accountant is designing a tax planning arrangement that has a material impact on the client's financial situation.
- 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 who exerts significant influence over the design of a particular tax arrangement, and it is doubtful as to whether 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 because of a difference of views on the position to take regarding a tax planning arrangement.

380.17 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.
- The number of jurisdictions involved and the nature of their tax regimes.
- The extent of the professional accountant's knowledge, skills 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.
- 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 extent to which the proposed tax planning arrangement reflects common 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.
- The known previous behavior or reputation of the client, including its business culture.

380.17 A3 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.

- Obtaining an advance ruling from the relevant tax authorities, where possible.
- Not pursuing, or advising the client not to pursue, the proposed tax planning arrangement.

380.17 A4 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.
- Consulting with an expert within or outside the professional accountant's firm in the relevant tax areas.
- 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.
- Obtaining an opinion from independent legal counsel regarding the interpretation of the relevant tax laws and regulations as applied to the particular circumstances.
- 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.

380.17 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.
- Reviewing the client's tax records, financial statements and other 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.

Disagreement with Management

R380.18 If the professional accountant disagrees with management that a proposed tax planning arrangement has a credible basis in laws and regulations, the accountant shall:

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

(b) Advise management not to pursue the arrangement.

R380.19 If management determines to pursue the tax planning arrangement, the professional accountant shall take steps to be disassociated from the arrangement. In doing so, the accountant shall consider:

(a) Advising management to communicate 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;

(c) Advising management to communicate the details of the arrangement and the difference of views to the external auditor; and

(d) Withdrawing from the engagement and the professional relationship.

Tax Planning Products or Arrangements Developed by a Third Party

380.20 A1 There might be circumstances where a professional accountant refers a client to a third party provider of tax planning products or arrangements, or where a client approaches the accountant for advice on a tax planning product or arrangement developed by a third party. In both circumstances, the provisions in this section apply.

Referral Fee or Commission

380.20 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 packaged tax planning products. The provisions in paragraphs 330.5 A1 and A2 are relevant in such circumstances.

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

Documentation

380.21 A1 When providing a tax planning service, a professional accountant is encouraged to document:

- The goals and economic purpose 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 the accountant considered, the judgments made and the decisions taken in developing the proposed tax planning arrangement.
- The results of discussions with the client and other parties.
- The client's response to the accountant's advice.

380.21 A2 It is in the interest of a professional accountant to prepare documentation relating to the tax planning arrangement in a timely manner. Such documentation assists the accountant to:

- Develop the accountant's analysis of the facts, circumstances, relevant tax laws and regulations, and any assumptions made.
- Record the basis of the professional judgments at the time they were made.
- 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.