

TAX PLANNING AND RELATED SERVICES

Significant Matters Raised on ED

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IESBA CAG Meeting
September 11, 2023

AGENDA

- Update on Task Force's (TF) activities since December 2022
- Overview of significant comments on the ED
- Timeline

ACTIVITIES SINCE DECEMBER 2022

- Publication of the *Proposed Revisions to The Code Addressing Tax Planning And Related Services* Exposure Draft (ED) on February 17, 2023, comment period ended on May 18, 2023
- Three global webinars
 - February 27 and 28, 2023
- Outreach with stakeholders, including
 - APESB Roundtable
 - European Commission
 - CFE Tax Advisers
- Task Force held in-person and virtual meetings during May, July and August to discuss observations from outreach and comments to ED



BREAKDOWN OF TOTAL RESPONSES (AGENDA ITEM D)



MATTERS RAISED IN COMMENTS

DESCRIPTION OF TAX PLANNING

RELATED SERVICES

ROLE OF THE PA IN ACTING IN THE PUBLIC INTEREST

CREDIBLE BASIS

STAND-BACK TEST

DISAGREEMENTS

DOCUMENTATION



DESCRIPTION OF TAX PLANNING



OVERVIEW OF COMMENTS – TAX PLANNING

- Broadly supportive in principle of the Task Force's proposals with further recommendations
- Main comments raised were:
 - Some stakeholders found the description too broad and goes further than the issue of aggressive tax minimization which may inadvertently create onerous requirements
 - A view that the definition of Tax Planning should reflect the description used by OECD
 - Confusion regarding the terms used – tax minimization versus tax efficient
 - Further clarification sought on the inclusion of transfer pricing arrangements as an example as it is already a requirement under the relevant applicable laws and regulations in numerous jurisdictions to adopt an arm's length standard
 - If the PA had provided initial advice followed by implementation of the transfer pricing arrangement or whether it also included the ongoing transfer pricing compliance aspects in the ensuing years

TASK FORCE PROPOSALS

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.

380.5 A2 Examples of tax planning services include:

- ~~Advising an individual to structure their tax affairs in an efficient manner, consistent with their planning goals.~~
- ~~Advising an individual business owner on structuring their ownership and income from the business to optimize 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.

The Task Force is proposing these revisions to clarify the range of services covered under the proposed description of Tax Planning Services, which respondents noted could be more advisory in nature

The Task Force is proposing these revisions to address concerns relating to the example of transfer pricing arrangement and other minor editorials

Do Representatives have
any questions or
comments?





RELATED SERVICES



OVERVIEW OF COMMENTS – RELATED SERVICES

- Main comments raised were:
 - Recommendation to either refrain from including “related services” within the scope or to provide substantial application material to clarify (tax advisory versus tax compliance)
 - predicated on the assumption that all related services are associated with a particular tax planning arrangement that the PA was involved in
 - clarify the extent of establishment of the credible basis and the overall stand-back test, as the view is that in circumstances where it is compliance related services or activities that may not require such exercise
 - Further clarification sought as to the applicability of the ethical framework to “another party,” as it is not clear which other parties this is intended to capture
 - Concerns raised on the monitoring and enforceability of provisions pertaining to the scope of related services as the description as drafted is unclear

TASK FORCE PROPOSALS

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.

The Task Force is proposing revisions to address concerns raised on the matter of related services

Do Representatives have
any questions or
comments?





ROLE OF THE PA IN ACTING IN THE PUBLIC INTEREST



OVERVIEW OF COMMENTS

- Broadly supportive in principle of the Task Force's proposals with further recommendations
- Main comments raised were:
 - General views that it is the PA's responsibility to determine public interest when necessary
 - Views that it would be challenging to ascertain, in cross-border transactions, who is the public and whose interest is being upheld
 - A stakeholder noted – “public opinion is fluid, and social media is unpredictable and not necessarily representative of public acceptance”
 - Concerns raised that this would place PAs in unfair competitive advantage compared to other professions, e.g., legal profession
 - Further clarification sought re drafting of the public interest considerations, particularly whether a PA has the necessary skill set to consider global public interest considerations
 - Recommendation not to refer to the term “tax evasion” in the section

TASK FORCE PROPOSALS

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.

The Task Force is proposing to align with the proposed definition of expertise from Experts Task Force

The Task Force is proposing editorial revisions to clarify the role of the PA in assisting the client/employing organization in meeting their tax obligations without referencing tax evasion, as the PA should never assist the client/employing organization circumvent tax laws and legislation to evade paying their share of taxes

Do Representatives have
any questions or
comments?





CREDIBLE BASIS



OVERVIEW OF COMMENTS

- Generally supportive in principle of the Task Force's proposals with further recommendations
- Main comments raised were:
 - Generally found the term subjective and presenting practical challenges
 - Consideration of “credible basis” should indeed include assessment of facts and circumstances to which the laws and regulations need to be applied
 - A stakeholder noted that “the articulation of the appropriate basis in the tax code varies by jurisdiction and no global terminology is possible”
 - Different terminologies noted in various jurisdictions which will unintentionally create further confusion in terms of monitoring and enforceability
 - Further clarification sought on whether the credible basis determination should be reconsidered when circumstances change and what matters would indicate that there is not a credible basis for the tax planning service
 - One regulatory stakeholder expressed concern that as tax law is complex, different interpretations could be argued as credible, including technically credible interpretations that do not meet the tax law's intent.

TASK FORCE PROPOSALS

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.~~

~~380.11 A2~~ 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.~~

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.

The Task Force is proposing to clarify the thought process PAs undertake when faced with the possibility that the tax planning arrangement does not have a credible basis and the PA is able to recommend or advise on an alternative arrangement that has a credible basis to the client

The Task Force is proposing that the PA be required to reconsider the previous credible basis determination should circumstances change

Do Representatives have
any questions or
comments?





STAND-BACK TEST



OVERVIEW OF COMMENTS

- Generally supportive in principle of the Task Force's proposals with further recommendations
- Main comments raised were:
 - Generally found the description too broad and concerns raised with regards to the consideration of wider economic consequences
 - Concerns raised that to codify such an exercise of professional judgement could result in uncertainty and confusion, as well as second guessing of the PA's professional judgement
 - Concerns raised that use of such test i.e., forward looking exercise to serve the global initiative and the investors' expectations, may raise expectations for PAs' role and responsibilities which may end up hurting the profession's role and reputation
 - Recommendation to reframe the stand-back test to focus on the consequences for the PA and the firm rather than the consequences for the client (which may be construed as a management responsibility) and develop additional guidance on:
 - (a) clearly delineating the responsibilities of the taxpayer and the professional accountant; and
 - (b) potential actions the accountant can take to meet the requirements of the stand-back test

TASK FORCE PROPOSALS

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.

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.

The Task Force is proposing to address concerns raised with regard to the consideration of wider economic consequences to focus the PA's work effort on their present and general understanding of the CURRENT economic environment without having to undertake extensive research

Do Representatives have
any questions or
comments?





DISAGREEMENTS



OVERVIEW OF COMMENTS

- Generally positive response to the Task Force's proposals with further recommendations
- Main comments raised were:
 - Consideration for the PA advising the client to make full disclosure of the arrangement to the relevant tax authorities or the external auditor, in the event of a disagreement, might create an expectation that the PA violate client confidentiality. This may not be permissible in some jurisdictions
 - Clarification sought as the requirements in paragraphs R380.20 and R280.20 to "take steps to disassociate from the engagement/arrangement" perceived to be unclear
 - Clarification sought as the action required from a PA in public practice (to consider withdrawing from the engagement in paragraph R380.21) does not seem proportionate as compared with the potentially more extreme action proposed for a PA in business (to consider resigning from employment in paragraph 280.20 A1)

TASK FORCE PROPOSALS

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.

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.

R380.224 In light of the client's response to the professional accountant's advice, the accountant shall consider the need to withdraw from the engagement and the professional relationship.

The Task Force is proposing to address concerns that this should not be restricted to instances where there is an adverse ruling, as this would imply that PA would not be able to meet the requirements re the credible basis and stand-back test

The Task Force is proposing to address concerns raised with regard to confidentiality when disclosing to tax authorities in jurisdictions where this is permissible and applicable

Do Representatives have
any questions or
comments?





DOCUMENTATION



OVERVIEW OF COMMENTS

- Generally positive responses in terms of documentation with further recommendations
- Main comments raised were:
 - Given the public interest invariably attached to tax services and its role in collecting the relevant jurisdiction's (or multiple jurisdictions') tax revenue, stakeholders believe documentation should be a requirement
 - Proper documentation is a useful tool to facilitate ethical considerations – especially as part of the process when considering whether the advice has a credible basis and then performing the stand-back test
 - Recommendation that documentation is introduced for at least circumstances where there is uncertainty associated with a tax planning service or where the engagement would be regarded as high risk, if it is challenging to introduce documentation requirements globally
 - A stakeholder viewed that the encouragement to document for activities within scope essentially amounts to a recommendation PAs compile such documentation even for very simple transactions

Do Representatives have
any questions or
comments?



NEXT STEPS



**September 2023
IESBA and CAG
meeting**

- Full review of significant comments on the ED
- First read of proposed revised text post-ED

October and November

- Advance Board comments on updated text via email
- Outreach to key stakeholders

**December 2023 IESBA
meeting**

- Second read of proposed revisions
- Scheduled approval of the final text



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