

Ref: #774497

**18 May 2023**

**The International Federation of Accountants**

**529 5<sup>th</sup> Avenue**

**New York**

**10017**

Per email: KenSiong@ethicsboard.org

Dear Mr. Ken Siong

**RE: EXPOSURE DRAFT (ED) PROPOSED REVISIONS TO THE CODE ADDRESSING TAX PLANNING (TP) AND RELATED SERVICES**

The South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make submissions to IESBA on the ED on *Proposed Revisions to the Code Addressing Tax Planning and Related Services*.

SAICA is South Africa's pre-eminent accountancy body which is widely recognised as one of the world's leading accounting institutes. The Institute provides a wide range of support services to more than 52 000 members who are chartered accountants [CAs(SA)] and associates [AGAs(SA)] who hold positions as chief executive officers, managing directors, board members, business owners, chief financial officers, auditors, tax practitioners and members that perform tax planning and related services and leaders in their spheres of business operation.

SAICA adopted the IESBA's International Code of Ethics for Professional Accountants (including International Independence Standards) (the Code) in November 2018 as the SAICA Code of Professional Conduct (the SAICA Code), with certain additional national requirements.

SAICA has consulted its membership in response to the exposure draft. Members who provided input into the process included academics, professional accountants in public practice and professional accountants in business who have vast knowledge and experience in the Tax Planning and related services in South Africa.

Following our consultations with our members, several material concerns and reservations have been raised in relation to the ED.

SAICA's comments to the ED are included in the annexures to this letter as follows:



- (a) **Annexure A:** Overall comments
- (b) **Annexure B:** Specific comments

We would appreciate the opportunity to engage further and to discuss the comments, if required. Please do not hesitate to contact Natasha Soopal at [natashias@saica.co.za](mailto:natashias@saica.co.za).

Regards,

A handwritten signature in black ink, appearing to be 'Mpho Mookapele', written over a horizontal line.

**Mpho Mookapele**  
**Chairperson: Ethics Committee**

**David Warneke**

---

**David Warneke**  
**Chairperson: National Tax Committee**

*The South African Institute of Chartered Accountants*



## ANNEXURE A – OVERALL COMMENTS ON THE ED

1. Addressing tax planning practices that seek to undermine the laws of countries and unlawfully divert or avoid necessary fiscal revenues is a matter of global concern. These outcomes are in many instances achieved through lack of transparency or creating artificial opaqueness/complexity as to facts and law (and artificial compliance with such laws). In this regard we support initiatives that are intended to mitigate against such conduct.
2. Such interventions do need to itself be transparent, uncomplex and clear to be effective (i.e. two wrongs don't make a right) as further opaqueness of principles and rules will in our view just further undermine the efforts to address the scourge and provide a place to "hide" for those within the profession that purposefully seek this type of conduct.
3. SAICA acknowledges and recognises the need for revisions internationally and support interventions to reduce unlawful tax avoidance and evasion. However, it is unfortunate that the scope of the ED is expressly seeking to mitigate against "specified" lawful and legal conduct of members, which creates much complexity and challenge with the proposals as set out in our comments.
4. We do not believe that the ED can seek to limit lawful conduct without seeking to impose a defined moral obligation, something the ED expressly states it does not want to do, leading to an impasse. We remain of the view that this proposal would have been better suited to a guidance document as was the initial proposal by the IESBA Workgroup.
5. Furthermore, based on tax legislation and regulation of tax practitioners in South Africa, SAICA believes that the proposed amendments may not be wholly appropriate for our jurisdiction.
6. Based on discussions with Professional Accountants (PAs) who perform, requisition, or assist in TP and related services in South Africa, SAICA has noted the following challenges on the proposed revisions to the Code Addressing Tax Planning and Related Services:

(a) Tax Planning and Tax Profession is in the Public Interest

As a point of departure, it must be emphasised, that many courts of law have concluded, taxpayers are legally entitled to tax planning (i.e. to arrange their affairs to minimise their taxes). Consequently, those who assist them in achieving this, while meeting the laws of the relevant countries, are acting in the public interest.

It is our understanding that IESBA and the ED recognise this right and does not seek to undermine it, even if lawful tax planning may result in the reduction of the theoretical maximum fiscal revenues that governments may collect. Our submission and point of departure is therefore that a taxpayers' right to lawfully arrange their tax affairs is a



matter of equal public interest to that of a state to enforce taxpayers fully paying the taxes they are required by law to contribute to the fiscus.

The ED states:

“Above all, the IESBA aspires to rise to the challenge of reinforcing public trust in the global accountancy profession.”

It is however unclear which “public trust” IESBA is referring to? Given that the ED explicitly seeks to limit PA’s and their clients / employers engaging in lawful conduct and eroding the trust amongst clients and PA’s and between employers and PA’s, will the aspirations of IESBA be met by this ED?

Furthermore, if we agree that tax planning and the professions’ role therein is in the public interest, the sustainability of the tax profession would also be in the public interest? We submit that the impact of the ED on the sustainability of PA’s in the broader tax profession is therefore a material concern and a matter to be considered and weighed against the perceived benefits.

It is a concern that globally, the tax advisory profession has been treated as inherently not being in the public interest and globally governments seem not too concerned about the sustainability of the profession, which like the globally declining audit profession, is also under pressure.

In South Africa an initial phase of registration was introduced in 2005 with only 17 000 tax professionals registering, estimated to be a third of the industry before this. This has nearly 20 years later only grown to 24 000. This is notwithstanding SARS allowing persons with qualifications as low as NQF 4 (i.e. low post secondary school level) to remain in the profession. A similar concern over the future of the Tax Profession was investigated by the Australian Inspector General of Taxation in 2018. Noticeably in 8-year period tax agents grew slowly whereas BAS agents (compliance) actually declined (see pg. 126). The parallels with the audit profession are hard to ignore. In South Africa in 2000, we had more than 4000 Registered Auditors out of just over 20 000 PA that qualified for this role. Today 23 years later we have less than 3600 out of 50 000 PA that qualify for this role.

We strongly believe that even though the tax profession includes many other professions, it would be a lot poorer without PA’s. Meeting a public need and desire that PA’s act in a moral and ethical way that is congruent with the standards of conduct the profession sets itself, is necessary. Imposing opaque and uncertain obligations on the majority of compliant PA’s who seek to meet the law and what it seeks to achieve, in an effort to weed out those that do not share this sentiment, may be a bridge too far.

(b) Practical implementation of the proposal

A significant amount of the proposals in the ED is subjective with no clear guidance. Subjectivity increases the risk of difference in interpretation and application by PAs



resulting in an inconsistent application of the proposals by PAs. This may result in the IESBA not achieving its desired outcome with the proposed amendments to the Code. In addition, the subjectivity in the proposal may not be practically implementable by PAs as a lot of professional judgement is left to the PAs. Examples of proposed areas where subjectivity may be a challenge includes amongst others, the credibility test, the stand back test and in the public interest.

(c) Overregulating PAs performing TP services.

The proposals in the ED are seen to be overregulating the profession in TP which may not be applicable to other professions involved in TP and potentially making it difficult for PAs to be competitive with other professions. Other risks that may arise because of the proposal is that PAs performing TPs may be requested to resign from their PAOs, especially PA's whose PAO's obligations pose a risk to their employers.

It is envisaged that the fundamental principles in the Code, as it currently stands, is applicable to all PAs and PAs involved in TP arrangements should be able to adapt the fundamental principles in the Code to their work.

Furthermore, the proposals may be overburdening PAs. Several additional processes will have to be performed by PAs which will result in additional costs on the part of the PA and the PA's organisation. We are of the view that it is highly likely that these additional costs will not be recoverable from clients as they may not see or understand the additional compliance burdens being placed on PAs rendering TP services and hence may not be willing to pay the additional costs.

(d) Monitoring by PAOs

A Code amendment makes no impact unless monitored and enforced by PAO's. This was not initially a concern raised in relation to this project given that the initial workgroup recommendation preferred a guidance document, which we still believe was better suited to a matter of this nature. Monitoring of the proposals may be an issue as the proposal is vague in most instances.

Where definitions are not provided or inadequate guidance provided, we have noted based on experience that it causes uncertainty by PAs and PAOs, as well as a difference in interpretation.

A recent similar example of this in the Code was the implementation of NOCLAR where uncertainty exists amongst PAs due to the subjectivity of terms used in the Code such as "clearly inconsequential." This has also negatively impacted the monitoring of the requirements of NOCLAR by PAOs. It is envisaged that if the subjectivity in the proposals for TPs is not corrected, similar challenges as those experienced by NOCLAR will occur.

Where a PAO seeks to enforce the Code and it contains vague provisions, it undermines the PAO's ability to do so and places it at financial and reputational risk should members revert to the courts to clarify and declare on the matter.



(e) Increased volume of the Code

The IESBA should consider the increase in content to the Code because of including a lot of application guidance. By including additional requirements for PA's performing TP services, we are potentially setting a precedent in the future to include additional paragraphs for other PAs who perform work in other areas which have a big public interest for example public sector. This may not be ideal for the Code as it will continuously increase in volume and as a result may lose its value to PAs.

This may also detract PAs from the requirements of the Code. Application guidance that may not be necessary should be placed in a guidance document outside the Code to reduce the risk of confusion by PAs and ensuring that it is consistently applied and practically implementable.

An example of a list of application guidance that may not be required to be included in the Code are Paragraphs 280.11 A3 and 380.11 A3 as it is envisaged that all PAs will apply the fundamental principal of professional competence and professional behaviour while performing TP service will consider specific processes.

Paragraphs 280.11 A3 and 380.11 A3 states:

“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 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 experts within or outside the employing organization regarding what a reasonable interpretation of the relevant tax laws and regulations might be.
- Consulting with the relevant tax authorities, where applicable.

The above can be compared to a list of audit procedures which is included in the Code which may be inappropriate as the Code should be principle based.



Furthermore, the practical guidance may be incorrectly interpreted by organisations who are not PAOs as requirements which may negatively impact members.

(f) International pressure

The tone of the ED is that IESBA is not addressing the “grey area” between lawful and unlawful (i.e., tax matters that were not designed to fall foul of the law but does) or illegal (tax matters that were intentionally designed to fall foul or seem to evade detection by the law) on the other side. This is notwithstanding that in the 2022 IESBA Roundtable discussions stakeholders noted this approach as being untenable. It therefore infers that IESBA is attempting to enforce ethical rules on “categories” of lawful conduct, with this ED attempting to articulate that “category”.

The ED further seeks to impose legal consequences in terms of the code of conduct for not meeting ethical obligations that are however lawful conduct. These consequences as enforcement through the PCC and disciplinary process, will also be public in many countries and have public legal consequences.

The ED notes that it is issued in support of the OECD’s BEPS initiative, though it is unclear exactly what about the BEPS project it supports given the global differing opinions on BEPS. This includes developing countries disagreement with it and their tabling at the UN of a more globally representative regime in 2022.

Ironically the BEPS project was initiated not because of “evading taxpayers”, but in seeking to align and get consensus on the fiscal policy of countries to avoid enabling legal tax avoidance. It is public record that the project has migrated significantly from this main objective to one where taxpayers were publicly accused of “not doing anything illegal but being immoral”. The IESBA ED however denies that it is attempting a tax morality exercise though it is hard to agree with this conclusion given the essence of the ED<sup>1</sup>.

Inevitably, the ED is adding to the now popular political approach to “publicly shame” taxpayers and tax advisors who comply with the law but force them into doing what is seen as “moral” in respect of a specific country or view, even if it is in contradiction to other country’s morals and their laws. This is also reflected in the overly vague “stand back test” proposed. It avoids that countries must address the laws they draft rather than taxpayers having to read “the spirit of the law”, resulting in that they cannot rely on what the law actually says at a particular point in time in a particular jurisdiction vs another (i.e., same spirit of the law can have different meanings in different jurisdictions). This state of affairs is with respect, not the accountancy professions to own or fix.

---

<sup>1</sup> 18. These provisions do not address the issues of tax morality, tax fairness<sup>11</sup> and tax justice which the Board determined was outside the scope of this project. 1





It is interesting that even the European Court of Human Rights<sup>2</sup> has taken a stance on governments using public shaming tactics, even where tax transgression occurred and debt is owed, therefore not even something as whimsical as “tax morality” matters.

Imposing a “ethical” standard on legal conduct that has a particular “open ended moral” view is a problematic proposal to apply and implement in practice and not in the interest of IFAC members.

In this regard we believe that addressing the “grey area between lawful and unlawful/illegal in addition to enhanced transparency disclosures (i.e., the latter cannot be hidden or made opaque), including in financial records e.g., as IFRIC 23 has done, is a lot more helpful in achieving the intended goals. It also enables professional bodies to address the actual problem namely those that seek to escape their legal liability through improper conduct, whether directly or through intentionally making transactions opaque and hide its true nature.

Regulation of tax advisors varies amongst jurisdictions.  
The ED does notes:

*“Further, feedback from outreach indicates that there are stakeholder perceptions that the tax adviser community is not as closely regulated as the audit profession and therefore, generally feels less constrained in its advisory services.*

It further states:

*Given the wide diversity of tax laws and regulations, the IESBA is cognizant that this framework will need to be jurisdiction-neutral (i.e., equally applicable in jurisdictions where the tax burden is high and where it is low).*

The first statement is not entirely true as the profession is regulated in some jurisdictions and substantially more than the audit professions. This notwithstanding that auditing by its very nature is a public interest assurance function, whereas tax planning is an individual tax advisor/client matter that should not be done in manner that undermines the public interest. That is a substantial difference. The ED should also specifically distinguish jurisdictions with regulation of the tax professions from those that have none.

The second statement recognises the diversity challenge of legislation but none the less attempts to achieve global alignment on matters not achieved before by countries or revenue services themselves.

Not acknowledging the impact that the tax profession reaches beyond the professional accountancy profession is disappointing as that is the reality our members face and that our members compete for their own financial sustainability I such market. The

---

<sup>2</sup> [PR - Chamber Judgment \(jurist.org\)](#)





reality is that the market for tax advisors is primarily to ensure tax efficiency (as a direct cost) and compliance as that is one of its core legal purposes.

It also is a reality that the legal profession inter alia is in many jurisdictions not regulated as relates to tax advice. In this regard, the fact that regulators have also indifferently treated and favoured the legal profession in local regulation like in South Africa, notwithstanding the lack of competency standards or ethical standards for that profession in tax, is a reality that PA must deal commercially and legally.

Negative perceptions that taxpayers have disclosure protection with legal practitioners and none with PA are exacerbated by compelled disclosures not applicable to the rest of the tax profession.

Added to regulatory requirements in jurisdictions that already regulate their tax profession compounds the above challenges and risks driving IFAC member bodies members out of the profession. This is not in the interest of IFAC or the tax profession as it just means that less people subject to code requirements will remain in the profession.

## **2. Key Recommendation**

### **(a) Application of implementation should be left to each jurisdiction.**

It has been noted that the IESBA has acknowledged in the Explanatory Memorandum that it leaves implementation to the decision of the jurisdiction as noted by the following example:

“Recognizing that what is a credible basis in laws and regulations will vary from jurisdiction to jurisdiction, the IESBA proposes guidance setting out various actions a PA might take to establish a credible basis for the TP arrangement.”

Based on the varying laws and regulations from jurisdiction to jurisdiction, SAICA recommends that the IESBA allows each jurisdiction to apply the proposals as it may be most applicable and appropriate for that jurisdiction.

It is also important to highlight that SAICA has been recognised by the South African Revenue Services as one of the Recognized Controlling Body for Tax Practitioners in South Africa.

For an entity to apply to the Commissioner to become a Recognised Controlling Body the entity must ensure with regards to tax practitioners that the following are maintained:

- Minimum qualifications and experience requirements.
- Continuing professional education requirements.
- Codes of ethics and conduct.
- Tax compliance; and
- Disciplinary process and procedures.



In South Africa it is a statutory requirement to belong to a Recognised Controlling Body and register with SARS as a tax practitioner if you are a person who: Provides advice to another person with respect to the application of a tax Act; or completes or assist in the completion of returns.

The tax practitioner must meet the requirements of the Recognised Controlling Body for registration with them as a tax practitioner. Recognised Controlling Bodies are required to regulate your minimum qualifications, conduct, knowledge, and behaviour in a specific manner thus protecting the interests of the taxpayers whom they represent.

When an entity is recognised as a Recognised Controlling Body, it must submit a report of its members and compliance within the prescribed time period and in the prescribed form and manner.

The above highlights that South Africa has legislation that monitors tax practitioners which will have to be considered when amending the Code of Professional Conduct from a local perspective.

(b) Separate guidance should be prepared.

SAICA recommends that application guidance included in the proposal should be revisited. Only the new guiding principles should be included, and the existing paragraphs in the Code should be enhanced where possible with the new requirements. The IESBA should consider preparing separate guidance outside the Code to support professional accountants who perform TP services.

The above recommendations should be considered in addition to the recommendations proposed in the rest of this submission.

(c) Timeframes for implementation and effective date

Based on past experience with similar Code amendment implementation, SAICA requests that the IESBA provides jurisdictions with adequate time to plan and implement the proposed amendments. PAOs will have to expose the amendments locally and will have to allow sufficient time for comments. Furthermore, there will need to be a lot of consultation locally to ensure that the amendments are appropriate and is practical for implementation.

We also seek clarity and guidance on the effective date as relates to these code amendments, should it be adopted, coming into effect as to which TP would it apply, both historical and future? Also, will there be transitional provisions to address the changeover?



## ANNEXURE A – SPECIFIC COMMENTS

### Question 1

#### *Proposed New Sections 380 and 280*

Do you agree with the IESBA's approach to addressing TP by creating two new Sections 380 and 280 in the Code as described in Section VI of this memorandum?

1. SAICA acknowledges the need for revisions internationally and support interventions to reduce unlawful tax avoidance and evasion, however we **disagree** with the proposed amendments in its current form in the new Sections 380 and 280 and propose the following should be considered:
  - (a) The level of over-regulations of tax practitioners that the proposed amendments will place on PAs. The proposed amendments may potentially increase the risk of PAs required to resign from PAOs by employers because of additional responsibilities of being a member of the PAO and the requirements of the Code which is not applicable to other tax advisors.
  - (b) A lot of the proposed amendments are subjective and may not be consistently applied by all PAs. The proposed amendments should be reviewed and updated to ensure that they are clear and unambiguous and practically implementable.
  - (c) The proposed amendments will have consequential amendments on other paragraphs of the Code such as Section 604 which will have to be amended accordingly.
  - (d) Given the subjectivity of the proposal, PAOs may have trouble in the implementation and monitoring of the proposed amendments. It is most important to ensure that the IESBA ensures that the proposals can be practically implemented by professional accountants.
  - (e) The regulation of tax advisors within jurisdictions varies, as a result the proposals may not be appropriate in all jurisdictions, therefore it is important that the IESBA allows each PAO to adopt based on the TP environment in that country.
  - (f) In addition, the responsibilities of tax advisors vary from preparing simple tax returns to more complex TP arrangements, it will be difficult to include requirements that will be applicable to all tax advisors, and this could potentially place unnecessary burden on PAs who perform fewer complex transactions.
2. SAICA requests that the answer to the responses from question 2 to 13, as well as our general comments are considered in terms of the response to this question.
3. SAICA recommends that the IESBA leaves each of the jurisdictions to individually consider the proposed amendments as tax legislation and the regulation of tax advisors varies in different jurisdiction.

### Question 2

#### *Description of Tax Planning and Related Services*

Do you agree with IESBA's description of TP as detailed in Section VII.A above?



4. The IESBA proposes the following description:  
*Tax planning comprises a broad range of [services/activities] designed to assist [a client, whether an individual or an entity/an employing organization] in **structuring** [the client's/the employing organization's] affairs in a tax-efficient manner.*  
(See paragraphs 380.5 A1 and 280.5 A1.)

5. SAICA **disagrees** with the IESBA's description of TP based on the following:  
(a) It is not clear in the ED if the IESBA will be including the definition of tax planning as articulated in the explanatory memorandum as the definition has been included as application guidance in paragraph 308.5 A1 and 280.5 A1.

Paragraph 28 of the EM states *"To facilitate consistent application, the IESBA is proposing in paragraphs 380.5 A2 and 280.5 A2 illustrative examples of TP services or activities covered under these sections."* It is acknowledged that paragraphs 380.5 A2 and 280.5 A2 are examples however as it is a very specific list, it may be interpreted by some PAs that they need to only cover those specified transactions. There is a potential risk that transactions that qualify as tax planning and that are not listed in paragraph 380.5 A2 and 280.5 A2 may not be considered by professional accountants. The lists may be considered as a checklist and the essence of the proposal may not be achieved.

- (b) Also, some PA's and potentially PAOs may interpret the term "structuring" as being a very broad term which is not clearly defined as it varies from professional accountants completing client returns to more complex transactions. Based on this interpretation there is a potential risk that transactions that should not be covered are in fact included. The list of examples increases the risk of subjectivity by professional accountants.

6. SAICA recommends that the definition of tax planning and related services considers the tax services description contained in section 604.2 A1 and A2 and include the related services in the same description rather than attempting to lay out specific types of arrangements as tax planning is a complex and diverse service which cannot be summarized into specific transactions taking cognizance of the fact that these are mere examples. Furthermore, the examples contained in paragraph 380.5A2 and 280.5 A2 should be removed.

### **Question 3**

*Role of the PA in Acting in the Public Interest*

*Do you agree with IESBA's proposals as explained in Section VII.B above regarding the role of the PA in acting in the public interest in the context of TP?*

7. SAICA **disagrees** with the proposals explained in Section VII.B regarding the role of the PA in acting in the public interest in the context of TP based on the following:



- (a) Paragraph 34 of the explanatory memorandum notes that *“the IESBA has recognised that there was a perceived challenge concerning understanding who is considered the public and interests of those groups of stakeholders PAs are expected to serve in the public interest”* and paragraph 37 indicates that *“considering all observations during the roundtable discussions, the IESBA determined not to attempt to define or describe the public interest in the abstract given the variety of considerations that may influence the meaning.”* This highlights the complexity of determining what is in the public interest by PAs in TP. The proposal does not provide guidance as to how far should a PA go when determining public interest and which stakeholders’ interest take preference over those of others. This therefore gives rise to a high level of subjectivity and inconsistency in the application of public interest amongst PAs.
- (b) It has been noted that the proposed paragraphs 280.4A1 – A3 are application guidance with no requirements. It is envisaged that application guidance should be provided to guide PAs. Given that the background and understanding contained in the explanatory memorandum will not appear in the Code once the proposed revisions are approved and published, the application guidance may cause confusion amongst PAs. This may result in the term “public interest” being inconsistently applied. Furthermore, PAO’s may experience challenges in monitoring the application of these paragraphs because of a lack of understanding and background as to what these paragraphs are trying to achieve without the background being provided in an introductory paragraph. Paragraphs 280.4A1 – A3 will be better placed in a guidance document for PAs which will allow for more information to be included to guide PAs on the considerations to be made when determining public interest.
- (c) Members have also noted that the proposed paragraphs may not be practical to implement. For example, in instances where PA’s may be challenged by Revenue Services and the PA may be required to go into a tax dispute where there are valid reasons that the position of the PA is correct. In this instance, even though tax disputes may be recognised by legislation and the PA may be correct in his or her view, the fact that the PA is disputing the Revenue Service’s view may be seen as not acting in the public interest despite the PA being correct. Therefore, this may become a conflict of interest for PAs in determining which public interest may take preference – shareholders, the revenue services, investors, or the public at large. Furthermore, how does a PA test that their decision in terms of what constitutes the public interest is correct?
- (d) Therefore, acting in the public interest in the context of TP is a very subjective concept and the application of this principle would be very difficult on a practical level. Many PAs would attempt to balance the needs of the fiscus (affecting society at large) whilst ensuring the most tax efficient position for their client (shareholders) as that is what the client is engaging the relevant PAs services and expertise for. The public interest as noted in paragraph 34 of the EM may at times result in a conflict of interest for the PA which is beyond his/her control as to which stakeholder included in the “public interest” category takes preference.



- (e) It should also be noted that case law in South Africa allows taxpayers to arrange their affairs in such a way to pay minimum amount of tax legally due – it is acceptable and allowable to do so.

#### **Question 4**

##### *Basis for Recommending or Otherwise Advising on a Tax Planning Arrangement*

Do you agree with the IESBA's proposals regarding the thought process for PAs to determine that there is a credible basis in laws and regulations for recommending or otherwise advising on a TP arrangement to a client or an employing organization, as described in Section VII.E above?

8. SAICA **disagrees** with the IESBA's proposal regarding the thought process for PAs to determine that there is a credible basis in laws and regulations for recommending or otherwise advising on a TP arrangement to a client or an employing organization, as described in Section VII.E based on the following:

- (a) The IESBA has been unable to define the term "credible basis" which will result in the risk of subjectivity and inconsistency amongst PA's. This will increase the risk of poor implementation of the application of a credible basis amongst PAs which will also be problematic for PAOs to monitor.
- (b) It has been noted by members that the credible basis of TPs may vary from the start to the end of the process of TP arrangements. At which point in the process will the PA conclude that the TP has a credible basis or not? Uncertainty will exist amongst PAs as to what will pass the test of credible basis as insufficient guidance has been provided. An example of this in South Africa is where a PA would want to claim a deduction for repairs and maintenance expenses. The PA will look at all the facts surrounding the transaction and may believe that the claim exists and is valid and will submit the claim on that basis. However, the Revenue Service may later indicate that the deduction is not allowed and will impose interest and penalties. What impact will this have in the determination of the credible basis by the PA? In other words, despite the PA using his professional judgement and applying his knowledge in determining a credible basis, the Revenue Services even though the decision of the Revenue Service may still be subject to objection and appeal by the PA as allowed by legislation.

Was the PA wrong? How does a PA make that judgment call as to whether there was a credible basis at a particular point in time? Furthermore, how will a PAO monitor this and at which point in time does the PAO determine that disciplinary action should be taken on the PA?

9. Members would prefer not to have a comprehensive list of "procedures" that a PA should undertake to determine a credible basis as included in paragraph 280.11 A3 and 380.11 A3 as there is concern that these 9 examples may be regarded as a "check list" should a



PA find himself in a position where there is an argument that he did not have a credible basis purely because he omitted one of the 9 examples which in his professional judgement was not required because he might have already had sufficient knowledge/experience in that specific area of tax, as an example.

10. Furthermore, members have also argued that providing so detailed application guidance in the Code will limit the PA's ability to provide advice to clients verbally or through emails, where clients regularly request advice quickly despite the PA considering all the ethical considerations into account in providing the advice whilst using the professional judgement and expertise in providing the advice. This may result in dissatisfied clients who may not be willing to pay additional for written opinion causing the client to find an alternative tax advisor who will be able to provide the advice immediately and is not a PA.
11. It has further been noted that the "credible basis" test requires the application by a PA of the Law of Interpretation for each jurisdiction that the TP applies. This is not a PA competency which may result in PAs not being able to implement the proposal, especially PAIB's where there is no reasonable expectation to have this competency, hence their reliance on specialist third party advice and those in PAIPP.
12. SAICA recommends that in order to include credible basis in the Code, the IESBA needs to clearly articulate what is meant by credible basis.
13. SAICA further recommends that the application of credible basis be left to each jurisdiction to determine on the appropriateness of implementation in that jurisdiction since the IESBA recognises that a credible basis in laws and regulation will vary from jurisdiction to jurisdiction as stated in paragraph 56 of the explanatory memorandum:

*"Recognizing that what is a credible basis in laws and regulations will vary from jurisdiction to jurisdiction, the IESBA proposes guidance setting out various actions a PA might take to establish a credible basis for the TP arrangement. (See paragraphs 380.11 A3 and 280.11 A3.) The IESBA is of the view that it would not be appropriate to ascribe a probabilistic numerical measure to a credible-basis threshold as doing so would convey a false sense of accuracy, more so given roundtable participants' feedback that there is a range of probabilities commonly understood and accepted in different jurisdictions."*





#### Question 5

Are you aware of any other considerations, including jurisdiction-specific considerations, that may impact the proper application of the proposed provisions?

14. **Yes**, there will be jurisdiction-specific considerations that will have to be considered that may impact the proper application of the proposed provisions based on the legislation of a jurisdiction as highlighted in our response in question 4 where legislation may allow PAs to object and appeal decisions by the Revenue Services, etc.
15. Furthermore, in terms of the South African Tax Administration Act No. 28 of 2011, section 223(3) states that –
- “SARS must remit a 'penalty' imposed for a 'substantial understatement' if SARS is satisfied that the taxpayer -
- (a) made full disclosure to SARS of the arrangement, as defined in section 34, that gave rise to the prejudice to SARS or the fiscus by no later than the date that the relevant return was due; and
  - (b) was in possession of an opinion by an independent registered tax practitioner that—
    - (i) was issued by no later than the date that the relevant return was due.
    - (ii) was based upon full disclosure of the specific facts and circumstances of the arrangement and, in the case of any opinion regarding the applicability of the substance over form doctrine or the anti-avoidance provisions of a tax Act, this requirement cannot be met unless the taxpayer is able to demonstrate that all of the steps in or parts of the arrangement were fully disclosed to the tax practitioner, whether or not the taxpayer was a direct party to the steps or parts in question; and
    - (iii) confirmed that the taxpayer’s position is more likely than not to be upheld if the matter proceeds to court”.**
16. SAICA therefore recommends that the IESBA allows for the adoption of the proposed amendments based on the tax legislations and processes in each jurisdiction.

#### Question 6

*Consideration of the Overall Tax Planning Recommendation or Advice*

Do you agree with the proposals regarding the stand-back test, as described in Section VII.F above?

17. SAICA **disagrees** with the proposals because of the below:
- (a) There is insufficient guidance to support the PA in determining how far he or she should go in terms of the stand back test. This is left to the professional judgement of the PA



may not see the value and may not be willing to pay. This will also have a huge impact on small and medium practices.

18. Furthermore, members have raised concerns that the additional requirement of applying a “stand-back test” may be incredibly onerous and borders on corporate governance issues which are more appropriately regulated by the King IV Code. Members are of the view that to impose this level of duty on a PA in rendering TP services may be unjustified. The role of a PA in rendering tax services, albeit tax advice/planning is simply to assist a client to undertake a commercial transaction in the most tax efficient manner. Consideration of public interest and applying a stand-back test is in our members view not practical or cost efficient in public practice.
19. Clients seeking tax advice prior to undertaking a transaction generally want to ensure tax compliance and have the comfort of knowing that they (corporate or individuals) are being tax efficient without any the risk of unlawfulness due to the complexities of tax law which contain various anti-avoidance provisions etc. and are already paying tax professional’s considerable fees for such services. To apply the additional “credible basis” principle, “public interest” requirement and the “stand-back test”, the costs of PAs in rendering such service will no doubt escalate. However, it is highly unlikely that such costs would be recoverable from clients, nor would it add value to them except in the unlikely instance where a corporate does not have a proper corporate governance committee due to it not being mandatory and hence not cost efficient for such client to incur the additional costs.
20. Should the IESBA maintain the view that the stand-back test is necessary, it is recommended that R380.12 be amended to delete the last part of the sentence so that it ends at “wider economic consequences” to make this less onerous. In terms of paragraph 380.12 A2, it is noted that that the proposal that the PA must have an awareness of the wider economic consequences of the tax planning arrangement on the tax base in that country or the relevant impacts of the arrangement on the tax bases of multiple jurisdictions, where the client operates” implies that the PA is required to have a working knowledge of multiple tax jurisdictions.
21. In practice most PAs’ tax expertise is limited to specific tax areas (for example, corporate tax specialists, VAT specialists, PAYE specialists etc.). This is mainly due to the complexities of tax law that may be jurisdiction specific hence it is highly unlikely that a PA advising on a specific tax planning arrangement that may involve another or multiple tax jurisdictions would be aware of the “relative impact of the arrangement” in the other or multiple jurisdictions that the client operates. To obtain such awareness, that PA would likely be required to engage the services of a PA in the other or multiple jurisdictions which would result in additional costs which may not be recoverable from the client as it was not within the scope of services requested from the PA in SA for example.



### Question 7

#### *Describing the Gray Zone and Applying the Conceptual Framework to Navigate the Gray Zone*

Do you agree with the IESBA's proposals as outlined in Section VII.G above describing the gray zone of uncertainty and its relationship to determining that there is a credible basis for the TP arrangement?

22. SAICA **disagrees** with the IESBA's proposal based on the following:
- (a) The ED does indicate what the IESBA articulates in the explanatory memorandum relating to the grey zone as a result PA's may does not have a background or understanding as to what paragraphs 280.17 A1 to A4 is trying to achieve. It is important the IESBA introduces the concept of the "grey zone" in the Code with a clear articulation of what it in means to achieve the desired outcome.
  - (b) Also, TP services often involve uncertainty for various reasons as mentioned in 380.15 A2. However the PA would state this in the advice to the client in determining the "credible basis" or in the SA context the "more likely than not to be upheld in court" concept hence whilst some of the members do understand the relationship between the gray zone and the credible basis, it is not considered necessary for this to be specifically mentioned in the Code.
23. Our response to Question 4 and 5 applies here as well.

### Question 8

#### *Describing the Gray Zone and Applying the Conceptual Framework to Navigate the Gray Zone*

In relation to the application of the CF as outlined in Section VII.H above, is the proposed guidance on:

- (a) The types of threats that might be created in the grey zone.
  - (b) The factors that are relevant in evaluating the level of such threats.
  - (c) The examples of actions that might eliminate threats created by circumstances of uncertainty; and
  - (d) The examples of actions that might be safeguards to address such threats sufficiently clear and appropriate
24. **No.** SAICA believes that the guidance provided in paragraphs 280.17 A1 to A5 may not be appropriate based on paragraphs 24 and 25.
25. The lists may not be complete. Additional important threats and safeguards that may be environment, client, or jurisdiction specific may not be included and because of the list provided may not be considered by the PA which potentially could drive bad behaviour in



PAs. It is recommended that these paragraphs be removed from the content of the Code and developed as separate guidance for TP.

26. Paragraph 380.17 A2 of the ED provides a comprehensive list of potential factors in evaluating the potential threats that may arise. Members are of the view that some of these factors are problematic, impractical, and rather subjective. The following serves as example –

- (a) *“The number of jurisdictions involved and the nature of their tax regimes”.*
  - As noted earlier, PAs generally specialize in a specific area or areas of tax within one jurisdiction, the expectation that a PA would be aware of the nature of the tax regime in another jurisdiction is impractical and unrealistic.
  - Furthermore, the term “nature” is rather vague and requires further clarification.
- (b) The significance of the potential tax savings.
  - The term “significance” is rather subjective. Further clarity is sought in this regard.
- (c) The nature and amount of the fee for the tax planning service.
  - This criteria in respect of the term “nature and amount” is again very subjective.
  - Clarification is sought as to the term “nature” as to whether this applies to how the fee is determined (e.g., Time spent vs contingency fee based on tax savings).
  - Clarification and guidance are also sought in respect of the amount. Would this amount be considered in relation a percentage of the tax saving, again possibly alluding to the charging of contingent fees?
- (d) The known previous behaviour or reputation of the client including its organizational culture.
  - This would likely be considered during the client acceptance stage of the engagement and hence does not require repetition here.

27. Section 380.17.A4 contains the examples of actions a PA may take to safeguard a threat. It is noted that much emphasis is placed on determining the identity of the ultimate beneficiaries, so much so that 380.17 A5 specifically provides steps that a PA may take to identify the ultimate beneficiary. Certain tax services or TP does not require the PA to have full knowledge of the ultimate beneficiary even if one does find himself or herself in the Gray Zone.



### Question 9

#### *Disagreement with Management*

Do you agree with the proposals outlined in Section VII.I above which set out the various actions PAs should take in the case of disagreement with the client or with the PA's immediate superior or other responsible individual within the employing organization regarding a TP arrangement?

28. SAICA **agrees** with the proposal however members disagree with the requirement in paragraph 380.20.
29. The requirement under R380.20 to advise the client where the client decides to pursue the tax planning arrangement despite the professional account's advice to the contrary, may be problematic on the basis that the PA who rendered the advice to not pursue the arrangement may not be informed by the client of the action taken and hence cannot make such further communication resulting in the proposal being practically implementable.
30. It is therefore recommended that this wording be amended such that the sentence starts with –  
“Where a PA is aware or becomes aware that a client decides to pursue the tax planning arrangement...”

### Question 10

#### *Documentation*

Do you agree with the IESBA's proposals regarding documentation as outlined in Section VII.J above?

31. SAICA **agrees** with the documentation however we caution of the risk that it may pose on PAs for TP where the documentation may be inappropriately used by third parties for other issues which may not be relevant to the Code. In this regard we specifically highlight the fact that in South Africa (as with many other tax jurisdictions) PAs rendering tax services are not entitled to legal professional privilege whereas professional attorneys rendering the same or similar services are permitted to claim legal privilege to protect their client's information.

### Question 11

#### *Tax Planning Products or Arrangements Developed by a Third Party*

Do you agree with the IESBA's proposals as detailed in Section VII.K above addressing TP products or arrangements developed by a third-party provider?



32. SAICA **agrees** with the proposal however members were concerned in term of 380.22 A1 which also refers to “where a client approaches the accountant for advice on a tax planning product or arrangement developed by a third party”.
33. This scenario would imply a second opinion which at times the PA may be aware of, or the client may not disclose to the PA that he is in fact providing a second opinion for several reasons such as not wanting to taint that PA’s view on the transaction etc. Should this wording not be changed to state that “**where the PA is aware that he is providing advice ...**” or alternatively reference should be made to the part of the code relating to second opinions (paragraph 321).

#### Question 12

##### *Multi-jurisdictional Tax Benefit*

Do you agree with the IESBA’s proposals regarding a multi-jurisdiction tax benefit as described in Section VII.L above?

34. SAICA **disagrees** with the proposal as it may be an overreach. It is recommended that the wording should be reconsidered as the proposal is broad and grey without defining what a tax benefit is.
35. Members raised the concerns that they did not understand the reasons on reporting issues that have been done legally and are lawful. It was recommended that the IESBA scope in what is lawful. It is difficult to understand the purpose of the proposal where PAs are acting ethically within the legal constraints.

#### Question 13

##### *Proposed Consequential and Conforming Amendments*

Do you agree with the proposed consequential and conforming amendments to Section 321 as described in Section VII.M above?

SAICA **agrees** with the proposal relating to consequential and conforming amendments.

Signature: David Warneke  
David Warneke (May 18, 2023 15:46 GMT+2)

Email: [dwarneke@bdo.co.za](mailto:dwarneke@bdo.co.za)

# INTEGRITAS-#774497-v1-2023\_05\_18\_IESBA\_submission\_tax\_planning\_and\_related\_services\_FINAL

Final Audit Report

2023-05-18

Created:	2023-05-18
By:	Pieter Faber (pieterf@saica.co.za)
Status:	Signed
Transaction ID:	CBJCHBCAABAA3n3oErX3y9vmA_t-W0YhZoIR7SiQfBTv

## "INTEGRITAS-#774497-v1-2023\_05\_18\_IESBA\_submission\_tax\_planning\_and\_related\_services\_FINAL" History

-  Document created by Pieter Faber (pieterf@saica.co.za)  
2023-05-18 - 1:42:17 PM GMT- IP address: 196.31.49.11
-  Document emailed to David Warneke (dwarneke@bdo.co.za) for signature  
2023-05-18 - 1:43:18 PM GMT
-  Email viewed by David Warneke (dwarneke@bdo.co.za)  
2023-05-18 - 1:45:05 PM GMT- IP address: 146.19.206.125
-  Document e-signed by David Warneke (dwarneke@bdo.co.za)  
Signature Date: 2023-05-18 - 1:46:38 PM GMT - Time Source: server- IP address: 102.134.126.103
-  Agreement completed.  
2023-05-18 - 1:46:38 PM GMT