

Comments from IBA Tax Committee Members on the Proposed Revisions to the Code Addressing Tax Planning and Related Services

The IBA Tax Committee has recently sought comments from its core members on IESBA's Proposed Revisions to the Code Addressing Tax Planning and Related Services. Here is a summary of the comments received so far. We hope you find the comments helpful and supportive of the overall objective of ensuring high standards of ethics and public interest consideration in the accountancy profession.

General Comments

As a general observation, some of our members believe that any framework which provides support to professional persons as to the standards which must be met in any given situation is welcome as it enables that professional to conform to recognized and agreed standards and for all members of their profession to operate with the same duties and constraints. They also think that IESBA's initiative is well thought of, and the Code itself is very insightful.

Specific Comments from our Members

1. The draft requires the PAs to obtain understanding of tax and regulatory laws, interpret such laws, reviewing and understanding the legislative intent, reviewing judicial precedents and rulings and to assess how courts are likely to interpret these laws and apply them to the facts under consideration in future. In essence, this requires the PAs to interpret laws and provide legal opinions to their clients/ employers. With due respect, these activities require proper legal training and comes under the exclusive domain of lawyers in many jurisdictions. Questions are already being raised in many jurisdictions as to whether accountants are professionally qualified to engage in such practices, which essentially involves interpretation of law. Hence, emphasis being laid on PAs undertaking such activities need to be reconsidered.
2. Tax Planning (TP) services should not be associated with a contingent or variable or success-based fee arrangement. Such an arrangement may heighten, or be perceived to heighten, the economic incentive for the PA to advise in a certain manner, to a point that it might result in development of TPs that would pose a risk that the client might not be willing to take. The threat is even greater when the PA is also involved in implementation of the advice or in defending the arrangement before the tax authorities. The draft does note this as a potential threat and notes that certain jurisdictions may not allow such variable or success-based arrangement. One may consider advising/ discouraging PAs from accepting such variable/ success-based fee arrangements, especially involving implementation of the tax planning advice, in order to ensure independence and

objectivity.

3. TPs resulting in saving above certain monetary threshold should recommendatory be reviewed by a second PA, for suitability to the client's commercial interests.
4. In all TP advice having a bearing on tax liability in countries having statutory General Anti Avoidance Rule (GAAR), it should be recommendatory to have an external lawyer's advice on compliance of the TP to the local GAAR regulations.
5. Where a TP advice, in addition to suggesting a business plan, requires the business plan to be implemented in a particular manner for the advice to pass the test of local laws, the scope of service of the PA should period verification of the manner of execution of the advice.
6. IESBA should develop and maintain an open database of tax and regulatory requirement of various countries affecting TP and Court rulings on TPs across various jurisdictions.
7. The teams of PAs involved in TP should mandatorily undergo Continuous Professional Education relating to tax law updates of the jurisdictions they deal with.
8. Determining what public interest is has to remain the competence of legislation and the courts and authorities enforcing such legislation; it is, however, not upon individual PA and not upon accountant firms or companies they work in or for to evaluate whether public interest is not honored when they apply the law as it stands and as it is interpreted by courts or authorities.
9. In the event of existing uncertainty, PA should not only discuss it with the client, but also ensure that the client has full understanding as to the potential risks and tax implications resulting from existing uncertainties associated with tax planning strategies proposed. (R380.16)

We propose to add a provision of possible alternative options (if any) as an addition to the existing points on possible actions of the PA in case of disagreement with the client. (R380.19)

10. The PA shall have more clarity in the procedure of withdrawal from an engagement in case of disagreement with the client after the respective actions described in R380.20 have been taken. The current wording of paragraph R380.21 leaves such an option open for the PA: "*shall consider the need to withdraw*". While it is relevant in case if the PA engaged as independent professional, but for the employed PA this option should be clarified stating, for example, a relevant documenting procedure that can be performed in-house and

protect the PA of further possible consequences.

11. When working on TP, PAs can also, if possible, consider sustainable development goals of the relevant jurisdiction. It can be done by considering options with tax incentives that promote economic growth, job creation in certain underprivileged areas, include a sustainability specialist on the stage of TP. The goal is for the PA to encourage clients to move beyond mere compliance with tax regulations and consider the wider implications of their TP decisions on society and the environment.
12. In the case of a Tax Practitioner who is a lawyer – either practicing or in-house –, we should note that as part of qualifying as a lawyer or being admitted to the bar, such an individual would, in many jurisdictions, be required to swear an oath or make similar confirmation as to various matters including ethics. Lawyers are also subject to their respective jurisdiction and Bar Council’s code of conduct and ethics.
13. Practising lawyers are liable to disciplinary and other similar proceedings **where** if their conduct can be said to have breached their code of ethics, which is a separate and distinct remedy and proceeding from professional negligence.
14. To overlay a further filter of a code of ethics specifically for TP work creates additional burden and obligation on tax practitioners who are lawyers. In the event that there is a conflict in the two codes of ethics, how do we determine which should be applicable?

Specific Comments from an Indian Member

Proposed New Sections 380 and 280

1- 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?

We agree with IESBA’s approach to address tax planning as a category of service through sections R380 & R280. We believe a broad principle-based framework in the code that addresses tax planning specifically will promote the overall integrity of the profession. However, it is important that the standard, in practice, provides flexibility to professionals to interpret legitimate tax planning in line with the laws of the jurisdiction and the tax culture within which they operate.

India has significant jurisprudence with the subject of tax avoidance and tax planning. For long, Indian courts have held that tax planning within the legal framework is permissible so long as taxpayers do not resort to colorable devices or subterfuges. In

2017, India's statutory general anti avoidance rules (GAAR) came into effect, which codified the commercial substance doctrine. In a circular issued by the Indian Government, it clarified that GAAR will not impede the taxpayer's right to choose a method for implementing a transaction. Notably, India's GAAR have only just become operational and their practice still in evolution. Therefore, practitioners should have the flexibility to discern legitimate tax planning in view of the tax ecosystem they operate in.

Description of Tax Planning and Related Services

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

We broadly agree with the IEBA's description of TP.

However, we note that the description of TP is further widened through the addendum of 'related activities or services. In this context, some of the activities described as 'related' may include services such as filing of tax returns or resolving disputes with tax authorities, etc. As such, in principle, we agree that 'related' services should be covered under TP to make the definition of TP holistic. However, we are of the view that a distinction should be made between a PA who has provided substantive TP services whilst also providing such related services vis-à-vis a PA whose scope of service is limited to executing a step connected to such TP arrangement on a standalone basis like filing of return of income. There could be a possibility that in the latter case, the PA may not have access to the TP arrangement nor a reason to believe that such routine compliance is part of the TP arrangement. In the absence of such differentiation, it may be impracticable for such a PA to render services to a Client. In our view, related services provided by a PA who renders substantive advice in connection with the TP arrangement should be considered at parity with TP, standalone provision of related services (where the PA has no nexus with the substantive advice in connection with the TP services) may be excluded from TP.

Further, the related services are more closely associated with routine compliance than planning. Similarly, assisting to resolve a dispute with a tax authority is an activity where a tax position taken by Client is contested and assistance is formally provided in defending the position in terms of law and existing jurisprudence on such position. Such activities would ordinarily be routine and outside the scope of TP. Moreover, PA is expected to comply with other ethical standards while rendering such services. Furthermore, practitioners would get involved in these downstream activities once the strategic tax planning was already set in motion.

Basis the above, we would recommend introducing some parameters for 'related activities or services', which could distinguish between 'related activities or services' being rendered as an integral part of TP vis-a-vis related services provided on a

standalone basis without participation in TP activities.

Role of the PA in Acting in the Public Interest

3- 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?

We broadly agree that PAs play an important role in supporting and enhancing the effectiveness of the tax system as explained Section VII.B. Indian tax law contains prosecution provisions against any person who assists or abets (this includes PA) in falsification of books of accounts or documents or misstatements in returns or accounts. However, with respect to tax planning, which has different connotations than tax evasion in the Indian context, the key responsibility for preserving the integrity of the tax system should be with the tax authorities and courts, as have been recognized in R 380.4 A3.

Moreover, with respect to R 380.4 A3, it's unclear what are the tax minimization strategies that will create threats to the fundamental principles. For instance, like many other jurisdictions, India's General Anti-Avoidance Regulations (GAAR) already prescribes robust standards around what would be an impermissible avoidance arrangement. In this context, having a subjective overlay of 'tax minimization strategies that are inconsistent with fundamental principles' may not be necessary. Also, please consider the deletion of the term 'might' as it adds further ambiguity to the proposed ethical standard.

Basis for Recommending or Otherwise Advising on a Tax Planning Arrangement

4- 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?

We have no additional comments to this.

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

No additional comments. We have incorporated jurisdiction specific considerations in our responses above.

Consideration of the Overall Tax Planning Recommendation or Advice

6- Do you agree with the proposals regarding the stand-back test, as described in

**Section
VII.F above?**

While we welcome the ‘stand-back’ test (to consider the overall stakeholder impact of the tax planning advice), this may be subjective and guided by the tax culture and public perceptions operating within a jurisdiction around tax planning strategies. We agree with the practical limitations of this test highlighted by the IESBA and that it is not intended for a “*professional accountant to carry out research on the economic consequences other than giving the matter due consideration based on the Professional accountant’s general awareness and understanding of the current economic environment in the context of tax planning*”. At the same time, the line of stand-back test may be blurred with tax morality (although we note that the intent is to steer clear of any moral judgment. Therefore, in our view, (i) flexibility should be given to PA to apply the stand back test in line with the prevalent tax culture and public perceptions operating within a jurisdiction; and (ii) the stand back test may be considered as more of a soft standard to guide the PA’s professional conduct.

Additionally, the stand back test may also look at the positive or intended economic ramifications of tax planning advice. For instance, in India, a capital gains tax exemption under the relevant tax treaties used to apply to investments that were routed through Mauritius and Singapore. This was encouraged by the Government to promote foreign direct investment in India and was defended in the Indian Supreme Court in the case of Azadi Bachao Andolan. In this context, a tax planning strategy may also subserve the broader economic purpose of a tax rule or incentive.

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

7- 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?

Yes, we agree with the approach of describing the gray zone of uncertainty and providing guidance for determining a credible basis for the TP arrangement in such situations. In our view, consultation with tax authorities or seeking an advance ruling, wherever permissible under relevant domestic legislation, may be added in the last bullet of para R380.16 A1 and R281.16A1. Such measures have also been referred to in R380.17 A3 and R281.17 A3.

8- 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 gray 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?

We have no specific comments on this.

Disagreement with Management

9- 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?

As such, we agree with the proposals outlined in this context and have no further comments. However, the PAs role should end at communicating to the client, the risks involved in the TP arrangements and the actions set out in R380.20. However, the key responsibility of electing to follow that advice or not should exclusively rest with the management of the client. Currently, under Indian tax laws, the management of a company is responsible for the affairs of the company. Once clear advice has been shared by the PA and the Client confirms its decision to pursue the TP arrangement in spite of such advice, it may be impracticable to expect the PA to proactively pursue the senior management on such matters as is currently contemplated in 380.20 A1.

Documentation

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

We have no comments on the proposals regarding documentation.

Tax Planning Products or Arrangements Developed by a Third Party

11- 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?

We have no comments on the application guidance provided.

Multi-jurisdictional Tax Benefit

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

As an additional factor, the PA should also recommend to the client obtaining expert

advice on TP arrangement in the relevant jurisdiction and consider globally accepted principles and guidance on double taxation and double non-taxation such as UN and OECD's principles of taxation.

Proposed Consequential and Conforming Amendments

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

We have no further comments on Section 321.