

Attached is the draft brochure relating to Section 76A of the Income Tax Act, 1962 (Act No. 58 of 1962).

You are invited to send your comments on the attached draft brochure on or before 10 June 2004 to:

Tax Avoidance Unit

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Included in this response should be your recommendations on arrangements that should be excluded from being reported in terms of Section 76A(1)(a) as arrangements that are not likely to lead to any undue tax benefits.

Due to time constraints it will not be possible to respond individually on comments received.

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INVITATION FOR COMMENTS ON DRAFT REPORTABLE ARRANGEMENT BROCHURE



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South African
Revenue Service

Draft Reportable Arrangements

This brochure is a general guide dealing with the introduction and implementation of section 76A of the Income Tax Act, 1962 (Act No 58 of 1962) (“the Act”).

Although fairly comprehensive it does not deal with all the legal detail associated with section 76A of the Act.

It, therefore, serves the purposes of a guide only and should not be used as a legal reference.

The brochure is based on the legislation as at 22 December 2003.

Should you require additional information you may:

- Contact your own advisors
- Contact the SARS Reportable Arrangement Division
- Visit the SARS website <http://www.sars.gov.za>

Prepared by

Law Administration

SOUTH AFRICAN REVENUE SERVICE

7 May 2004

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1 Introduction

The Revenue Laws Amendment Act (Act 45 of 2003), promulgated on 22 December 2003 introduced a new section 76A in the Income Tax Act, 58 of 1962 (“the Act”), to provide for the reporting of certain arrangements as defined.

This section provides that every company or trust which derives or will derive any tax benefit in terms of a reportable arrangement must report that arrangement to the Commissioner within 60 days after the date that any amount is first received by or accrues to any person or is paid or actually incurred by any person in terms of that arrangement. A further extension of 60 days will be granted where reasonable grounds for delay exist.

Reporting of an arrangement in terms of this section does not have the effect that the Commissioner approves of the arrangement. The purpose of reporting arrangements is to enable the Commissioner to evaluate them from an anti-avoidance point of view at an early stage of the implementation thereof.

No time limits are set on the Commissioner in terms of this legislation to review the arrangement or to issue a ruling, but as the legislation was introduced to enable SARS to be proactive in respect of tax avoidance the arrangements will be dealt with as expeditiously as capacity allows.

The legislation does not at this stage make provision for advance rulings in respect of arrangements, reported in terms of section 76A. Legislation to regulate an advance ruling system will be proposed towards the end of 2004.

2 Background

The Act contains various provisions enabling the Commissioner to request further information or detailed returns with respect to any matter from taxpayers. The gathering powers are contained in inter alia sections 66, 69, 74A and 74B. These provisions enable the Commissioner to include certain questions in respect of “structured finance” transactions in the current prescribed returns. However, the existing procedures have certain limitations as, firstly, they are not sufficiently proactive due to the fact that the information is only obtained once the taxpayer has filed its return and, secondly, they fail to properly describe what is meant by a “structured finance” transaction. Section 76A was designed, inter alia to address the deficiencies in this regard and to act as an early warning system to the Commissioner as to the type of tax structuring taking place in the market.

3 The International Position

In countries such as the United Kingdom, taxpayers are obliged to disclose information regarding transactions which would include questionable transactions. This obligation is of a general nature and the success achieved is of limited scope.

The United States has adopted formalised rules in their tax code which define tax shelters and require the registration of these tax shelters and the maintenance of investor lists by promoters and which also levy penalties for non-compliance.

Canada also has well developed reportable transaction (tax shelter) legislation. New Zealand is considering introducing similar legislation.

4 Interpretation of section 76A

4.1 Introduction

The parameters within which section 76A is applied, are contained in subsection (1) containing the definitions of “arrangement”, “reportable arrangement” and “tax benefit”. The specific requirements of these definitions, read and interpreted as a whole, must be considered to determine whether a particular arrangement must be reported.

4.2 What is an “arrangement”?

Introduction

An “arrangement” is defined as any transaction, operation or scheme. These words also appear in section 103(1) of the Act. As these words are not defined in the Act, SARS has to look at the meaning the courts have ascribed to them or, otherwise, to their ordinary meaning. Although the focus of the legislation is a “reportable arrangement” the following definitions may serve as guidelines to the meaning of the words in the context of section 76A.

The ordinary meaning of “transaction” according to the:

- Concise Oxford Dictionary of Current English, Clarendon Press, Oxford, 1990 is: “piece of especially commercial business done; a deal; the management of business.”
- Chambers Twentieth Century Dictionary, Chambers, 1972 as: “(The) act of transacting: an agreement: a piece of business performed.”

The ordinary meaning of “operation” according to the:

- Concise Oxford Dictionary of Current English, Clarendon Press, Oxford, 1990 is: “The action or process or method of working or operating.”
- Chambers Twentieth Century Dictionary, Chambers, 1972 as: “(An) act or process of operating: that which is done or carried out: agency: influence: method of working: action or movements.”

The ordinary meaning of “scheme” according to the:

- Concise Oxford Dictionary of Current English, Clarendon Press, Oxford, 1990 is: “A systematic plan or arrangement for work, action, a proposed or operational systematic arrangement, an artful or deceitful plot.”

Chambers Twentieth Century Dictionary, Chambers, 1972 as: “A diagram of positions, a table: a system: a plan of purposed action for achieving an end, a project: a programme of action.”

The meaning of “scheme” has been interpreted by our courts as a wide term and covers a series of transactions as illustrated in Meyerowitz v CIR 1963 (3) SA 863 (25 SATC 184) and ITC 1496 53 SATC 229.

4.3 What is a “reportable arrangement”?

Section 76A provides for two categories of reportable arrangements i.e.:

Category 1:

An arrangement which complies with three requirements qualifies as a reportable arrangement. The requirements are:

- the calculation of interest as defined in section 24J of the Act, finance costs, fees or any other charges (“finance charges”) must be wholly or partly dependent on the tax treatment of that arrangement;

- provision must have been made for the variation of such finance charges should “the actual tax treatment differ from the anticipated tax treatment”. It is not a requirement that an assessment must have been issued, as the requirement is only for the presence of such a provision. It is important to note that the variation refers to a variation in respect of the finance charges resulting from the potential variation in the taxable amount where the actual tax treatment would differ from the tax treatment anticipated by the promoters of the arrangement; and
- the ‘potential’ amount of the variation contemplated in such a provision referred to above must exceed R5 million. The use of the word ‘potential’ is a clear indication that “the actual tax treatment” should not be interpreted to mean that some form of assessment would be required or that a challenge by the Commissioner is needed before the “variation” can be determined. The potential variation should be determinable with reference to a comparison of the position where the tax benefit is allowed to the position where the tax benefit is not allowed, i.e. the potential “actual tax treatment” (i.e. the potential application of the Act by the Commissioner as opposed to the taxpayer’s anticipation of the tax liability.) On a proper analysis of section 76A the following terms are used to differentiate between this potential difference in the Commissioner’s interpretation and that of the taxpayer:

“anticipated tax treatment” refers to the taxpayer’s view of tax treatment and

“actual tax treatment” refers to the Commissioner’s potential view of tax treatment.

(This interpretation is substantiated by the use of this term in section 76A(1), definition of “reportable arrangement” (a)(ii)).

As there is no dispute between SARS and the taxpayer at this stage the two positions that should be compared to each other are the objective tax position of all parties in the reportable arrangement as envisaged by the taxpayer e.g. in its financial model or tax analysis of the arrangement, and the objective tax position should all tax benefits created in the arrangement be disallowed. This comparison is only for purposes of determining the value of the potential amount of the variation of finance charges. The adjustment caused by the disallowance will indicate whether the potential amount of the variation exceeds R5 million.

The first two of these do not pose problems; whereas the third one may appear more complex and needs to be illustrated with a few examples (see par 4.5 below).

Exclusions to Category 1:

Note that a reportable arrangement does not include any arrangement identified by the Minister by notice in the Gazette, which is not likely to lead to any undue tax benefit. A list of such arrangements will be published in due course.

Category 2:

The second category of reportable arrangements consists of arrangements identified by the Minister by notice in the Gazette. These arrangements will be identified on the basis of certain characteristics which have the effect of avoiding or postponing liability for or reducing the amount of taxes on income.

4.4 What is a “tax benefit”?

Before an arrangement needs to be reported in terms of section 76A(2) a “tax benefit” in terms of a “reportable arrangement” must be derived by a company (or a trust).

A “tax benefit” is defined as any reduction or postponement of the liability of a person for any tax, duty, levy, charge or other amount in terms of any of the Acts (inter alia the Income Tax Act No. 58 of 1962, Tax on

Retirement Funds Act No. 38 of 1996, Value-Added Tax Act No. 89 of 1991, Estate Duty Act No. 45 of 1955, Uncertificated Securities Tax Act No 31 of 1998) administered by SARS, based on the anticipated tax treatment of the arrangement.

This definition does not create any new concepts and is substantially in conformity with the interpretation given by the Supreme Court of Appeal (CIR v Louw, 45 SATC 113, Hicklin v SIR, 41, SATC 179) to the words “has the effect of avoiding or postponing liability for the payment of any tax, or of reducing the amount thereof” as used in the predecessor of the current section 103 of the Act. In Hicklin, supra at 193 it was held that the word “liability” in section 103 as it then read ‘does not refer to an accrued or existing one, for such a liability cannot be avoided by any transaction (see CIR v King 1947(2) SA 196(AD).’ In Smith v CIR 1964 (1) SA 324 (A) it was held that liability means an anticipated liability. Clearly there may be more than one “anticipated tax treatment” of an arrangement. This is due to the fact that the Commissioner may have a different interpretation of the Act or may apply the principles contained in the Act differently than the taxpayer does.

4.5 How should the variation in finance charges be calculated:

Example 1:

The Facts

The anticipated tax benefits created by the implementation of an arrangement with a capital value of R50,000,000 amounts to R10,000,000 of which R7,500,000 is passed on to Company XYZ in the form of a reduced interest rate on the condition that Company XYZ takes the tax risk. ABC Bank is therefore able to advance the funds at an interest rate of 8% nacs.

Calculation of variation in finance costs, etc

To determine whether the arrangement is reportable or not, eliminate the tax benefit of R10,000,000. This will result in the adjustment in the interest rate charged to Company XYZ from 8,00%nacs to 11,00%nacs. The difference in the finance costs over the five year term will be R7,500,000 (finance cost calculated at an interest rate of 11,00% will be R27,500,000 and the finance costs calculated at an interest rate of 8,00% will be R20,000,000).

Summary:

The arrangement falls within the definition of reportable arrangement as:

- the transaction fits into definition of arrangement; and
- is a reportable arrangement as the arrangement’s calculation of interest is dependant on the tax treatment as ABC Bank is able to reduce the interest rate from 11,00% nacs to 8,00% nacs ; and
- the potential amount of the variation in the interest cost of the anticipated tax treatment and the actual potential tax treatment of this is R7,500,000.

Example 2: Defeasance Arrangement

The Facts

XYZ Bank lends an amount of R400 000 000 to X Bank. Interest is serviced by semi-annual payments and the loan capital will be repayable by means of a single payment at the end of the 5 year loan term. Of this loan, R200 000 000 is advanced by X Bank to Corporate Client as a 5 year fixed rate term loan. The balance of the amount borrowed (R200 000 000) from XYZ Bank is paid to a newly formed company who carries on business as a specialised finance company (“Y”) to make payment to XYZ Bank of X Bank’s debts in year 5 (“the defeasance payment”). Y will place the R200 000 000 received in exchange for assuming the obligation to make payment of X Bank’s debt on deposit with either XYZ Bank or with any acceptable financial institution, which deposit will bear a market related interest and will grow with capitalised interest to at least R400 000 000 in year 5.

At inception of the loan, an interest rate swap agreement will be entered into between XYZ Bank and X Bank, on a notional principle amount of R400 000 000. In terms of this swap, X Bank will through market funding raised for this purpose, make a single upfront fixed rate payment of R200 000 000 to XYZ Bank and XYZ Bank will make semi-annual variable rate payments to X Bank. The variable rate of interest is to be calculated by means of a computer program which relies on assumptions in respect of the tax treatment of the transaction. In the event that this tax treatment does not correspond with the tax treatment applied by SARS, it will be reflected in the variable rate payment. Therefore provision can be made for variation in the finance charges in an interest rate swap agreement between any two parties in a structure and that the corporate client need not necessarily be a party to the agreement containing the variation provision.

The anticipated tax treatment

The Corporate Client deducts the interest paid on the R200 000 000 loan in terms of section 11(a) read with section 24J.

XYZ Bank includes the interest it receives from X Bank on the R400 000 000 loan in its gross income on an accrual basis in accordance with section 24J, whilst it deducts the interest expenditure on the deposit in terms of section 11(a) read with section 24J. XYZ Bank will further include the up-front fixed rate swap receipt over the life of the transaction in terms of section 24K, and will deduct the variable swap payment on accrual basis in terms of section 24K.

X Bank will deduct the upfront fixed rate swap payment and include the variable swap payment over the life of the transaction in terms of section 24K and include the interest on the loan to the Corporate Client in its gross income on an accrual basis in accordance with section 24J.

Tax Benefit

According to Bank X's view of the transaction:

- it will deduct the interest on the full amount of the loan, i.e. R400 000 000 from XYZ Bank in terms of section 11(a) read with section 24J;
- it will deduct the cost of the defeasance payment in terms of section 11(a);
- the taxpayer therefore maintains that there is no gain or loss on disposal of an instrument as the proceeds equals the present value of the defeasance payment and that section 24J is not applicable thereby creating a mismatch between interest deducted by X Bank and interest accrued by it.

In respect of Y:

- the tax treatment envisaged by the taxpayer is that it acquired an instrument with a R200 000 000 accrual of interest and a R200 000 000 incurral of interest thereby creating a set off with no tax consequences.

The potential actual tax treatment

From SARS' point of view, the defeasance payment is not deductible by X Bank as it does not meet the requirements of section 11(a) of the Act.

Alternatively the Commissioner may be of the opinion that section 103(1) or the substance over form doctrine may be applicable to the arrangement.

Calculation of variation in finance charges

If all the tax benefits that contribute to this amount are disallowed and there will be a variation in the rate of interest that XYZ Bank pays to X Bank. Assume that in terms of the computer model of the arrangement the variable rate is anticipated at 8,5%. Assume that due to the disallowance of all the tax benefits in the arrangement the variable rate is amended to 11,5%. As the nominal amount of the interest rate swap agreement is R400 000 000, the

difference of 8,5% of R400 000 000 (R34 000 000) compared to 11,5% of R200 000 000 (R46 000 000) will determine whether the variation in finance charges of R12 000 000 exceeds R5 000 000.

Summary:

From the above it is evident that:

- the calculation of finance charges is wholly or partly dependent on the tax treatment of the arrangement;
- that there is a provision contained in the agreements that such finance charges will vary should the tax treatment anticipated by the taxpayer be challenged by the Commissioner;
- the potential amount of the variation between the anticipated tax treatment, i.e. the taxpayer's view of the tax treatment as set out in the Agreements and the computer model and the actual tax treatment, i.e. SARS' potential view of the tax treatment (by ignoring the tax benefits that were structurally created) exceeds R5 million and the transaction will be reportable.

The transaction is therefore reportable.

5 Operational Implementation

5.1 Who must report the arrangement?

The company or trust that receives or will receive the tax benefit created in terms of the arrangement.

5.2 When must the arrangement be reported?

The arrangement must be reported to the Commissioner within 60 days after the date that any amount is first received by or accrued to any person or is paid or actually incurred by any person in terms of that arrangement. The period may be extended by no more than 60 days if the Commissioner is satisfied that reasonable grounds exist for the delay in reporting that arrangement.

Example:

XYZ Bank enters into an agreement with Company Y whereby it is agreed that a capital amount of R400 000 000 will be advanced to Company Y on 1 May 2004. If the agreement falls within the definition of reportable arrangement as defined in section 76A(1)(a), it must be reported to the Commissioner by not later than 30 June 2004, being 60 days after the date that an amount is first received as envisaged by this section.

5.3 To whom must the arrangement be reported?

All documents relating to the reportable arrangements should be sent to either of the following addresses:

Reportable arrangement division

Lehae La SARS
Block B, First Floor
299 Bronkhorst Street
Nieuw Muckleneuk
Pretoria, 0181
Email address: reportable@sars.gov.za

Reportable arrangement division

Lehae La SARS
Block B, First Floor
Private Bag X923
Pretoria
0001
Fax number: 012 422 5193

Contact telephone numbers during office hours are:

(012) 422 4903	(012) 422 4970
(012) 422 5304	(012) 422 6592

5.4 What documentation must be provided to SARS?

- A summary containing a description of the steps and features of the reportable arrangement;
- A list of all the parties to the arrangement;
- Copies of all the signed contracts in respect of the arrangement; and
- The Financial Model of the arrangement in electronic format.

Electronic submission of the required information will be made possible through SARS' website.

5.5 Who must report where more than one company or trust derive a tax benefit?

Where another company or trust has reported an arrangement to the Commissioner, then any other company which also has a duty to report need only to provide to the Commissioner the name and address of the other company or trust that reported the arrangement together with the date on which it was reported.

5.6 What happens after reporting?

Upon receipt of the required particulars of a reportable arrangement, a SARS reference number will be allocated to the arrangement and an acknowledgement of receipt containing this allocated number will be forwarded to the company or trust reporting the arrangement.

SARS will maintain a proper database system for the management of this information.

5.7 What happens in case of failure to report?

The consequences of not reporting are two-fold and depend on whether the failure to report was:

- **Not wilful or reckless**

A company or trust that failed to report a reportable arrangement, shall be deemed to have entered into that arrangement in a manner or by means as contemplated in section 103(1)(b)(i) or to have created rights or obligations as contemplated in section 103(1)(b)(ii) of the Act. This means that the abnormality requirements for the application of the anti-avoidance section will have been met, thereby removing any onus on the Commissioner to prove this requirement; or

- **Wilful or reckless**

Where the failure is wilful or reckless, the company or trust concerned shall also be required to pay, in addition to the tax chargeable in respect of its taxable income, a penalty equal to the tax benefits in terms of that arrangement to which that company or trust is entitled. Examples of such wilfulness will be where the parties to an arrangement enter into an agreement that there will be no variation of finance charges if the actual tax treatment differs from the anticipated tax treatment, so as to exclude the application of the section. Any other arrangement that overturns this effect will be proof of wilfulness with the effect that the penalties equal to the tax benefits shall be levied once the arrangement comes to the knowledge of SARS.

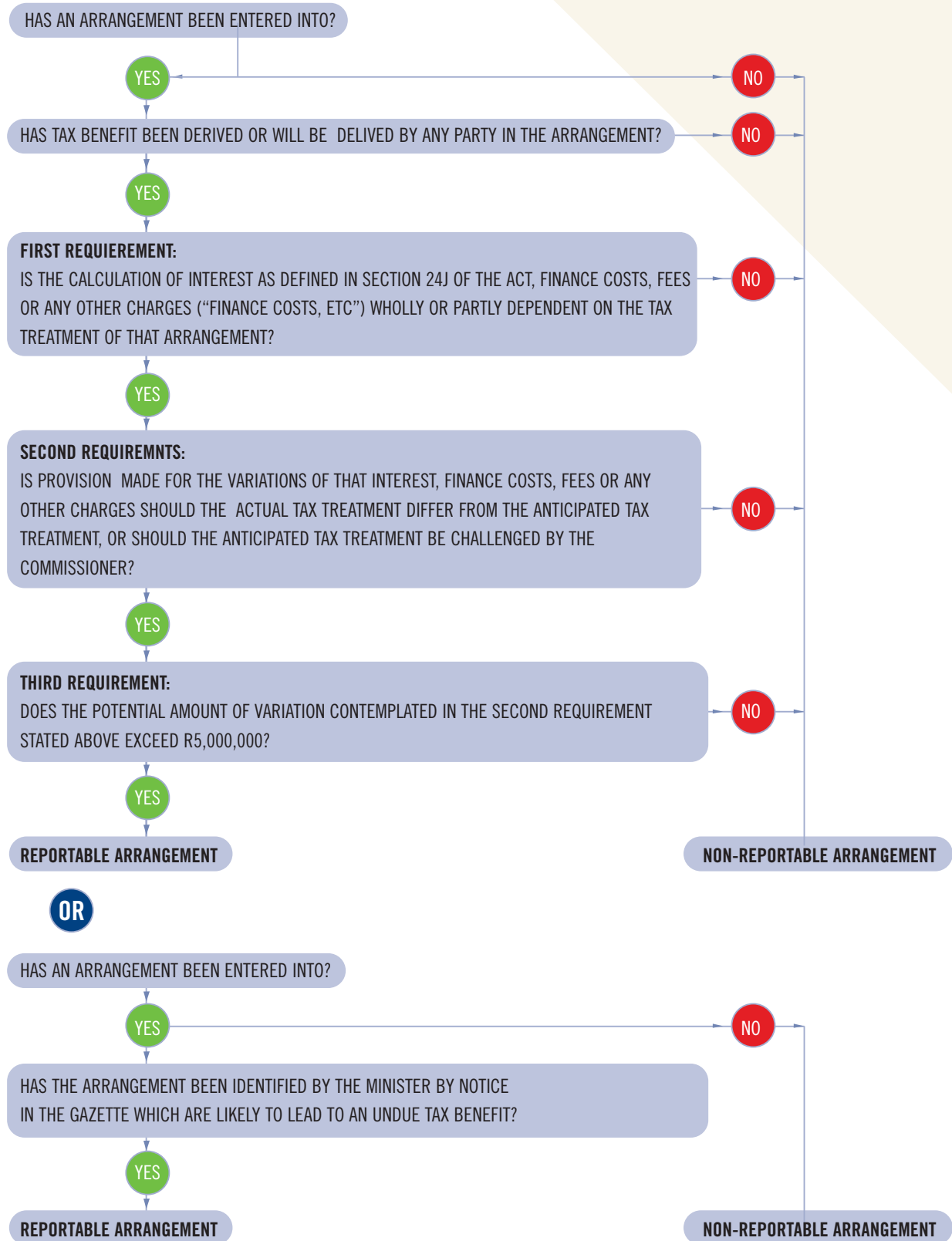
The Commissioner may remit the penalty or part thereof where he or she is satisfied that there were extenuating circumstances.

5.8 Operational date of section 76A

Projected date of implementation of section 76A: ?

Publication of list of inclusions and exclusions in terms of section 76A(1)(a):?

6 Appendix
Appendix A: Decision Tree



Appendix B: Checklist

Reportable arrangement not yet reported:

- Particulars of company or trust reporting the arrangement;
- Detailed description of all the steps and key features of the reportable arrangement;
- List of all the particulars of the parties involved in the reportable arrangement;
- Copy of all the signed documents relating to the reportable arrangement; and
- Copy of the financial model, including any spreadsheet or computer model of the implementation thereof.

Reportable arrangement already reported:

- Description of the reportable arrangement already reported;
- Particulars of company or trust who reported the reportable arrangement;
- Date on which that reportable arrangement was reported.

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APPENDIX C: REPORTABLE ARRANGEMENT FORM

ARRANGEMENTS REPORTED IN TERMS OF SECTION 76A OF THE ACT

1. PARTICULARS OF COMPANY OR TRUST REPORTING THE ARRANGEMENT

1.1 Name of company or trust

1.2 Registration number of company or trust

1.3 Income Tax Reference Number

1.4 Business Address

POSTAL CODE:

1.5 Postal Address

POSTAL CODE:

1.6 Business telephone number:

1.7 Facsimile number:

1.8 What is the activity of the main operating company in the group?

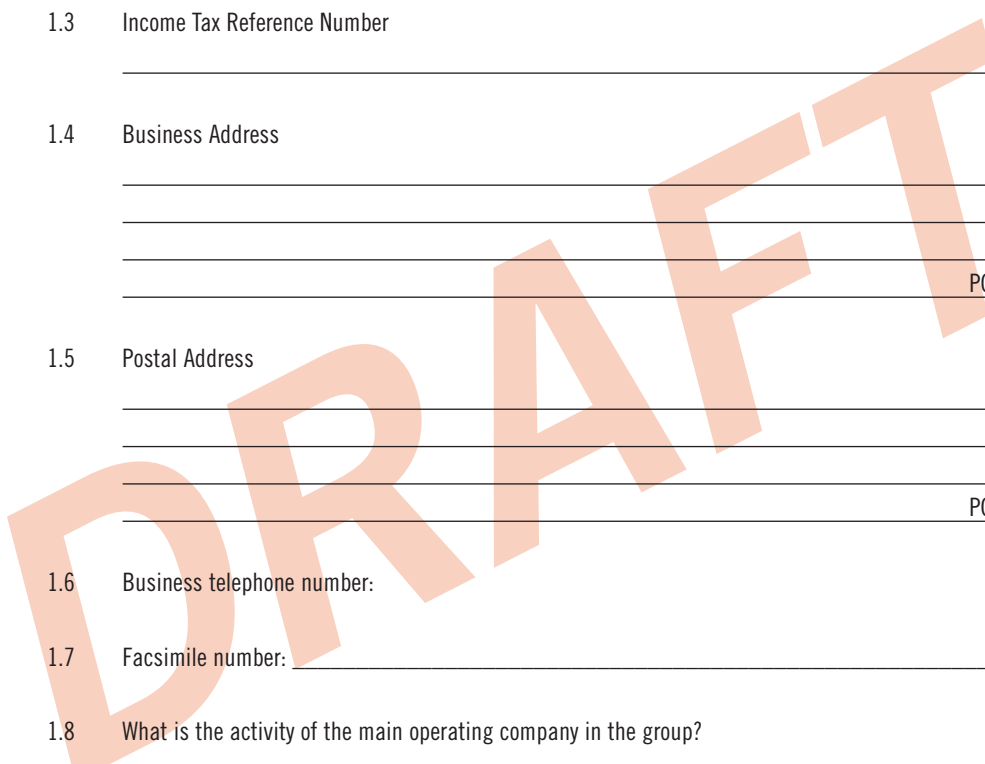
1.9 Particulars of accounting officer/ bookkeeper or contact person

1.9.1 Surname:

1.9.2 Name

1.9.3 Postal Address

POSTAL CODE:



1.9.4 Residential Address

POSTAL CODE: _____

1.9.5 Business telephone number: _____

1.9.6 Facsimile number: _____

1.10 Particulars of public officer or trustees: _____

1.10.1 Surname: _____

1.10.2 Name: _____

1.10.3 Postal Address

POSTAL CODE: _____

1.10.4 Residential Address

POSTAL CODE: _____

1.10.5 Business telephone number: _____

1.10.6 Facsimile number: _____

NOTE: *If the reportable arrangement has not yet been reported, complete point 2 below.
If the reportable arrangement has already been reported, complete point 3 below.*

2 INFORMATION REGARDING THE REPORTABLE ARRANGEMENT

2.1 *Brief description of the reportable arrangement (a detailed description (including a diagram) of all the steps and key features of the reportable arrangement must be attached)*

2.2 Describe the tax benefits created by the implementation of the arrangement, including allowances, deductions, exclusions from gross income, exemptions and how it was derived at

2.3 Provide a separate estimate of the amount of each of the tax benefits described above for each affected tax year.

2.4 List all the particulars of the parties involved in the reportable arrangement.

1. Name : _____

Registration number: _____

Tax Reference number: _____

2. Name : _____

Registration number: _____

Tax Reference number: _____

3. Name : _____

Registration number: _____

Tax Reference number: _____

4. Name : _____

Registration number: _____

Tax Reference number: _____

5. Name : _____

Registration number: _____

Tax Reference number: _____

6. Name : _____

Registration number: _____

Tax Reference number: _____

2.5 Attached a copy of all the signed documents relating to the reportable arrangement.

2.6 Attached a copy of the financial model, including any spreadsheet or computer model of the implementation thereof.

3. REPORTABLE ARRANGEMENT ALREADY REPORTED

3.1 Brief description of the reportable arrangement

3.2 Name of company or trust who reported the reportable arrangement

Name: _____

Registration number: _____

Business number: _____

Facsimile number: _____

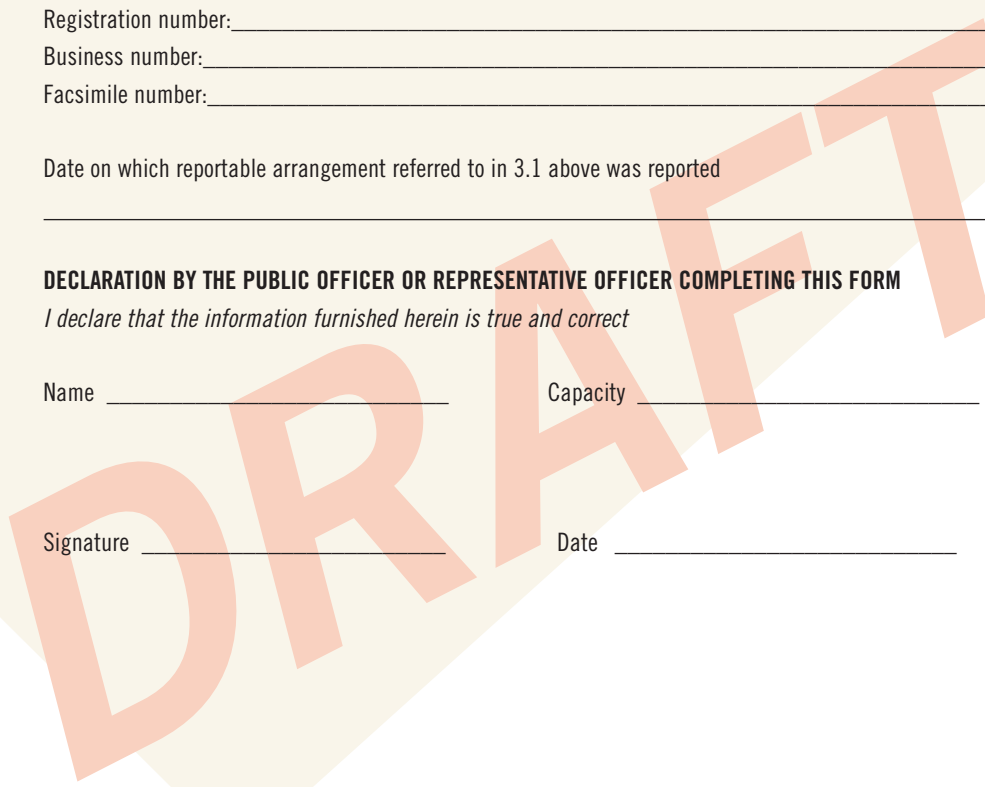
3.3 Date on which reportable arrangement referred to in 3.1 above was reported

4. DECLARATION BY THE PUBLIC OFFICER OR REPRESENTATIVE OFFICER COMPLETING THIS FORM

I declare that the information furnished herein is true and correct

Name _____ Capacity _____

Signature _____ Date _____



Appendix D : Section 76A

Reportable Arrangements

1) For purposes of this section:

'arrangement' means any transaction, operation or scheme;

'reportable arrangement' means:

a) any arrangement in terms of which:

i) the calculation of interest as defined in section 24J, finance costs, fees or any other charges is wholly or partly dependent on the tax treatment of that arrangement;

ii) provision is made for the variation of that interest, finance costs, fees or any other charges should the actual tax treatment differ from the anticipated tax treatment (otherwise than by reason of any change in the provisions of the Act) or should the anticipated tax treatment be challenged by the Commissioner; and

iii) the potential amount of the variation contemplated in subparagraph (ii) exceeds R5 million, but does not include any arrangement identified by the Minister by notice in the Gazette, which is not likely to lead to any undue tax benefit;

b) any arrangement which has certain characteristics identified by the Minister by notice in the Gazette which are likely to lead to an undue tax benefit;

'tax benefit' means any reduction in or postponement of the liability of a person for any tax, duty, levy, charge or other amount in terms of any Act administered by the Commissioner based on the anticipated tax treatment of the arrangement.

2) Every company or trust which derives or will derive any tax benefit in terms of a reportable arrangement must report that arrangement to the Commissioner at such place as the Commissioner may determine within 60 days after the date that any amount is first received by or accrues to any person or is paid or actually incurred by any person in terms of that arrangement: Provided that the Commissioner may extend the period of 60 days by no more than 60 days where he or she is satisfied that reasonable grounds exist for the delay in reporting that arrangement.

3) The company or trust must in so reporting provide to the Commissioner-

a) a description of all the steps and key features of the reportable arrangement;

b) a list of all the parties to that arrangement;

c) copies of all the signed documents relating to that arrangement; and

d) any financial model of that arrangement, including any spreadsheet or computer model of the implementation thereof:

Provided that the company or trust may in so reporting, where another company or trust has reported that arrangement to the Commissioner, provide to the Commissioner only the name and address of that other company or trust and the date on which that arrangement was reported.

4)

a) Where a company or trust fails to report a reportable arrangement as contemplated in subsections (2) and (3), that company or trust shall be deemed to have entered into that arrangement in a manner or by means as contemplated in section 103(1)(b)(i) or to have created rights or obligations as contemplated in section 103(1)(b)(ii).

b) Where a company or trust willfully or recklessly fails to report a reportable arrangement as contemplated in subsections (2) and (3), that company or trust shall also be required to pay, in addition to the tax chargeable in respect of its taxable income, an amount equal to the tax benefits in terms of that arrangement to which that company or trust is entitled. Provided that the Commissioner may remit the additional charge or any part thereof where he or she is satisfied that there were extenuating circumstances.

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