Our reference: KM/jt
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ATTENTION:
MR K SIONG
Technical Director
International Auditing and Assurance Standards Board (IAASB)

By email: kensiong@ethicsboard.org

Dear Mr. Ken Siong

PKF SOUTH AFRICA'S COMMENTS ON IESBA'S EXPOSURE DRAFT PROPOSING A NEW SECTION 380 TO BE INCLUDED IN THE CODE RELATING TO TAX PLANNING AND RELATED SERVICES

PKF South Africa is a part of the PKF International network of independent firms with approximately 220 member firms that operate under the PKF brand in 150 countries across 5 regions and encompasses 20,000 professionals, the majority of which would be Chartered Accountants and members of the South African Institute of Chartered Accountants (SAICA) as well as many Registered Auditors with Independent Regulatory Body for Auditors (IRBA).

As professional accountants (PA's) the majority of our professional employees are by governed both of these regulatory bodies and a significant number of these PA's render tax planning and related services.

PKF SA welcomes the opportunity to make submissions to IESBA on the ED on "Proposed Revisions to the Code Addressing Tax Planning and Related Services" and would appreciate further engagements in respect of the comments submitted below.

PART 1 - General Comments on Proposed Revisions to the Code Addressing Tax Planning and Related Services – Section 380 only.

1. ***Practical concerns with regards to the overall application of the code***

   We express our concern that the terms of this Code Amendment appear equally applicable to the following very diverse aspects of tax planning and related services which are so diverse that an equal treatment under the Code would, in our opinion, be inappropriate as it would over regulate and make the current simplistic aspects of tax compliance and tax planning to be uncompetitive as expanded on in point 3 below.

   - Within the scope of tax compliance (in the draft ED referred to as a related tax service) there is a vast range of levels of service to which different skill sets are applicable but will apply equally, for example:

/2...

- ***Scenario 1*** – tax compliance service relating to the completion of a simple corporate/trust tax return or an individual, where they are only in receipt of interest income as evidenced by a certificate from a bank. In this scenario we are of the view that the application of section 380 would be wholly inappropriate.

- ***Scenario 2*** - tax compliance services relating to the completion of tax return is that of a multi-national with foreign branches where the Income Tax return itself would be complex but would also require additional returns to be submitted such as the country-by-country return (CbCR), Transfer Pricing policy uploads by way of a master and/or local file. This type of compliance service may be relevant in relation to the proposed new requirements of section 380 to a certain extent.

- In the realm of tax planning a similar situation would arise and illustrated by way of examples detailed below:

  - ***Scenario 1*** – where one is dealing with an individual and a question that is posed, for example, "Should I have a retirement annuity or a provident fund or should I have a travel allowance or a company car?", this type of advice can be rendered almost immediately assuming the PA has met the fundamental elements of the Code (i.e. the PA is professional competent in that he/she has the necessary known and expertise to answer that type of simplistic question, and takes due care in the response given). In this scenario we are of the view that the proposed section 380 should not find application as the additional requirements are unrealistic and will outprice the services of a PA to such a taxpayer.

  - ***Scenario 2*** – where tax planning is required for a corporate for example where one is dealing with aspects like treaty shopping, transfer pricing, corporate restructuring etc., there would likely be a certain level relevance in the Code Amendments contained in section 308 however as per our comments below, these are still in our view overburdensome in relation to the PA and highly subjective.

Our overall comment however, would be that much of what is being sought in this Code Amendment is already applicable in the Code in the fundamental principles and other overlapping provisions and this proposed additional section is considered an overburdening of the profession with unnecessary and impractical regulation whilst duplicating and increasing the volume of the Code mainly to achieve tax morality and ethical tax practices which in our view is already achieved by the Code in its current form.

/3...

2. ***Overall application of this code is too subjective and requires a very high level of professional judgement***

Due to the wording throughout this code being rather vague and subjective a high degree of interpretation which is the general nature of tax services, particularly tax planning services, makes this section very difficult to comply with and at times impractical. Specific examples are noted below in answering some of the specific questions posed by the IESBA.

Due to the subjectivity of the requirements proposed in section 380, a substantial amount of application guidance is contained in the code. Which also makes the code rather voluminous and convoluted. It is therefore recommended that some of the application guidance should be moved to a guidance document rather than being contained in the code itself. This is expanded on below under point 5.

3. ***Overregulating of PAs undertaking TP services***

It is noted that there is concern by the IESBA with regards to aggressive tax planning being undertaken by PAs in providing tax services to their clients. However, cognizance must also be given to the non-PAs that provide similar services, for example, those in the legal field who are not subject to a stringent or similar code of conduct in South Africa (SA).

The additional costs that would likely arise in respect of PAs providing the TP services would be substantial in relation to non-PAs. These additional costs of compliance would likely not be recoverable from the respective clients and if attempted to be recovered could render the TP services provided by a PAs in SA to be uncompetitive in relation to those who are not subject to this code.

This creates an uneven playing field for the tax profession as a whole which is a major concern for members that have studied hard and dedicated many years to obtain the relevant qualifications to become members of regulatory bodies such as the South Institute of Chartered Accountants (SAICA) and the Independent Regulatory Board for Auditors (IRBA) and are already subject to the fundamental principles of code specifically with regards to professional behaviour, professional competence and due care.

We are of the view that this proposed section will overburden PAs in rendering TP services and also may force some PAs to move to other regulatory bodies in SA that are not subject to the code in order to remain competitive in SA.

As an aside, it is also worth mentioning that in SA the required continuous professional development (CPD) hours that a PA in public practice must achieve is 30 hours per year. However, we are of the notion that if one were to interrogate the CPD hours logged by tax advisory specialists PAs as opposed to other PAs in public practice we are of the view that the tax advisory specialists PAs would have approximately 3 times more than required CPD hours due to the extent of time that tax advisory specialist PAs spend ensuring that they are up to date with the fast-changing tax regulations as

/4...

opposed to the audit regulations which do not change as rapidly. This is also indicative of the professional behaviour, professional competence and due care that is currently undertaken by tax advisory specialists in fulfilling the role of a PA rendering TP services and ensuring that they meet the fundamental principles of the Code.

4. Application of the new section 380 of code is too far reaching

Due to the wording throughout this code being rather vague and subjective due to the nature of this area of work the following concerns are raised:

- The code as it currently stands (without proposed section 380) would apply to all tax services (advisory, disputes and compliance). Hence the fundamental principles would need to be adhered to by PAs.
- We note that Part 4A and 4B of the current code already addresses the tax, potential threats to independence and relevant safeguards in the provision of "tax services" (which per that part of the code, includes tax planning and related services) however this application is limited to tax services in relation to audit and review engagements- (Part 4A) and assurance engagements other than audit or review (Part 4B).
- Whereas this new section also seeks to address possible risks to independence it also seeks to hold PAs to a higher level of standard in providing TP and related services (i.e., meeting the requirements of acting in the public interest, determining a credit basis, satisfying the "stand-back test" as well as the gray zone requirements). The main issue being that satisfying these additional requirements would apply to all clients (individuals, trusts, partnerships etc.) not just corporates for basically all TP and related services.

Our recommendation is that there should be a clear distinction to the application of the additional obligations in respect of TP services and in respect of other tax related services (such as compliance)

5. Application of the additional obligations imposed on PAs is not practical

- We are of the view that the extent of work required for a tax compliance service versus tax advisory or tax dispute resolution service would require different skill sets and requirements in performing such services.
    - It is **impractical to apply** the various proposed tests of determining a credit basis, stand-by test, acting in the public interest and compliance when the gray area is applicable, when it comes to every type of tax service provided **particularly highlighting tax compliance services** where this would not be considered necessary nor would the costs justify the addition extent of work required on the part of the PA and their respective compliance teams.

    For example:

        - Assume an employee with sufficient knowledge and experience is tasked with completing a tax return for a trust within a public practice,

/5...

that review may be reviewed by a supervisor who may or may not be PA.

- In preparing and submitting that tax return the relevant employee would request and review the information received from the client, prepare the tax computation for the client to review and sign off before submitting confirming the accuracy of such return. As with most public practices the submission goes to the South African Revenue Service ("SARS") electronically via the eFiling profile of the main tax practitioner of that public practice.
- It is not uncommon for SARS to request the supporting documents for that tax return to be verified but this generally does not require every source income or deduction to be supported, for example a standard verification letter is initially sent to the tax practitioner (PA) requesting the generic type information such as the tax computation and justification of the highest deductions or tax sensitive items (e.g., individuals – log books and vehicle details if claiming a travel deduction) etc.
- In the event SARS is not fully satisfied with the information sent or wishes to verify additional income or expenses it may issue a second letter requesting specific information.
- Should SARS decide to disallow the travel deduction on the basis that they are not convinced that the travel stated on the log book is accurate but it looks reasonable to the employee that completed the return, their supervisor (PA or non-PA) and upon this matter being raised the relevant PA through whose profile is used to submit such return, looks at the matter for the first time agrees that the log book is reasonable but SARS maintain their view and submit a complaint to the PAs regulatory body, in practice how would the regulatory body discipline such PA and which PA would be disciplined (i.e., the supervisor on the assumption that he/she was a PA or the PA whose profile was ultimately used to submit such return?)

- As stated above, we suggest that a clear distinction be drawn as to which paragraphs of the proposed new section would apply to the tax compliance service and if IESBA maintains the view that the entire section 308 is applicable to tax compliance services then the guidance documentation must provide examples on how this would work on a practical level.
- We wish to highlight paragraph 604.1 A which currently states -

  "(a) Tax return preparation services are based on historical information and principally involve analysis and presentation of historical information under existing tax law, including precedents and established practice; and

/6...

(b) tax returns are subject to whatever review or approval process the tax authorities consider appropriate".

This confirms the basis of the argument as stated above in the example, where the PA may or may not play a significant role in preparing that tax return hence it may not be appropriate to apply the various additional obligations imposed under paragraph 308.

6. *Multiple sections throughout the code dealing with tax services resulting in the increased volume of the Code*

As noted above, Part 4A and 4B of the current code already address the potential threats to independence in the provision of "tax services" (which includes tax planning and related services) however this application is limited to tax services in relation to audit and review engagements- (Part 4A) and assurance engagements other than audit or review (Part 4B).

In particular section 604 of Part 4A is extremely comprehensive and rightly so as it ensures independence of the tax professional in relation to the audit client and audit team and allows for certain safeguards to be place in order for this service to be rendered.

Section 950 of Part 4B relates to non-assurance services provided to assurance clients and does not specifically mention tax services but for all intents and purposes it is accepted that tax services would be included. It is noted further that section 950 is less stringent as section 604 as these are services provided to non-audit or review clients.

It is therefore our understanding that the introduction of section 380 for PAs in Public Practice would seek to address all tax planning services regardless of whether the client is an audit client, review client, assurance client or a client to whom only tax services are provided as this seeks to also include individuals.

Should this understanding or assumption be correct, we are of the view that the new proposed section 380 in so far as it relates to threats to independence and the relevant safeguards should not be as stringent as section 604 which in our view requires a higher level of independence in the capacity of a firm being the auditor and tax advisor/practitioner for the same audit client.

We are of the view that section 380 should be drafted on the basis of the current threats and safeguards as detailed in terms of section 604 but adjusted to include individual clients who would not be subject to an audit or review engagement taking cognizance of the fact that Part 1 of the Code which deals with the fundamental principles and conceptual framework applies to all PAs in Part 2 and 3.

Where sections overlap, we are of the view that reference should rather be made to such sections rather than provide additional guidance in the code which results in this section being rather convoluted and extremely comprehensive with a significant amount of unnecessary detail that is already contained elsewhere in the code. It is recommended that a mere reference to such other section in the code would suffice.

/7...

7. *Consistency in terminology throughout the code and the Explanatory Memorandum (EM)*

It is noted in section VII paragraph 26 that is specifically mentioned that *"the IESBA, however considered that the term 'tax efficiency' would be more neutral than 'tax minimization'"*. We are in agreement that the term tax efficient is a more neutral concept and does not give rise to any negative connotation however in the Exposure Draft (ED) section 380.4 A2 specifically uses the phrase "tax minimization arrangement". This phrase, in our view, does denote a negative connotation and possibly alluding to some type of "tax scheme" which would be considered rather aggressive tax planning. It is therefore proposed that this wording be changed to rather state *"tax efficiency structures or measures"*

8. *Difficulty for monitoring of the code by the relevant regulators in each jurisdiction*

Monitoring of the proposals may be an issue as the proposal is vague in many instances. In instances where definitions are not provided or inadequate guidance provided, we have noted based on experience that it causes uncertainty by PAs and the relevant regulatory bodies in the relevant jurisdictions, as well as a difference in interpretation.

An example of this is 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 relevant regulatory bodies. It is envisaged that if the subjectivity in the proposals for TPs is not corrected, similar challenges as those experienced to NOCLAR will occur.

Another example where there may be difficulty in determining whether a PA has complied with the section 380 is as follows:

- In an instance where a PA's TP advice is challenged by the tax authority and results in a tax dispute, albeit the PA's position being correct. In this instance, even though tax disputes may be recognised by legislation, the fact that the PA is disputing the tax authority's opinion may be seen the PA did not have a credible basis, or did not meet the stand back test, or the public interest test despite the PA being correct.

- Should the matter proceed to a Tax Court (assuming such taxpayer has the necessary funds to take the matter to Court) the court might find that the PA did have a "credible basis" however it may still be argued that the PA did not meet the additional tests of the stand back or acting in the public interest and could still be subject to a disciplinary by the regulatory body in SA.

Cognisance must be given to the fact that the PA is acting within the confines of the law and has most likely met the fundamental principles as already contained in the code hence this is not an unlawful (tax evasion) type situation which requires a PA to be disciplined/sanctioned.

/8...

Differing tax professionals (PAs and non-PAs -e.g., legal tax practitioners) can interpret tax law differently based on the same exact set of facts. This can be proven by the high number of tax cases we seen in the last 2 years in South Africa where the taxpayer was successful in the matter at the Tax Court level however upon SARS proceeding to the Supreme Court of Appeal (SCA) the findings of the Tax Court was overturned and the SCA found in favour of SARS. This type of situation should not give rise to a PA being subject to any sort of misconduct as this is the very nature of the profession in question. It is highly subjective and requires a very high level of competence to render such TP service.

We do not believe that the relevant regulatory bodies in the various jurisdictions would be sufficiently equipped to be able to adjudicate such matters if even at the highest level of legal expertise on tax matters you may have differing outcomes as stated above where a judge at the tax court held a view different to that of the SCA and even in the SCA cases where there are sometimes 3 judges the judgement maybe not be unanimous. This again comes back to the highly subjective nature of TP services rendered by tax specialists (PAs and non-PAs) _ the latter of which is not subject to any specific tax code of conduct or regulation.

PART 2 - Specific Questions

1. ***Do you agree with the IESBA's approach to addressing TP by creating the new Section 380 in the Code as described in Section VI of this memorandum?***

Response:

Whilst we understand the rationale in terms of wanting to apply the code to tax services rendered to all clients (not just entities subject to audit, review or assurance engagements) we are not fully convinced that an entire new section needs to be created as the fundamental concepts are already covered in other parts of the code.

However, on the basis that section 604 should be limited to audit clients and the new section 380 be created to address the tax services to clients other than corporate entities, then we would recommend that the underlying principles of this section should be closely aligned to section 604 which specifically deals with tax services in relation to audit or review clients.

For example: section 604.2.A1 contains a description of what would comprise a "tax service" and specifically lists "Tax advisory services", "Tax planning services", "assistance in the resolution of tax disputes" etc., whereas section 380.5 A1 contains a description of "Tax Planning and Related Services".

Section 380.5.A2 specifically lists examples of tax planning which contains very specific tax planning scenarios and then at 380.5.A3 a description of related services which includes dispute resolution, preparing a client's tax return etc.

There is concern that the term tax services as contained 604.2 A1 and A2 may cause confusion as it differs to the terms used in section 380.5 A2 and A3 of "tax planning and related services". We recommend that these different terminologies be reassessed to determine if it is considered necessary to have differing terminology in these sections.

/9...

Further example: Section 380.4 A3 makes reference to an "adjudicative body" whereas section 604 makes reference to a "tribunal or court". Whilst it is accepted that the term "adjudicative body" is used multiple times in the code, we are of the view that the term "tribunal or court" is more appropriate in the context of a tax matter (particularly a tax dispute). In particular we note that 6.4.27 A2 reads as follows:

> "What constitutes a 'tribunal or court' depends on how tax proceedings are head in the particular jurisdiction".

Description of Tax Planning and Related Services

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

Response:

No, we do not agree with this description for the reasons noted in point 1 above and reiterate that the terminology should be aligned to the tax services description contained in section 604.2 A1 and A2 to not cause any unnecessary confusion or where it be clearly identified which paragraphs of the new code would apply to TP services and which paragraphs of the code would apply to related services. We are of the view that if this is the intention of the IESBA then this needs to be clarified.

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.

Paragraph 28 of the EM states "*To facilitate consistent application, the IESBA is proposing in paragraphs 380.5 A2 illustrative examples of TP services or activities covered under these sections.*"

- It is acknowledged that the list contained in terms of paragraph 380.5 A2 are examples however it sets out a very specific list of transactions may be interpreted by some PAs as only covering those specified transactions. There is a potential risk that transactions that qualify as tax planning and not listed in paragraph 380.5 A2 may not be considered by professional accountants. The lists may be considered as a checklist and the essence the proposal may not be achieved.

- However, on the contrary 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.

- As indicated above, paragraph 380.5 A2 appears to be a limited list which does not include all transactions relating to structuring. However, if one were to apply the term "structuring" on a broader basis, unintended transactions may be erroneously included. The list of examples increases the risk of subjectivity by professional accountants.

/10...

We therefore recommend that the list contained in paragraph 380.5 A1 be moved to guidance documentation rather than being included in the Code.

We also find issue with the term "related services" contained paragraph 380.5 A3 which states that a PA in preparing the client's tax return must ensure that it reflects the position in the tax planning arrangement regardless of whether that PA or another PA advised on the tax planning arrangement.

- We note that this does not take into account many instances where the tax planning arrangement is undertaken by a different PA to the PA that is completing the client's tax return and might not be aware of any tax advice that might have been provided by another PA at the time of completing the tax return. Often specialist PAs are used for TP services due to their specific area of expertise hence may not be recurring clients or audit clients or compliance clients. Hence, we are adverse to this suggestion for the following reason:
- The PA completing the return should not be **obliged** to ask the client whether tax advice was obtained in order to claim any/all deductions on the taxability or non-taxability of its income etc. This is not practical. Unless a taxpayer volunteers such information and provides the tax opinion to the PA completing the return, that PA may not even be aware that any such advice was sought.
- Furthermore, in order to assess whether such other PA had a credible basis for the conclusion reached would require a significant amount of work on the part of the PA undertaking the compliance work. This presents 3 hurdles:
    - The first being the fact that the compliance PA may not have sufficient knowledge in that area of tax to make such a determination
    - The second being this additional assessment of credible basis may be viewed as the equivalent to the obtaining of a second opinion which is already covered in the Code under paragraph 321.

The costs incurred by the compliance PA would most likely not be recoverable by that PA as the client (unless specifically requested a second opinion) would not be willing to compensate the compliance PA for having undertaken these additional functions which in the client's view may be regarded as irrelevant on the basis that they have already sought tax advice on the matter and are satisfied with the opinion provided by the Advisory PA.

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?***

Response:

Acting in the public interest in the context of TP is very subjective 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.

In the South African context for example, a client may approach a PA stating that his estimated taxable income is R4 million rand but because he is entitled to a deduction for donations made to approved (section 18A) Public Benefit Organisations (PBOs) that he would prefer to rather donate up to R400,000 to a PBO (e.g. The Gift of the Givers) where he is confident that the funds donated are being used for benefit of society at large as the work undertaken by this organization is rather publicized and the head of that organization Dr Imtiaz Sooliman is on site whenever the country faces a crisis as opposed to government who are often slow to react and in addition there is a perceived very high level of corruption in our country.

As a PA, my client has made a valid point in terms of why he believes he is acting in the public interest in addition he is entitled to claim such deduction in terms of the SA tax law hence I would agree that such donation, provided he obtains the necessary certificate from the PBO etc., should be made to be tax efficient and would also serve the public interest. However, another PA may take a differing view and propose that making such donation may be regarded as aggressive tax planning and not advise the client to make such a donation or at least not to such a large extent. There is a very high level of subjectivity in applying this concept.

As a point of departure, it must be emphasised, as 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. This state of affairs exists even though it may be in contrast to revenues services mandate to collect as much tax as the law requires and governments to use as much tax to provide services and public goods to those in that country.

The fact that the latter is in the public interest does not denigrate that the former is as well and the wants and wishes of revenue services and governments still must remain within the confines of the law, just as is expected from taxpayers and advisers. It is the law that they ultimately create. This principle is illustrated in the example above.

The ED states:
"Above all, the IESBA aspires to rise to the challenge of reinforcing public trust in the global accountancy profession."

Its however unclear which "public" IESBA is referring to? Is it governments and regulators or is it the members of the profession (who are also the public) and their clients and employers? The ED seems to want to deal primarily with the former even

/12...

if at the cost of the latter, notwithstanding that the targeted conduct of the latter under review is by the ED's own admission legal under the countries they reside in.

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 to worry about the sustainability of the profession, which like the globally declining audit profession which a similar single-minded approach has been applied, is also under pressure.

South Africa is a developing country and as was evident from the Panama Papers and HSBC leaks is that taxpayers and advisors in developed countries are mostly responsible for "aggressive tax planning", the financial flows of which are in most instances to the benefit of the economies of those developed countries. Much of the financial reporting occurs at consolidated basis in the developed countries, remaining opaque to developing countries where the beneficial flows originate. This state of affairs is in many instances enabled by developing countries lack resources to implement complex tax administrations or to match the developed countries political and legal tax regimes that enable these tax indifferent flows.

In South Africa we have a definitive interest in addressing "aggressive tax planning" but it must operate within the confines of the law i.e., unlawful conducting or hiding unlawful conduct should be the object. In this regard, enabling more transparency through financial reporting, especially in countries from where financial flows originate and identifying where it ultimately goes would significantly assist developing countries in addressing this matter. Transparency in reporting as to not only as relates to the taxpayers' affairs but as to who is providing such advice will further deter "playing on the line" between what is lawful and unlawful or illegal.

In addition, it is also important to note that SA was one in the first batch of countries to adopt the common reporting standards (CRS) and began first exchanges in September 2017 and country-by-country reporting (cBcR) (applicable for years of assessment commencing on or after 1 January 2016) which confirms that we are a country where tax transparency has been promoted and additional measures have also been taken since the countries recent "grey listing" to further improve such transparency which will deter aggressive tax planning due to the additional disclosures that are now being required.

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?***

Response:

We would prefer not to have a comprehensive list of "procedures" (described as examples) that a PA should undertake to determine a credible basis 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.

In this regard we note that paragraph 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 principled based.

Additionally, it noted in the context of providing tax services or tax planning that not every request from a client for tax advice would justify the resources (time spent and costs of research etc) to issue a formal written tax opinion.

In practice tax advise can be verbal or via email (i.e., not on a formal letterhead of such public practice etc) simply because the PA from the service was requested may have the adequate experience and knowledge to render such tax advice, having considered his/her provisional competence and feel comfortable enough to render such service verbally without documenting the basis upon which that tax conclusion was reached.

This type of situation arises more often than not and should the PA be found to be negligent in rendering such advice then he/she would not be complying with the

/14...

fundamental principle of the code in terms of professional competence and due care and should be disciplined in terms of the general disciplinary process contained in the code.

5. **Are you aware of any other considerations, including jurisdiction-specific considerations, that may impact the proper application of the proposed provisions?**
   Section 380.11 A2 – credible basis –

Response:

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 <u>more likely than not to be upheld</u> if the matter proceeds to court".

In the South African context, the "more likely than not" position indicates that the PA must confirm that there is **a more than a 50% chance of success of the taxpayer's position** should the matter proceed to court. I am of the view that this threshold is in fact lower than the "credible basis" threshold proposed as well as the "likely to prevail" threshold contained in section 604.4.

Hence, we are of the view that paragraph 380.11 A2 would supersede the credible basis test as the domestic legislation would override this provision.

We however recommend that this be confirmed in the Code under section 380.

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?**

/15...

Response:

The additional requirement of applying a "stand-back test" is incredibly onerous and borders on corporate governance issues which is properly regulated by the King IV Code. I am of the view that to impose this level of duty on a PA in render TP services is 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 my view not practical or cost efficient in public practice.

Clients seeking tax advice prior to undertaking a transaction are generally wanting 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. In order 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 client's nor would it add value to them except in the instance where a corporate does not have a proper corporate governance committee due to not being mandatory and hence not cost efficient for such client to incur the additional costs.

Should 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 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.

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 in that one specific jurisdiction hence it is highly unlikely that a PA advising on a specific tax planning arrangement that may involve another tax jurisdiction would be aware of the "relative impact of the arrangement" in the other or multiple jurisdictions that the client operates. In order 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.

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?**

/16...

Response:

Tax planning services often involve uncertainty for various reasons as mentioned in 380.15 A2 however the PA would as a matter of course 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" hence whilst I do understand the relationship between the gray zone and the credible basis, I do not think it is necessary for this to be specifically mentioned in the ED.

However, should it still be considered necessary we wish to reiterate

- the point noted in the general comments with regards to the list of examples being included in in a guidance document rather than the ED itself; and

- my response to question 4 with regards to the concern raised that the list of circumstances/examples noted in 380.15 A2 will not be applied as a "check list" in the event that a PA is found to have provided advice that potentially falls within such Gray Zone.

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?

Response:

308.17 A2 provides a comprehensive list of potential factors in evaluating the potential threats that may arise. The lists may not be complete. Additional important threats and safeguards that may be environment, client or jurisdiction specific may not be included and as a result 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

We are also of the view that some of these factors are problematic, impractical and rather subjective. We list the following example –

- *"The number of jurisdictions involved and the nature of their tax regimes".*
  - As noted in my response to question 6, 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 unlikely.
  - Furthermore, the term "nature" is rather vague and requires further clarification.

/17...

- *The significance of the potential tax savings.*
    - The term "significance" is rather subjective. Further clarity is sought in this regard.
- The nature and amount of the fee for the tax planning service.
    - The criteria in respect of the term "nature and amount are 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?
- 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.

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 tax planning does not require the PA to have full knowledge of the ultimate beneficiary even if one does find himself in the Gray Zone. Kindly advise the emphasis of the requirement to identify the ultimate beneficiaries.

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?**

Response:

Yes, I do agree that where the PA disagrees with management that this needs to be communicated as noted in R380.19.

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 hence cannot make such further communication. As mentioned in our response to question 2 clients that require TP services are not often recurring clients and may not be audit clients hence it may be difficult for a PA after having provided such TP service to determine whether or not the client decided to pursue the arrangement.

It is therefore recommended that this wording be amended such that the sentence starts with –

/18...

"Where a PA is aware or becomes aware that a client decides to pursue the tax planning arrangement..."

Documentation

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

Response:

Yes, I do agree with this as this generally happens in practice anyway as it safeguards the PA in terms of the information provided in respect of the tax service rendered.

However, we do caution 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) professionals accountants 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.

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?**

Response:

Yes, we are in agreement with this however concern is raised in terms of 380.22 A1 which also makes reference to "where a client approaches the PA for advice on a tax planning product or arrangement developed by a third party".

This scenario would imply a second opinion which at times the PA may not be aware of as the client may not disclose this to the PA for various reasons such as not wanting to taint that PA's view on the transaction etc.

We recommend that this wording should be changed to rather 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)

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?**

Response:

We do not have any objections to this disclosure being made to the client however the concept of *"**significance** of the tax benefits in the relevant jurisdictions"* in the first bullet point requires further clarification. I am assuming that this means the quantum but is a PA intended to just merely apply professional judgement to determine what is would be a significant tax benefit in the relevant jurisdictions?

/19...

Furthermore, it may be difficult for the PA to determine the actual tax benefits in the relevant jurisdictions as he/she would generally be a tax specialist in relation to a specific country. The term tax benefit would also require further clarification.

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?**

Response:

Yes, I agree as, in my view, it merely extended the second opinions section to tax matters. Clarity is however sought on the term "other service provider" as this term is considered too vague. When a second opinion is sought on other matters the initial opinion is provided by the "existing accountant" or "predecessor account"

The glossary contains definitions for both the existing terms as follows:

Existing accountant - – A professional accountant in public practice currently holding an audit appointment or carrying out accounting, tax, consulting or similar professional services for a client".

"Predecessor accountant" – A professional accountant in public practice who most recently held an audit appointment or carried out accounting, tax, consulting or similar professional services for a client where there is no existing accountant".

Based on the above and the fact that the 2 current definitions "existing accountant" and "predecessor accountant" include the carrying out of tax services for a client, I do not consider it necessary for the insertion of the wording "other service provider" unless further clarity is provided in this regard to include a legal tax professional for example.

Once again, we thank you for the opportunity to comment on the ED and ask that you do not hesitate to contact us should you have any queries or require further consultation in relation to anything contained in this submission.

Yours faithfully

PAUL GERING
Chairman
PKF National Tax Committee

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