

CONTACT DETAILS

TEL: 056 8114882

FAX: 056 8114881

E-MAIL:

corrie@gc-cloete-accountants.co.za

STREET ADDRESS

TH' BONNY VIEW

53 PRESIDENT KRUGER
DRIVE PARYS.

POSTAL ADDRESS

Postnet Suite 5 PO BOX 2030
PARYS 9585

GC CLOETE ACCOUNTING AND TAX SERVICES INC.

REGISTRATION DETAILS

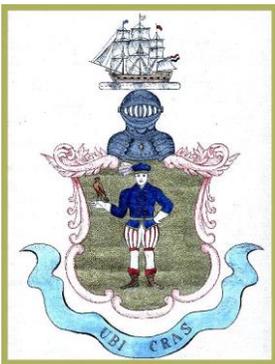
COMPANY REGISTRATION NUMBER: 2011/006610/21

VAT REGISTRATION NUMBER: 4900267867

PRACTICE NUMBER: PRAC800

DIRECTOR

GC CLOETE. B.Com (Accounting), B.Com (Hons), M.Com, ACCA Cert IFRS, MDP B-BBEE (UNISA), Professional Accountant (SA) (1659), Registered Independent Reviewer (SA) Professional Tax Specialist (SA) Master Tax Practitioner (SA) (10863456), Registered Tax Practitioner (PR-0015450) Commercial Forensic Practitioner (SA) FSP (6239)



PROFESSIONAL ACCOUNTANTS (SA)
PROFESSIONAL TAX SPECIALIST
MASTER TAX PRACTITIONER (SA)

THE INTERNATIONAL ETHICS STANDARDS BOARD FOR ACCOUNTANTS.

RESPONSE TO: RESPONDING TO NON-COMPLIANCE WITH LAWS AND REGULATIONS

Dear Sir

Thank you kindly for affording me the opportunity to respond to the May 2015 Exposure Draft on the abovementioned topic.

In order to provide you with a response, kindly allow me to provide you some of the facts and circumstances regarding one particular instance or engagement that my own office has been involved

in. I will then use this example to test this Exposure Draft in order to provide my feedback in a structured manner.

Kindly accept my apologies for responding in detail. However, I support the development of Ethics in our profession more than any other development as I believe that once we get our Ethics on a more acceptable level, we as professional accountants will be able to be proud servants of the public interest.

Allow me to take you back to a 1967 study commissioned by the Carnegie Corporation in the United States entitled, "*Horizons for a Profession.*" The opening remarks of this study conducted by Messrs Roy and MacNeill were as follows:

*"When to speak out, when to be silent, how to say or write that which is necessary but awkward, courage to face up to the need for doing so, talent to be firm yet diplomatic, imagination to see beneath and beyond the surface, perceptivity not only for what has happened but also for what may happen, **constancy in ethical behavior**, sagacity to avoid errors of omission as well as those of commission: these and other attributes like them are qualities, not definable as knowledge but inherent in individuals. Without them a CPA can be nothing more than a technician, regardless of the scope of his knowledge; possessing these attributes plus the requisite knowledge, he is a professional."*

The abovementioned statement underpins the expectation a reasonable member of public should have in his or her dealings with a professional accountant. Particularly IFAC executed tremendous efforts during the past 10 years in particular to ensure that professional accountants are properly equipped to live up to these expectations and if individual members applied the required standards in their various dealings and engagements with clients, I have no doubt that the general perceptions of professional accountants would have been much more positive.

However, in the real world this has not happened and various reasons were cited for this performance gap. This response will also not be the ultimate solution to be able to ensure that the profession operates on a standard that is expected, but I hope that it will in some way be helpful.

FACTS AND CIRCUMSTANCES REGARDING XYZ DIAMOND MINING COMPANY LIMITED

1. Background

The enterprise secured diamond mining concessions off the West Coast of South Africa for a total of approximately 27 individual seafaring vessels. In order to bypass the rules and regulations governing the soliciting of the general public to finance larger ventures, the initial directors decided to register a separate company for each of the boats and issue share certificates to each individual shareholder. However, the small group of directors that started the enterprise held the majority of shares in each of these companies and the mining concession

was registered in a special purpose company that held no assets apart from the right to mine these concessions.

This arrangement drew the attention of the South African Reserve Bank (SARB), the Companies and Intellectual Properties Commissioner (CIPC), the Financial Services Board (FSB) as well as the South African Revenue Services (SARS). It is important to note that this structure was established after consultations with two of the Big 4 auditing firms and at least three independent legal firms.

The SARB fired the first shots and charged the company and its directors with alleged transgressions of the South African banking laws, company laws as well as financial services laws. As this group of companies were involved in the mining industry, it became evident after numerous consultations that accountants or legal advisors with strong mining, banking and company legislation backgrounds were urgently required. They were referred to us purely on the grounds that we are known forensic accountants and that we have vast experience in the mining industry.

2. Our involvement

After studying the SARB charge sheet, we drafted a comprehensive engagement letter for the client and our services were procured 7 days after the SARB charges were made. We consulted with the SARB and were given 21 calendar days to address the serious allegations particularly the allegations regarding racketeering and deposit taking without a banking license. The arrangement was that if we could prove the allegations to be unsubstantiated, we would be given another two months to restructure the company (ies) as per the CIPC and SARB requirements.

We managed to get the serious allegations withdrawn and we then executed the following as per the CIPC and SARB instructions:

- Produce a prospectus for an unlisted public company.
- Recorded all shareholders of the various companies in terms of the Companies Act
- Arranged roadshows on a country wide scale where we had to explain the requirements of the SARB as well as CIPC with the singular purpose of obtaining written approval of all shareholders (2 300 plus) to re-structure the various companies into one unlisted public company and to refund any shareholder that did not wish to participate any further. (We did not have to refund even one shareholder).
- Executed the accounting and secretarial functions to transfer the assets and shares from the various companies to the single unlisted company and to also address the possible tax consequences.

The SARB appointed one of the Big 4 auditing firms as bank inspectors and we had to report our every move to them and they also appointed a team of experts to sign off on each of the tasks we performed.

We executed the above in record time and the company was allowed to proceed with its activities. In order to keep this response as short as possible I will not elaborate on the secondary assignments we executed on behalf of the client. However, it is important to note that the SARB insisted that our client also employ the services of one of the leading international legal firms to provide our client with legal advice on the future of the company. The SARB also insisted that only the representative of the legal firm may act as the spokesperson for the company during the whole process. The end result was that we had three masters to report to: the client, the bank inspectors and these legal representatives. I am fearful to sound too judgmental, but have to humbly submit that both the two parties appointed by the SARB did not contribute in any way to the woes of the client and even when we requested their approval to add their names to the prospectus, both parties refused. With full approval of the SARB and CIPC we ended up on the prospectus as the professional accountants and legal advisors. The prospectus was approved without much trouble and the company was allowed to proceed.

We were then requested to accept appointment as the accountants for the company and to ensure that all the accounting and statutory records of the company be maintained in a proper and legal manner. We agreed on condition that we were given unhindered access to the company's financial records as well as any other statutory records.

Needless to state, this company became one of our bigger clients.

3. The South African Revenue Services

The greater part of our initial engagement was to get the various tax matters in order as soon as possible. SARS did not join the initial attack on the client as it believed that the client was going to be destroyed by the SARB and CIPC.

We fulfilled our full tax engagement and due to the bad publicity surrounding the company at the time, the company was subjected to three vigorous audits which we also managed to conclude in favour of the client.

However, when the Income Tax returns were completed as well as the final VAT and employees' withholding tax returns, we calculated that the client owed the revenue authorities some R33m. We also found that the initial concessions were obtained with the payment of bribes and we reported all these transgressions to the audit committee. The chairperson of the audit committee requested a second opinion which we allowed and the second opinion, although never discussed with us, resulted in the client approaching us with the request to remain as the accountants on record. We accepted it on condition that we correct and report these transgressions to the applicable authorities as well as the shareholders.

We informed the audit committee that the various tax returns needed to be submitted urgently as the resultant administrative penalties would most definitely cripple the company even further. The response we got was a visit from the chairperson of the board of directors as well as the chairperson of the audit committee with a request to reduce the tax bill by approximately 50%. We obviously refused and SARS instituted criminal charges against this company and its directors for not submitting its tax returns. I was confident at the time that we will be submitting the returns as the Court will force the client to submit.

However, after the fifth or sixth court appearance the client informed me that the court withdrew all charges. Needless to say, I was very surprised. Shortly after this incident the chairperson of the board visited me again and offered me an amount of R200 000 as a cash incentive to reduce the tax bill by 50% and also to pay the total outstanding account owed to the practice which was just under R850 000-00. I refused once again, expecting the SARS will insist eventually that the returns be submitted and the tax be paid.

4. Actions against SARS

In terms of the RSA Tax Administration Act anybody can institute legal action against the Revenue Authority but notice must be given in terms of a certain set of rules. I did issue a notice in January 2014 and although I get these periodical visits from SARS officials nothing has been happening since the notice was recorded.

I was forced to declare the VAT on the invoices issued to the client and as SARS is directly involved in the company not having to submit its returns and pay its taxes I also refused to pay the VAT and Income Tax on the invoices issued to the client. SARS is doing nothing about this matter and I believe that they are not in a position to do anything as it will prove that the revenue authority of the country is involved in corrupt activities. I even disclosed the name of the international criminal that was identified to me as the contact between this company and the revenue authority and even advised that the chairperson indicated that the total cost to the company was not even 10% of what the taxes were and my final fees. It was also stated that the revenue authorities were going to investigate my office and other clients if I persist in my so called crusade against them.

5. The results of the above.

I did approach my own institute to assist in normalizing my relationship with SARS and to also assist in getting the criminals in the employ of SARS to be charged. However, due to the fact that the company that we acted for has quite a lot of good political contacts and contacts with international criminals, not much assistance came from them. Furthermore, the South African government limited the powers of professional institutes in terms of tax law to such an extent

that these bodies are merely classed as Controlling Bodies. These bodies can only ensure CPD compliance and institute disciplinary actions against individual members.

To date, due to the non-payment of the taxes on the invoices issued to this company, it is impossible to get a Tax Clearance Certificate and this makes my life even more complicated as I can't tender for government work and I am left to the mercy of my institute that can revoke my license to practice at any moment.

THE COSTS OF ACTING ETHICAL

As stated earlier on, I am fully supportive of the Exposure Draft: Responding to Non-Compliance with Laws and Regulations. However, I believe that we should add or consider adding the following:

1. The distinction made between auditor and professional accountants in public practice. Being an accountant requires a pre-determined competence level in subjects such as Auditing, Accounting, Financial Management and Tax Law. It is unclear to me why those licensed by the various jurisdictions to issue audit opinions are always singled out. If taken into account that most enterprises in the world will not be subjected to statutory audits and the fact that SME's are the future source of growth in the world economy, this very old conditioning of audit exclusivity should be abandoned and be replaced with a more inclusive approach whereby professional accountants be held in high regard and not the individual accounting "brands". I'm personally amazed that the corporate failures of the past 15 years could not achieve this. Therefore, in my humble view, the avenues open to auditors to report any form of non-compliance should also be open to other professional accountants in public practice. The penalties for not doing so should also be similar, but more severe than is currently the case. If a central body could have been established in our country to address non-compliance issues, it will motivate professional accountants to be much more forthcoming about these issues. Currently, the feeling of being left out to dry is very prevalent and real. By abandoning the differential approach to responding to NOCLAR and expecting all professional accountants to be able to follow the same procedures will ensure a speedy solution to similar situations.
2. I regard IFAC to be the ultimate accounting organization and would like to recommend that a special tier of professional accountant be established in order to more effectively address matters pertaining to ethics. The various institutes are bound by country loyalties and other factors and cannot ever act as a deterrent or ultimate controlling body. In South Africa we even have the IRBA but due to the fact that the goodwill of the ruling party is the only guarantee for its own survival, it is impossible for even this regulator to ensure ethical compliance. It is true that ethical compliance regulation by the various institutes and controlling bodies could be exercised as far as the general public and members of these bodies are concerned. However,

the vast array of corporate failures, high levels of government corruption on a worldwide scale now requires more than evolutionary steps. The profession now needs to become revolutionary. As accountants we have a duty to the general public and it seems that we are not shy to always state this duty and confess to do everything possible to conform. In South Africa we experienced the concerted efforts by one particular institute in our country with the sole purpose of “protecting their brand” and literally taking legalized possession of certain words in the English dictionary to ensure their own brand safety while completely ignoring the vast amounts of public funds being stolen or misappropriated. If those efforts could have been directed at rather ensuring ethical behaviour of its members and less criticizing of its sister institute, we would have lived in a much better environment. Sometimes it would seem as if we are our own worst enemies.

3. The Exposure Draft clearly defines *Those Charged With Governance*, but it does not clearly include certain State departments such as the Revenue Authorities. The process identified in how NOCLAR should be addressed is clear and corresponds with the applicable ISA’s. However, if a professional accountant becomes entangled in an ethical dilemma with a State Department, the Exposure Draft offers no protection after the correct procedures have been followed. The Whistleblowing consequences requires further thought and attention. One may argue and state that the courts should then be approached. This might be the solution in the First World, but in Third World countries this will never happen as most individuals cannot afford the costs associated with litigation against the State. There is also the security of the complainant that needs to be addressed.
4. The Tax Administration Act in South Africa requires responsible reporting from those charged with the compilation of tax returns. It is impossible to provide a tax service by merely conducting an audit on a client’s financial records and there are not that many companies left that require a statutory audit. Most engagements performed on behalf of clients where statutory reporting is involved are now more of a forensic nature than anything else and one would expect that it will be during these non-audit engagements that most issues pertaining to NOCLAR will be identified and also long before an audit is conducted. In my humble view this practical truth should be reflected in the Exposure Draft.

CONCLUSION

Professional Accountants must at all times act in the public interest. However, we need to always, before issuing exposure drafts of any kind or before re-evaluating issues such as the conceptual framework of accounting, start with the philosophical underpinnings of our profession. If we don’t start doing this we will remain technicians and nothing else.

The world is changing very fast, and we should change with it. For me to have been able to limit my own financial and emotional suffering by reporting an issue of non-compliance, I would have needed to

be put in a position where I could directly approach the High Court with an application against the Revenue Authority to correct the non-compliance immediately or provide the court with an explanation why it is impossible to do so. By just doing this, I would have been able to have the non-compliance in the public domain and also claim consequential damages. This in turn would have ensured better security for my direct family and myself and ensured that I'm not stripped of my dignity. On an international scale, if we can prosecute a head of state for crimes against humanity, the next logical step will be to also be able to prosecute a government for not acting in the interests of the people. The results are ultimately the suffering of innocent people.

By not being able to execute legal action, I lost my dignity in favour of maintaining my integrity. I do not regret this for one moment, but I constantly have to compete and be exposed to other professional accountants that rather turn a blind eye and thereby maintain a good relationship with the State. While this one incident was playing out, I could not afford to pay my annual membership fees with the AICPA and my membership was suspended. By the time I managed to salvage my practice after nearly destroying my whole asset base, I was informed that the internal rules of the AICPA have changed and that I was no more eligible for membership.

As I need to at all times act in the public interest, I never openly discussed this case in particular, but will be adding it as one of the case studies in my PhD (Accounting) studies. Do not for one moment believe that this is the only example I have. I was subjected to six other instances of this nature and it is regrettably becoming even more difficult to maintain high ethics as one has to compete against unethical professional accountants, unscrupulous legal representatives and government employees that believe that ethics is purely a nicety.

The future development of Africa's middleclass is imperative for the economic growth of not only Africa but the world. The First world should be able to have checks and balances in place where development funds and particularly IMF sourced funds can be controlled to such an extent that the money adds value to the greater population of the beneficiary country and not only a few connected individuals.

I hope that the above will at least assist in recognizing the high importance of ethical standards in our profession.

Thank you kindly for affording me the opportunity to air some views

Yours faithfully



GC CLOETE

30 AUGUST 2015