

LAW ADMINISTRATION

# regulating tax practitioners

discussion paper

## 1. INTRODUCTION

South Africa comes from a past where several factors came together to create a compliance culture that is less than it should be. These factors include:

- The economic marginalisation and consequent lack of knowledge about tax of a large segment of the population.
- The mindset and practices that took hold when circumventing the imposition of international sanctions.
- The historically limited capacity of the tax and customs administrations to challenge tax evasion and highly arguable, or even fanciful, tax planning structures and techniques.

SARS is engaged in a number of initiatives aimed at improving the compliance culture and reducing the tax gap in South Africa. As far as tax practitioners are concerned a significant problem for both SARS and taxpayers is that no minimum standard in respect of qualifications or experience is required for tax practitioners and that not all tax practitioners are subject to a code of professional conduct.

From SARS' perspective this means a great deal of time and energy is spent unnecessarily and inefficiently in correcting errors made by or addressing the unprofessional conduct of a small but significant number of tax practitioners.

From a taxpayer's perspective the unprofessional conduct of a tax practitioner may place both his/her funds and good reputation at risk. In their day-to-day work and in public forums, such as radio talk shows, SARS staff members are confronted with the question of what redress is available to taxpayers for poor advice, misappropriated funds, etc. The South African Institute of Chartered Accountants has noted that it has received "many complaints from members of the public for poor performance or other problems encountered with accountants related to people not registered with SAICA" in this context.

Where a tax practitioner is a member of a profession, SARS or a taxpayer may report unprofessional conduct of that practitioner to the profession to which he/she belongs. Unfortunately, existing codes of professional conduct are normally not tax specific and professional bodies may encounter difficulties when prosecuting misconduct with specific reference to tax. A closely related problem is that complainants are not always aware of the code of professional conduct binding a member of a particular profession. Without this knowledge complainants are not in a position to evaluate whether a tax practitioner's conduct is in breach of the particular code of professional conduct that might bind him/her.

In view of these issues the Budget Review 2002 stated that; "Many individual and business taxpayers receive advice and assistance from tax consultants and advisors. Although the final responsibility for the contents of a tax return legally rests with the taxpayer, the return is completed on the advice of the tax consultant or advisor, who bears limited responsibility for the advice given. In order to promote better compliance and ensure that taxpayers receive advice consistent with the tax legislation, SARS

will initiate discussion on the regulation of tax consultants and advisors in South Africa, with appropriate sanctions in the event of non-compliance with tax legislation."

This paper is intended to open the discussion by providing an overview of:

- The Customs accredited client scheme,
- The spectrum of possible regulation of tax practitioners,
- The regulatory system in place in three foreign jurisdictions, and
- A possible model for regulation in the South African context.

The model presented is by no means final and merely represents a starting point for debate by all stakeholders. It does, however, offer a number of advantages for all stakeholders.

- SARS will enjoy administrative efficiencies and the integrity of the tax system will be improved.
- Taxpayers will have the assurance of minimum standards for tax practitioners and the opportunity to challenge unprofessional conduct in a cost effective way.
- Tax practitioners will gain access to dedicated tax resources and a unified forum for interacting with government.

## 2. CUSTOMS ACCREDITED CLIENT SCHEME

The accredited client scheme was introduced into the Customs and Excise Act, 91 of 1964, by way of section 64E. This scheme is open to enterprises involved in Customs transactions (imports, exports, warehouse and movement of cargo) which are capable of instituting and maintaining high quality internal operational processes and computer systems in order to comply with the Customs laws and procedures.

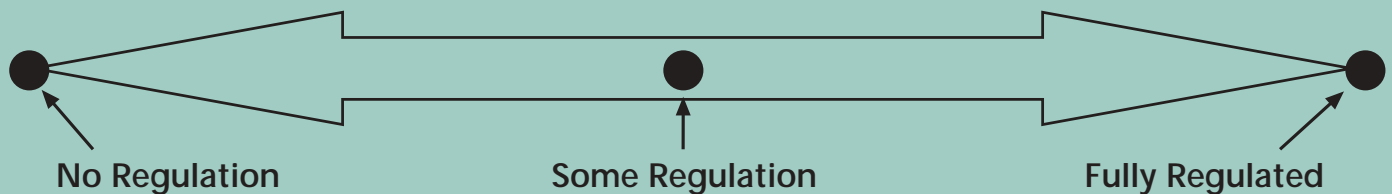
Essentially, a client whose internal controls meet a certain standard, whose record of compliance over the five years preceding accreditation is acceptable to SARS and whose computer systems are capable of operating within a paperless environment can enter into an agreement with SARS and be recognised as an accredited client.

The primary benefits to the client revolve around simplified procedures with respect to the vast number of individual transactions that make up its interactions with SARS– electronic clearances, a paperless environment (no supporting documents), and less human intervention (border passage, removal of goods in bond).

On the other hand, an employer or VAT vendor may choose to utilise a paperless means of filing a tax return (e-filing) and no sophisticated computer system is required by the taxpayer for this purpose. Clearly the service provider rendering the e-filing service does indeed need such a system and also enters into an agreement with SARS. In this context it is the service provider for tax purposes that can be equated to the accredited client for Customs purposes.

### 3. SPECTRUM OF POSSIBLE REGULATION

Before considering the international examples it may be appropriate to briefly consider the spectrum of possible regulation.



The two poles labelled "no regulation" and "fully regulated" are extremes and it is doubtful whether any tax jurisdiction can be regarded to have no regulation, in the widest possible sense, or on the other hand to be fully regulated.

Although South Africa does not regulate tax practitioners in the sense of a code of conduct or a qualification requirement, certain provisions of the tax legislation may be applied in respect of tax practitioners acting on behalf of taxpayers. Examples are Section 104 (Offences and penalties) and Section 105A (Reporting of unprofessional conduct) of the Income Tax Act, 58 of 1962. Admittedly the second example is premised on the offender belonging to a professional association, body or board.

Towards the "no regulation" end of the spectrum market forces are the only mechanism to ensure tax practitioner competence, in that taxpayers wishing to obtain sound tax advice will normally engage a professional person specialising in tax. This is the position in jurisdictions such as the UK and Ireland, where apart from attorneys, accountants and other professional bodies there is a specific tax profession. The Chartered Institute of Taxation in the UK (CIOT) and the Irish Institute of Taxation in Ireland. Members of these bodies are required to demonstrate a certain degree of competence by way of examination or dissertation before being allowed to utilise their professional body's designation.

At the other end of the spectrum, no tax authority has full regulatory authority over tax practitioners. Where there is a higher degree of regulation, the regulatory body is often an independent government body separate from the tax administration, as in Australia, or there is some flexibility over categories of practitioner and their qualification requirements, as in the USA.

### 4. INTERNATIONAL EXAMPLES

#### 4.1. AUSTRALIA

##### Registration of Tax Agents

The registration of tax agents is provided for in Part VIIA of the Income Tax Assessment Act 1936 (ITAA36) and Part 9 of the Income Tax Regulations. A person must be registered as a tax agent to

charge a fee for preparing or lodging income tax returns and objections, or for transacting business on behalf of a taxpayer in income tax matters.

If a person charges a fee for these services whilst not registered as a tax agent that person will be committing an offence under section 251L of the ITAA36 and face a fine, upon conviction, of up to 200 penalty units (\$22,000). It is also an offence, under section 251O of the IT AA36, to represent oneself as a tax agent or to advertise that tax returns can be prepared and to attend to income tax matters unless registered as a tax agent. The penalty for breaching section 251O is a maximum fine of 10 penalty units (\$1,100).

These offences do not apply to a solicitor or counsel in certain situations where they are acting in the course of their profession.

In order to practice as a tax agent a person must be registered with the Tax Agents' Board in the appropriate State. If a person intends to practice through a company or partnership that entity must be registered as the tax agent.

## General Responsibilities

Being a tax agent gives a person the right to charge a fee to prepare income tax returns and objections and to transact business on behalf of taxpayers in income tax matters; it also carries a number of responsibilities.

Most importantly, a tax agent is expected to:

- Prepare returns honestly and competently, so that they are true and accurate.
- Keep up to date with changes in tax laws and practice.
- Act professionally in dealing with clients, including the Australian Taxation Office.
- Maintain "good fame and character". A reputation for honesty and integrity is one of a person's major assets as a tax agent.

Generally, the Board accepts behaviour and practice consistent with the various "Codes of Professional Conduct" of the accounting and legal professional associations, as satisfying these requirements.

## Qualifications

Income Tax Regulation No. 156 deals with the prescribed qualifications of tax agents. Broadly speaking four categories of qualification are acceptable in terms of this regulation.

### *1. Tertiary qualification in accountancy plus experience*

Such person:

- (a) Shall have completed the academic requirements for the award of a degree, diploma or other qualification from an Australian university, college of advanced education or other tertiary

institution of an equivalent standard, and have passed examinations in such subjects, under whatever name, which an appropriate authority of the university, college of advanced education or other tertiary institution certifies to the Board to represent a course of study in accountancy of not less than 3 years' duration and in commercial law of not less than 18 months' duration or shall possess such other qualifications as the Board regards as equivalent to those qualifications;

(b) Shall have:

- (i) Been engaged in relevant employment on a full-time basis for not less than a total of 12 months in the preceding 5 years;
  - (ii) Otherwise be engaged in relevant employment to an extent that the Board regards as equivalent to that referred to in (i) above; or
  - (iii) Been engaged in such other employment and for such time as the Board regards as equivalent to being engaged in relevant employment as referred to in (i) above; and
- (c) Shall have, by written examination, successfully completed a course of study in Australian income tax law acceptable to the Board.

### *2. Admissible as a barrister or solicitor*

Such person:

- (a) Shall have completed the academic requirements for admission as a barrister or solicitor of the High Court or of the Supreme Court of a State or Territory;
- (b) Shall have:
- (i) Been engaged in relevant employment on a full-time basis for not less than a total of 12 months in the preceding 5 years;
  - (ii) Otherwise be engaged in relevant employment to an extent that the Board regards as equivalent to that referred to in (i) above; or
  - (iii) Been engaged in such other employment and for such time as the Board regards as equivalent to being engaged in relevant employment as referred to in (i) above;
- (c) Shall have, by written examination or examinations set by a college of technical and further education (or an examination or examinations of an equivalent or higher standard), successfully completed a course of study in basic accounting principles; and
- (d) Shall have, by written examination, successfully completed a course of study in Australian income tax law acceptable to the Board.

### *3. Study in accountancy at TAFE*

Such person:

- (a) Shall have completed the academic requirements for the award of a diploma or certificate from a college of technical and further education (TAFE) following a course of study in accountancy of not less than 2 years' duration of full-time study or 4 years' duration of part-time study;
- (b) Shall have:
- (i) Been engaged in relevant employment on a full-time basis for not less than a total of 2 years in the preceding 5 years;

- (ii) Otherwise be engaged in relevant employment to an extent that the Board regards as equivalent to that referred to in (i) above; or
- (iii) Been engaged in such other employment and for such time as the Board regards as equivalent to being engaged in relevant employment as referred to in (i) above; and
- (c) Shall have, by written examination, successfully completed a course of study in Australian income tax law acceptable to the Board.

#### *4. Minimum of 8 years of relevant employment*

Such person:

(a) Shall have:

- (i) Been engaged in relevant employment on a full-time basis for not less than a total of 8 years in the preceding 10 years;
- (ii) Otherwise be engaged in relevant employment to an extent that the Board regards as equivalent to that referred to in (i) above; or
- (iii) Been engaged in such other employment and for such time as the Board regards as equivalent to being engaged in relevant employment as referred to in (i) above; and

(b) Shall:

- (i) Be a member of and entitled to vote at meetings of the Australian Society of Accountants, the Institute of Chartered Accountants in Australia or the National Institute of Accountants; or
- (ii) Have, by written examination or examinations set by a college of technical and further education (or an examination or examinations of an equivalent or higher standard), successfully completed a course of study in basic accounting principles and have, by written examination, successfully completed a course of study in Australian income tax law acceptable to the Board.

Essentially all categories require that persons must have, by written examination, successfully completed a course of study in Australian income tax law acceptable to the Tax Agent's Board. Other requirements consider varying degrees of experience and accounting competency.

The term "relevant employment" means employment by a person in the course of which there has been substantial involvement in income tax matters including:

- The preparation or examination of a broad range of income tax returns,
- The preparation or examination of objections to assessments issued in respect of such returns, and
- The provision of advice in relation to income tax returns, assessments or objections.

#### **Good Fame, Integrity and Character (Disqualification)**

It appears that Australian legislation specifically states two instances of conduct that affects fame and character to a degree that is deemed intolerable for the tax profession. Consequently, a person is not to be a "fit and proper person" if:



- The person has been convicted of a serious taxation offence during the previous 5 years, or
- The person is under sentence or imprisonment for a serious taxation offence.

A "serious taxation offence" has been defined in Division 1 of Part VIIA of the Income Tax Assessment Act 1936. Section 251A states the term to mean:

- (a) An offence against Section 29D or 86A of the Crimes Act 1914, being an offence that relates to a tax liability within the meaning of the Taxation Administration Act 1953; or
- (b) An offence that relates to an offence of a kind referred to in paragraph (a); or
- (c) An offence that is:
  - (i) An offence against a taxation law; or
  - (ii) An offence against Sections 6, 7 or 7A of the Crimes Act 1914, or subsection 86(1) of that Act by virtue of (a) of that subsection, being an offence that relates to an offence against a taxation law.

## 4.2. MALAYSIA

### Registration of Tax Agents

Section 153 of the Malaysian Income Tax Act provides for Tax Agents. Subsection 1 states that "No person holding himself out as a tax agent, a tax consultant or a tax adviser (or under any other like description) shall be permitted to act in Malaysia on behalf of any person for any of the purposes of this Act unless he is a tax agent as defined in this section."

A proviso to the above states, "nothing in this subsection shall be construed as restricting an advocate in the lawful practice of his profession."

For the purposes of the Act, "tax agent" means:

- (a) A professional accountant authorised by or under any written law to be an auditor of companies;
- (b) Any other professional accountant approved by the Minister; or
- (c) Any other person approved by the Minister on the recommendation of the Director General.

In order to register as a tax agent, a fee as prescribed from time to time in the Gazette must be paid. Registration is valid for a period of 24 months after which such registration must be renewed.

### Representing a Taxpayer

A person can only act on behalf of a taxpayer for any purpose under the Income Tax Act if registered as a tax agent. Acting on behalf of a client includes preparing and filing documents, corresponding and communicating with the IRB and representing the client at meetings.



## Eligibility to become a Tax Agent

A professional accountant authorised by or under any written law to be an auditor of companies or any other professional accountant approved by the Minister of Finance may become a tax agent, provided such person is not under suspension or disbarment.

The Minister of Finance on the recommendation of the Director General of the IRB may grant enrolment to applicants who do not hold a professional qualification mentioned above. Compliance with the code of ethics is used as one of the criteria for approving and renewing the licence of the tax agent.

## Code of Conduct

The purpose of the code is to instill professionalism amongst tax agents and to ensure public confidence. The following are important elements of the code:

### *1. Integrity*

- (a) A tax agent shall be well mannered, honest, sincere and truthful, always giving full co-operation when dealing with the IRB. In handling the case of a client, a tax agent shall furnish only information which, to the best of his/her knowledge and belief, is correct.
- (b) A tax agent shall refrain from using information acquired in the course of his/her work for his/her own advantage or that of a family member.
- (c) A tax agent shall accurately inform/advise his/her client on the progress of that client's case.
- (d) A tax agent shall not misuse any monies entrusted by his/her client for purposes of the payment of tax. Proof of payment shall be given to his/her client for purposes of record.
- (e) A tax agent shall not enter into any arrangement with an unqualified person to endorse the work of that unqualified person.

### *2. Competency*

- (a) A tax agent shall always strive for professional competency and exhibit a high degree of skill in discharging duties. A tax agent must therefore be conversant with the tax laws/practices and constantly ensure that his/her technical knowledge is up-to-date.
- (b) Staff members of a tax agent must also be well trained in relevant aspects of tax laws and regulations so as to ensure that work performed by such staff members also meet the required standard.
- (c) A tax agent shall to the best of his/her ability, ensure that all returns and tax computations submitted are properly completed with the required supporting statements and schedules, and such submissions are in compliance with the guidelines issued by the IRB.
- (d) A tax agent shall only undertake cases that are within his/her experience and capability. This is to avoid any sub-standard work being performed and undue finalisation of cases.

- (e) When making appeals against any assessment, proper care shall be taken to ensure that such appeals are based on valid grounds.
- (f) A tax agent is expected to give prompt and complete replies to enquiries from the IRB.

### *3. Professional Advice*

- (a) In giving professional advice to clients, the tax agent shall always have regard to the prevailing tax laws.
- (b) The tax agent shall impress upon his/her clients the various obligations and duties as taxpayers under the tax laws and educate the clients on the importance of maintaining proper records of all transactions especially in business cases.
- (c) The tax agent shall also advise clients of the necessity to make sufficient provisions for payment of tax as well as the importance of keeping to the installment plans for payment of tax so as to avoid late payment penalties.

### *4. General*

Apart from the code of conduct mentioned above, a tax agent is also advised to observe the following:

- (a) Tax agents must quote the approval number indicating their registration on all correspondence with the IRB.
- (b) Tax agents must inform the IRB when they cease to act on behalf of any particular client.
- (c) The tax agent's own affairs must be kept up-to-date. All returns, accounts etc. ought to be timely lodged and tax payable be settled within the time allowed.

### **Return Preparation Penalties**

The Income Tax (Amendment) Act 1999 introduced a new provision in the Income Tax Act in respect of a person who assists in, or advises with respect to the preparation of any return.

Under this new provision, a person will be guilty of an offence if his/her advice or assistance in preparing the tax return results in an understatement of another person's tax liability. This will not apply if the tax agent exercises reasonable care in the course of providing the advice or assistance.

If found guilty of the offence, the tax agent will be subject to:

- A fine of which the amount is between RM2,000 and RM20,000, or
- Imprisonment for not more than 3 years, or
- A fine and imprisonment.

## 4.3. THE UNITED STATES OF AMERICA

### Practice before the IRS

Publication 947 – Practice before the IRS – discusses who can represent a taxpayer before the IRS. This publication seeks to address representation of a taxpayer after filing rather than regulating who can complete a tax return. Practice before the IRS can cover all matters relating to any of the following:

- Communicating with the IRS for a taxpayer regarding the taxpayer's rights, privileges, or liabilities under laws and regulations administered by the IRS.
- Representing a taxpayer at conferences, hearings, or meetings with the IRS.
- Preparing and filing necessary documents with the IRS for a taxpayer.

Just preparing a tax return, furnishing information at the request of the IRS, or appearing as a witness for the taxpayer is not practice before the IRS. These acts can be performed by anyone to the extent provided by the regulations governing practice before the IRS.

### Qualified Persons

Any of the following individuals can practice before the IRS but must file a written declaration with the IRS stating that he/she is authorised and qualified to represent a particular taxpayer:

- Attorneys – who are not under suspension or disbarment from practice.
- Certified Public Accountants (CPAs) – who are not under suspension or disbarment from practice.
- Enrolled Actuaries – the practice of enrolled actuaries is limited to certain of the tax code, principally those sections governing employee retirement plans.
- Enrolled Agents – any enrolled agent in active status (described below).
- Unenrolled Return Preparers – persons other than the above. Such persons are limited in their practice before the IRS.

### Enrolled Agents

The Director of Practice can grant enrolment to practice before the IRS to an applicant who demonstrates special competence in tax matters by passing a written examination administered by the IRS. Enrolment can also be granted to an applicant who qualifies because of past service and technical experience in the IRS. Additionally, an applicant must not have engaged in any conduct that would justify suspension or disbarment from practice before the IRS.

An enrolment card will be issued to each individual whose application is approved. The individual is enrolled until the expiration date shown on the enrolment card. To continue practising beyond the expiration date, the individual must request renewal of the enrolment.

## Limited Practice

An unenrolled return preparer may represent the taxpayer only concerning the tax liability for the year or period covered by the return that he/she prepared. The unenrolled return preparer is only permitted to represent taxpayers before the examination function of the IRS and is not permitted to represent taxpayers before the Appeals, Collection, or other function of the IRS.

Unenrolled return preparers cannot perform the following activities for another taxpayer:

- Sign claims for refunds.
- Receive refund cheques.
- Sign consents to extend the statutory period for assessment or collection of tax.
- Sign closing agreements regarding a tax liability.
- Sign waivers of restriction on assessment or collection of a tax deficiency.

Any individual engaged in limited practice before the IRS who is involved in disreputable conduct is subject to the same disciplinary action as for any other person in practice before the IRS.

Because of their special relationship with a taxpayer, the following unenrolled individuals can represent the specified taxpayers before the IRS beyond the examination function, provided they present satisfactory identification and except for (a) below, proof of authority to represent the taxpayer:

- (a) An individual
- (b) An immediate family member – spouse, child, parent, brother or sister of the individual
- (c) An officer – a bona fide officer of a corporation, where the corporation is the taxpayer
- (d) A partner – a partner can represent the partnership
- (e) An employee – a regular full-time employee can represent his/her employer
- (f) A fiduciary – a trustee, executor, administrator, receiver or guardian, stands in the position of the taxpayer, not as a representative.

## Rules of Practice

Any person authorised to practice before the IRS (a practitioner) who does not comply with the rules of practice or engages in disreputable conduct is subject to disciplinary action.

### 1. Duties

- (a) Practitioners must promptly submit records or information requested by officers or employees of the IRS.
- (b) The confidentiality protection for certain communications between a taxpayer and an attorney (privileged communications) applies to similar communications between a taxpayer and a practitioner (any person authorised to practice before the IRS), provided that they relate to non-criminal:

- (i) Tax matters before the IRS, or
  - (ii) Tax proceedings brought in federal court or against the United States
- (c) This protection of tax advice communications does not apply to any written communications between a practitioner and a director, shareholder, officer, employee, agent or representative of a corporation. It also does not apply if the communication involves the promotion of the direct or indirect participation of the corporation in any tax shelter.
- (d) A practitioner who knows that his/her client has not complied with the revenue laws or has made an error or omission in any return, document, affidavit, or other required paper, has the responsibility to advise the client promptly of the non-compliance, error or omission.
- (e) A practitioner must exercise due diligence when performing the following duties:
- (i) Preparing or assisting in the preparing, approving, and filing of returns, documents, affidavits, and other papers relating to IRS matters.
  - (ii) Determining the correctness of oral or written representations made by him/her to the Department of the Treasury.
  - (iii) Determining the correctness of oral or written representations made by him/her to clients with reference to any matter administered by the IRS.

## *2. Restrictions*

Practitioners are restricted from engaging in certain practices.

- (a) A practitioner must not unreasonably delay the prompt disposition of any matter before the IRS.
- (b) A practitioner must not knowingly, directly or indirectly, do the following:
  - (i) Employ or accept assistance from any person who is under disbarment or suspension from practice before the IRS.
  - (ii) Accept employment as associate, correspondent, or subagent from, or share fees with, any person under disbarment or suspension from practice before the IRS.
  - (iii) Accept assistance from any former government employee where provisions of Treasury Department Circular No. 230 or any federal law would be violated.
- (c) A practitioner who is a notary public and is employed as counsel, attorney, or agent in a matter before the IRS, or has a material interest in the matter, cannot engage in any notary activities related to that matter.
- (d) Practitioners who are income tax return preparers must not endorse or otherwise negotiate (cash) any refund cheque issued to the taxpayer.

## *3. Disreputable Conduct*

Any practitioner or unenrolled return preparer may be disbarred or suspended from practice before the IRS for disreputable conduct. The following list contains examples of conduct that is considered disreputable:

- (a) Committing any criminal offence under the revenue laws or committing any offence involving dishonesty or breach of trust.

- (b) Knowingly giving false or misleading information in connection with federal tax matters, or participating in such activity.
- (c) Soliciting employment by prohibited means as discussed in section 10.30 of Treasury Department Circular No. 230.
- (d) Wilfully failing to file a tax return, evading or attempting to evade any federal tax or payment, or participating in such actions.
- (e) Misappropriating, or failing to properly and promptly remit, funds received from clients for payment of taxes.
- (f) Directly or indirectly attempting to influence the official action of IRS employees by the use of threats, false accusations, duress, or coercion, or by offering gifts, favours, or any special inducements.
- (g) Being disbarred or suspended from practice as an attorney, CPA, public accountant, or actuary, by any district, state, possession, territory, commonwealth, or any federal court, or any body or board of any federal agency.
- (h) Knowingly aiding and abetting another person to practice before the IRS during a period of suspension, disbarment, or ineligibility.
- (i) Using abusive language, making false accusations and statements knowing them to be false, circulating or publishing malicious or libellous matter, or engaging in any contemptuous conduct in connection with practice before the IRS.
- (j) Giving a false opinion knowingly, recklessly, or through gross incompetence; or following a pattern of providing incompetent opinions in questions arising under the federal laws.

#### *4. Reprimands, Disbarments, and Suspensions*

The Director of Practice may reprimand or institute proceedings to suspend or disbar any attorney, CPA, or enrolled agent who the Director of Practice has reason to believe violated the rules of practice. Except in certain unusual circumstances, the Director will not institute a proceeding for suspension or disbarment against a practitioner until the facts (or conduct) which may warrant such action have been given in writing to that practitioner and the practitioner has been given the opportunity to demonstrate or achieve compliance with the rules.

## 5. A POSSIBLE MODEL FOR SOUTH AFRICA

The model conceived for discussion purposes is based on the formation of an Association of Tax Practitioners. This Association would have its own legal persona and would be run by the stakeholders themselves. SARS would be an important stakeholder but would not be the regulator.

Self-regulation would enhance the credibility of the Association to all parties concerned, viz. the taxpayers making use of tax practitioners, SARS in working with tax practitioners and amongst tax practitioners themselves.

## Legislative Backing

In order to provide the impetus for the formation of the Association of Tax Practitioners, a legislative provision along the following lines is proposed.

"With effect from 1 January 2004 any–

- (a) person rendering tax-related services for reward, other than to or on behalf of a single employer;  
or
- (b) employee of a person, who is employed solely or mainly in rendering tax-related services to or on behalf of that person or any connected person, other than under the direct supervision of a member of the Association of Tax Practitioners entitled to full practice;

who is not registered as a member in the appropriate membership category of the Association of Tax Practitioners shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years."

The provision would:

- Provide a window period for the establishment of the Association of Tax Practitioners and a transition period for the change to the new arrangement.
- Identify persons rendering tax-related services to clients for reward as being persons that should be subject to a code of professional conduct.
- Identify employees whose employment is solely or mainly for the purpose of rendering tax-related services as being persons that should be subject to a code of professional conduct, unless they render these services under the direct supervision of a registered tax practitioner entitled to full practice. An example of an affected employee would be a tax manager for a group of companies.

The provision would not:

- Require employees working under the direct supervision of a registered tax practitioner entitled to full practice to register as tax practitioners. An example of an unaffected employee would be a tax consultant in public practice reporting to a registered tax practitioner entitled to full practice.
- Require an employee responsible for the tax affairs of a company, a close corporation or a trust to register as a tax practitioner where this is not the sole or main employment of the employee. An example of an unaffected employee would be the financial director of a private company whose tax-related services to the company form only a small portion of the services he/she provides to the company.



An issue that has been left open for discussion is the definition of "tax-related services." An example of a possible exclusion from this definition would be a legal practitioner's representation of a taxpayer in the course of litigation.

In as far as the constitutionality of this provision is concerned it should be noted that section 22 of the Constitution provides that; "The practice of a trade, occupation or profession may be regulated by law." Furthermore the self-regulatory environment proposed is comparable to or less intrusive than that of other professions in South Africa and that of the tax professions in other open and democratic societies.

### **Objects of the Association**

The following objects of the Association are proposed:

- (a) To promote the common interests of tax practitioners throughout the Republic of South Africa by means other than the carrying on by the Association of any trading or other profit-making activities, or the participation by the Association in any business, profession or occupation carried on by any of its members, or the provision to any of its members of financial assistance or of any premises or continuous services or facilities required by its members for the purpose of carrying on any business, profession or occupation;
- (b) To advance the theory and practice of taxation in all its aspects;
- (c) To insist upon a high standard of professional behaviour on the part of members of the Association and to preserve and maintain the integrity and status of the profession, to take any steps which may be thought necessary to stop or prevent dishonourable conduct and practices by members, for this purpose to hold enquiries into the conduct of members and to take disciplinary action against members, including the termination of their membership and their expulsion from the Association;
- (d) To consider and pass comment on actual or impending legislation in the Republic of South Africa affecting the profession or otherwise and to apply for, petition for, or promote any Act of Parliament or other legislative enactment desirable for the betterment or enhancement of the profession;
- (e) To provide for research into taxation and kindred matters and to provide members with information on developments in professional thought and methods both inside and outside the Republic of South Africa;
- (f) To provide opportunities for an exchange of views among members;
- (g) To implement steps to enable the profession as far as is practicable to speak with one voice on matters of national or international importance affecting the profession;

- (h) To co-operate at all times with SARS and the National Treasury;
- (i) To apply for membership of and to co-operate with national and international bodies representing the interests of the profession;
- (j) To provide courses, seminars or other presentations for members of the Association, members of other professions and interested members of the public, and to charge reasonable fees to persons attending such courses;
- (k) To publish from time to time lists of members of the Association;
- (l) To provide for the amicable settlement or adjustment of professional disputes, including disputes between members of the public which relate directly or indirectly to tax practitioners;
- (m) To prescribe the qualifications and/or experience to be obtained by any person wishing to become a member;
- (n) Generally to do and undertake and advise on all matters which may be expedient and in the interests of members of the Association and the general public in relation to matters of concern to the profession;
- (o) Generally to do such other things as may be incidental or conducive to the attaining of the above objects.

### **Composition of the Board**

The affairs of the Association should be managed by a representative Board drawn from members of the Association who are resident in the Republic together with one representative each nominated by SARS and the National Treasury.

### **Membership**

In addition to any absentee or honorary membership that the Association may wish to grant, two main categories of membership are proposed:

1. Members entitled to limited practice. A member entitled to limited practice is effectively limited to return preparation and associated functions. Such a member may only represent the taxpayer concerning the year or period covered by the return that he/she prepared. A member entitled to limited practice is only permitted to represent taxpayers in respect of an application for extension, deferred payment arrangement, query, audit or objection in relation to a return he/she is preparing or prepared and is not permitted to represent taxpayers in respect of any other tax matter.

2. Members entitled to full practice. A member entitled to full practice may provide the full spectrum of tax related services and is not limited to return preparation and associated functions.

### **Qualifications for Admission to Membership**

Qualification for admission to the Association shall be proof to the satisfaction of the Board of one of the following:

1. That the applicant has passed the examinations, where applicable, and has the practical experience-, prescribed by the Board; or
2. If the application is for admission as an associate member, that the applicant has passed the examinations prescribed by the Board for this purpose, where applicable, has the practical experience prescribed by the Board and is a member in good standing of a body of recognised by the Board for this purpose. Issues for discussion are the extent to which an associate member should be required to meet the academic and experience requirements set out below, as well as the bodies to be recognised.

### **Members Entitled to Limited Practice: Examinations and Practical Experience**

#### *1. Minimum Academic Requirements*

- (a) Where the applicant is only to prepare and file the tax returns of individuals who are not directors of companies and who earn a taxable income of less than that at which the maximum marginal rate applies, there is no academic requirement.
- (b) Where the applicant is to prepare and file tax returns of any other person, the applicant must have passed at a South African university, technikon or approved equivalent:
  - (i) At least one course in accounting, e.g. Accounting I; and
  - (ii) At least one course in South African taxation.

#### *2. Minimum Experience Requirements*

- (a) Applicants requiring no academic qualification must demonstrate that they have completed 2000 hours of relevant South African tax work in the preceding five years.
- (b) Applicants requiring at least one course in accounting and at least one course in South African taxation must demonstrate that they have completed 1200 hours of relevant South African tax work in the preceding three years.

#### *3. Relevant South African Tax Work*

Relevant South African tax work includes:

- (a) Completing and submitting of any tax return of an individual or any other tax return as permitted respectively;
- (b) Responding to queries of a routine nature, e.g. a request for a schedule of bad debts, raised by SARS regarding any tax administered by SARS; and
- (c) Drafting objections to tax assessments of an administrative nature, e.g. arising out of arithmetic errors.

## **Members Entitled to Full Practice: Examinations and Practical Experience**

### *1. Minimum Academic Requirements*

- (a) Bachelor's degree from a South African university or a four year degree from a South African technikon, or an approved equivalent.
- (b) Either as part of the qualification or as extra courses, the applicant must have passed at least two courses in:
  - (i) Accounting;
  - (ii) Commercial or mercantile law; and
  - (iii) South African taxation. (One of these taxation courses should be at a fourth year or postgraduate level eg. an Honours degree including taxation, a Higher Diploma including taxation, an Advanced Certificate in Taxation.)
- (c) An applicant is still eligible for admission if only one course has been completed in up to two of the three categories in (b), subject to the increased experience requirements set out below.

### *2. Minimum Experience Requirements*

- (a) Applicants who have passed at least two courses in each of the three categories above must demonstrate that they have completed 1200 hours of relevant South African tax work in the preceding three years.
- (b) Applicants who have passed one course in one of the categories above and at least two courses in two of the categories above must demonstrate that they have completed 1800 hours of relevant South African tax work in the preceding three years.
- (b) Applicants who have passed one course in two of the categories above and at least two courses in one of the categories must demonstrate that they have completed 2400 hours of relevant South African tax work in the preceding three years.

### 3. *Relevant South African Tax Work*

- (a) Completing and submitting income tax returns, other than income tax returns for individuals who are not directors of companies and who earn a taxable income of less than that at which the maximum marginal rate applies;
- (b) Responding to queries raised by SARS, other than queries of a routine nature, e.g. a request for a schedule of bad debts;
- (c) Drafting objections to tax assessments or decisions, other than objections of an administrative nature, e.g. arising out of arithmetic errors;
- (d) Preparing for appeals, or assisting in preparing for appeals, in respect of tax assessments or decisions; and
- (e) Giving considered written opinions regarding tax matters.

### **Punishable Offences**

- (a) In respect of a member entitled to limited practice, performing the following:
  - (i) Representing a client in matters other than those pertaining to the preparation and submission of tax returns, applications for extension, deferred payment arrangements, queries, audits, or objections;
  - (ii) Representing a client concerning a tax liability for a year or period covered by a return not prepared by him/her; or
  - (iii) Signing of any tax return, any request for the extension of time in respect of the submission of any tax return or any deferred payment arrangement on behalf of a client without the express written consent of that client on each occasion;
- (b) Conducting himself/herself with gross negligence in connection with any work performed by him/her in his/her profession or employment;
- (c) Performing the following without exercising due diligence:
  - (i) Preparing or assisting in the preparing, approving, and submission of tax returns, affidavits, and other documents relating to tax matters;
  - (ii) Determining the reasonability of oral or written representations made to him/her by clients relating to tax matters; or
  - (iii) Determining the correctness of oral or written representations made by him/her to clients relating to tax matters;
- (d) Unreasonably delaying the prompt disposition of any matter before SARS;

- (e) Knowingly giving false or misleading information in connection with tax matters or participating in such activity;
- (f) Directly or indirectly attempting to influence the official action of SARS employees by the use of threats, false accusations, duress, or coercion, or by offering gifts, favours, or any special inducements;
- (g) Using abusive language, making false accusations and statements knowing them to be false, circulating or publishing malicious or libellous matter, or engaging in any contemptuous conduct in connection with practice before SARS;
- (h) Giving a false opinion knowingly, recklessly, or through gross incompetence; or following a pattern of providing incompetent opinions in questions arising under the tax laws;
- (i) Directly or indirectly paying a person, other than a fellow member, a commission or giving such person monetary or other consideration, as remuneration for bringing the member work, or for inducing other persons to give work to the member;
- (j) Accepting directly or indirectly any commission, brokerage or other remuneration in respect of professional or commercial business referred to others as an incident to his/her service to any client, except with the knowledge and consent of that client;
- (k) Improperly obtaining or attempting to obtain work;
- (l) Soliciting or advertising or canvassing in the Republic (or in any territory outside the Republic designated by the Board from time to time) in any manner not permitted by the Rules or Code of Professional Conduct prescribed by the Board from time to time;
- (m) Wilfully refusing or failing to perform or conform with any of the provisions of the By-laws which it is his/her duty to do;
- (n) Committing a breach of any Rule or Code of Professional Conduct prescribed by the Board or, after having been previously warned by the Board or any committee appointed by it, continuing to commit a breach of such Rules or Code of Professional Conduct;
- (o) Unlawfully failing to account for, or unreasonably delaying an accounting of any money or property received for or on behalf of a client or any other person when called upon to do so;
- (p) Conducting himself/herself in a manner which, in the opinion of the Disciplinary Committee, is discreditable, dishonourable, dishonest, irregular or unworthy or which is derogatory to the Association, or tends to bring the profession of tax practitioners into disrepute;

- (q) Without reasonable cause fails to resign from a professional appointment when requested by the client to do so;
- (r) Fails to answer or deal with appropriately within a reasonable time any correspondence or other communication from the Association or any other person which requires a reply or a response;
- (s) Fails to comply within a reasonable time with an order, requirement or request from the Association; or
- (t) Fails after demand to pay any subscription or any fee, levy or other charge payable to the Association.

### **Cancellation of Membership**

- (a) The Board shall cancel the membership of any member who subsequent to his/her admission to membership is:
  - (i) Removed from an office of trust on account of misconduct; or
  - (ii) Convicted of theft, fraud, forgery, or uttering a forged document or perjury and sentenced in respect thereof to imprisonment without the option of a fine or to a fine of an amount to be determined by the Board from time to time and published by the Board for the information of the members.
- (b) The Disciplinary Committee may in its discretion order the cancellation of the membership of any member who is found guilty of committing a punishable offence.
- (c) The Disciplinary Committee may in its discretion order the cancellation of the membership of any member whose estate is provisionally or finally sequestrated or who enters into an arrangement with his/her creditors subsequent to his/her admission to membership.
- (d) A person whose membership has been cancelled may apply for his/her re-admission as a member after the expiry of a period of 10 years reckoned from the date of such cancellation, provided however that the Board may, on the recommendation of the Disciplinary Committee, reduce this period in any particular case where it considers that it would be just and equitable to do so.
- (e) The Board shall report any cancellation of membership to members and may report such cancellation to whomsoever else it considers appropriate, in whatever manner it considers appropriate.

### **Code of Professional Conduct**

In addition to the Association's by-laws, it may be expected that the Association will also set a code of professional conduct dealing with aspects such as:



- (a) Objectives
- (b) Integrity and Objectivity
- (c) Conflicts of Interest
- (d) Professional Competence
- (e) Confidentiality
- (f) Fees for Professional Services
- (g) Clients' Monies
- (h) Recruiting

## **Funding**

As a major stakeholder in the Association, SARS is prepared to contribute to its initial start-up and running expenses. SARS would, however, expect the Association to be self-financing from its first full year of operations.

## **6. CONCLUSION**

The above model is intended to provide a starting point for debate by stakeholders. Alternative models, comments, and/or suggestions are welcome. Comments are specifically invited in respect of:

- (a) The definition of "tax-related services" to be regulated;
- (b) The need for more than one category of tax practitioner;
- (c) Academic requirements;
- (d) Experience requirements;
- (e) Punishable offences; and
- (f) Transitional arrangements.

The alternative models, comments, and suggestions will be considered and meetings will be held with professional associations and focus groups in order to debate them. If a variant of the above model emerges as the most appropriate model for South Africa, it will then be necessary to convene a working group to establish the Association of Tax Practitioners and a legislative amendment along the lines discussed above will be proposed.

DISCUSSION PAPER  
REGULATING TAX PRACTITIONERS

Alternative models, comments, and/or suggestions should be directed to one of the following addresses by no later than 28 February 2003.

**Mail:** Regulating Tax Practitioners, South African Revenue Service  
Private Bag X923, Pretoria 0001

**e-Mail:** [rtp@sars.gov.za](mailto:rtp@sars.gov.za)    **Fax:** (012) 422-4443

SARS, Private Bag X923, Pretoria 0001  
Lehae La Sars, 299 Bronkhorst Street  
Nieuw Mucklenuk, Pretoria 0181  
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