Mandatory transfer pricing documentation

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On 15 December 2015, SARS issued a draft Public Notice that sets out the additional record-keeping requirements for transfer pricing transactions.

It proposes extensive and comprehensive documentation requirements that must now be kept by taxpayers with a consolidated South African turnover of R1 billion or more.

Although this provides South African taxpayers with clarity on the information that must be retained for transfer pricing purposes, these requirements are fairly onerous and will increase the compliance burden of these taxpayers, resulting in additional costs.

The notice introduces the new term of “potentially affected transactions” which refers to all cross border transactions with the connected persons as listed in section 31, regardless of whether the terms and conditions of such transaction are different from the terms and conditions of an arm’s length transaction. In other words, where the focus on preparing a transfer pricing policy is only on those transactions that are not at arm’s length, the transfer pricing documentation must now deal with all such connected party cross-border transactions.

Despite the need for clarity from SARS on the extent of the transfer pricing documentation that must be retained by taxpayers in South Africa, these proposed record keeping requirements for multinationals will require detailed information which may not be relevant for tax purposes.

Some of the more onerous (and interesting) information to be retained include:

- A business operation summary which includes, *inter alia*, the key value drivers supported by independent industry research findings or reports. This can be problematic where industry research findings or reports may not exist for certain African countries.
- For a non-resident tested party, all contracts and invoices with customers and suppliers as well as segmented financial information per potential affected transaction.
- For tested parties, a detailed allocation of revenues, costs, expenses and profits between its connected person transactions and independent person transactions.
- Detailed information for affected transactions that relate to financial assistance.
- A summary of financial forecasts that are contemporaneous with the financial assistance transactions in question, but only as far as is meaningful in relation to the period of the funding transactions, indicating the expected levels of interest cover, gearing or other relevant measures over the forecast period.
- Any other information, data or document which may be relevant in the determination of an arm’s length return under section 31(2), including data relating to a connected person.

Taxpayers with a South African turnover which does not exceed the R1 billion threshold **must** also retain records to support any cross-border related-party transaction. In the absence of any indication of what these “records” should include, it seems that these taxpayers should ensure that they have a transfer pricing policy that meets the requirement as set out by the OECD.

It is interesting that the Draft Notice makes no reference to the Master File and Local File transfer pricing documentation approach as recommended by the OECD under the BEPS Action 13.

Although we appreciate SARS’ need for information which will allow it to properly assess the transfer pricing risks of taxpayers, SARS has not aligned itself with the recommendations of the OECD under Action 13.