# When must a reportable arrangement be disclosed to SARS?

Under the Tax Administration Act, No 28 of 2011 (TAA) persons who enter into certain types of transactions must report the details of those transactions to SARS. These types of transactions are called "reportable arrangements".

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The list of transactions that must be reported are set out in s35(1) of the TAA, and in s35(2) of the TAA as read with a SARS notice issued pursuant to that provision.

The term "reportable arrangement" is defined in s34 of the TAA as "an 'arrangement' referred to in section 35(1) or 35(2) that is not an excluded 'arrangement' referred to in section 36".

The term "arrangement" is defined in s34 of the TAA as "any transaction, operation, scheme, agreement or understanding (whether enforceable or not)".

The term “participant” is defined in s34 of the TAA, simply put, as a person who promotes the arrangement, a person who may obtain a tax benefit by virtue of the arrangement, or a party to an arrangement as listed in a public notice under s35(2) of the TAA.

Section 38 of the TAA sets out the information which a taxpayer must submit to SARS when reporting an arrangement.

Section 37(1) of the TAA is the important provision for purposes of this contribution. It reads as follows:

The information referred to in section 38 in respect of a ‘reportable arrangement’ must be disclosed by a person who:

(a) is a ‘participant’ in an ‘arrangement’ on the date on which it qualifies as a ‘reportable arrangement’, within 45 business days after that date; or

(b) becomes a ‘participant’ in an ‘arrangement’ after the date on which it qualifies as a ‘reportable arrangement’, within 45 business days after becoming a ‘participant’.

Section 37(5) of the TAA states that SARS may grant an extension for disclosure for a further 45 business days, if reasonable

grounds exist
for the extension.

To determine by when information must be disclosed one must first
establish at what time an arrangement can be said to “qualify as a
reportable arrangement”.

For example, if an agreement which could give rise to a reporting
requirement in principle is subject to a suspensive condition, will the
agreement “qualify as a reportable arrangement” at the time the
agreement is concluded or at the time the suspensive condition is
fulfilled?

Unfortunately, the TAA is not clear at all on when the clock for the 45-day period starts ticking.

Initially, before its amendment with effect from 20 January 2015,
s37(4) of the TAA required participants to disclose the arrangement
within 45 days of the date that any amount was first received by or
accrued to a participant under the arrangement, or the date that an
amount was paid or incurred by a participant under the arrangement. By
implication, in the case of an agreement subject to a

suspensive
condition, in most cases, that date would at the earliest have been the
date when the condition was fulfilled.

On the other hand, the term “arrangement” does not require an agreement to be “enforceable” to fall within the definition. However, in
my view, the word “enforceable” should be understood to mean legally
binding between the parties, that is, an agreement which, for example,
is not rendered void by statute.

The prescribed SARS form for disclosing reportable arrangements
(RA01) does require participants in Part 3 headed “Information regarding
the reportable arrangement” only to disclose the “[d]ate [the] reportable arrangement was entered into”.

In my view, however, one should adopt a common sense approach. The
effect of a suspensive condition is to suspend the full operation of
obligations and renders the obligations dependent on an uncertain future
event. An agreement which is subject to a suspensive condition is valid
from the moment of its conclusion. However, non-fulfilment of a
suspensive condition renders the contract void retrospectively. (See *The Law of South Africa* Volume 9 Third Edition at paragraph 362; and Bradfield, GB *The Law of*

*Contract in South Africa* Seventh Edition at page 171.)

For example, one type of arrangement that is a reportable arrangement is one that does not "result" in a reasonable expectation of "pre-tax profit" (s35(1)(d) of the TAA). Clearly, an agreement that is subject to a suspensive condition will only actually "result" in an outcome if the condition is fulfilled.

If a participant is required to report a conditional agreement within 45 days of the date of conclusion of the agreement, it would mean that a participant would be required to report an arrangement which may never take effect. It is unlikely that it could have been the intention that agreements that are void due to non-fulfilment of conditions should be reported.

It would be useful if clarity was provided through a change to the law or a guidance note from SARS, particularly in light of the stiff penalties that are imposed for late disclosure in terms of s212 of the TAA.

In the meantime, taxpayers should perhaps err on the side of

caution
and ensure that reportable arrangements are disclosed within 45 days of
the conclusion of the relevant agreements, despite the fact that the
agreements may be conditional.download PDF