

# **A CRITICAL ANALYSIS OF THE CURRENT SARS MODEL FOR THE DISCLOSURE OF REPORTABLE ARRANGEMENTS AND A PROPOSED ALTERNATIVE**

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May 2012

## **Abstract**

The reportable arrangements (RA) provisions are contained in sections 80M to 80T of the Income Tax Act. SARS issued a revised Draft Guide on 31 March 2010, which contains a model for the application of these provisions. However, due to numerous discrepancies and ambiguities contained in the Act and the guide, the interpretation of these provisions could be subjective and difficult to apply in practice. Failure to disclose a RA may result in a R1 million penalty. It is the purpose of this paper to develop an alternative, workable model to serve as a usable guide for taxpayers. This paper comprises a literature review and a study of empirical evidence obtained through a survey conducted among tax partners at a sample of 40 leading audit and legal firms. The majority of respondents considered the alternative model to be more accurate, user-friendly and helpful than SARS' model.

## **Keywords**

Arrangement, Reportable, Tax benefit, SARS, Penalty, SAICA, Tax Administration Bill

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## **1. BACKGROUND AND FORMULATION OF THE STUDY**

### **1.1 Background**

A reportable arrangement (RA) is defined in section 80T of the Income Tax Act No. 58 of 1962, as amended, (the Act) as any arrangement contemplated in section 80M. Such an arrangement must be reported to the Commissioner of the South African Revenue Service (SARS) within 60 days in terms of the disclosure obligation of section 80O. Failure to disclose such arrangements may result in a R1 million penalty in terms of section 80S.

The Explanatory Memorandum on the Revenue Laws Amendment Bill of 2003 explains that a reporting system was necessary to uncover innovative corporate tax products that effectively cost the tax system hundreds of millions of rand annually (SARS, 2003). This reporting system (in the form of the first RA provisions) was designed to counter tax evasion and was introduced to the Act by section 76A which came into effect on 1 March 2005.

Section 76A was repealed on 1 April 2008 and replaced with a new Part IIB, inserted into the Act by section 6(1) of the Revenue Laws Second Amendment Act No. 21 of 2006. Part IIB contains sections 80M to 80T and applies to any arrangement entered into with effect from 1 April 2008. Sections 80M to 80T are hereafter collectively referred to as the 'RA provisions'.

On 31 March 2010 SARS issued a revised Draft Guide to Reportable Arrangements for public comment (SARS, 2010). The Draft Guide, which seeks to address the new RA provisions and which contains a flowchart (or model) for the application of the RA provisions, has not been issued in its final format and no response document to public commentary has been released by SARS yet. In e-mail and telephone correspondence with SARS's Legal & Policy Division, SARS could not confirm if and when the new guide would be released, nor if and when they would publish any response document. Therefore, more than 18 months after the release of the Draft Guide, there is still no finalised, updated guide available to address the new RA provisions.

The new Draft Guide is certainly a step in the right direction by SARS. However, due to numerous discrepancies and ambiguities contained in the Act and the guide itself, the interpretation of these provisions could be subjective and difficult to apply in practice. This is evidenced by the number of sets of comments and recommendations that the South African Institute of Chartered Accountants (SAICA) has made to SARS (SAICA, 2004; 2007a; 2007b; 2008 & 2010a). Despite SARS' well-meaning intention for the flowchart to simplify decision-making (SARS, 2010:32), it is submitted that, due to the ambiguities contained in the wording of the Act as well as numerous anomalies in the Draft Guide model, this model is flawed and not useful for taxpayers.

### **1.2 Objective of the study**

It is, therefore, the purpose of this paper to develop an alternative, workable model to serve as a usable guide for South African taxpayers in the identification and application of the RA provisions. The Draft Guide model will be used as a starting-point and will be critically examined to identify any errors or anomalies.

### 1.3 Research method

Both a literature study and an empirical study were performed. The paper is structured as follows:

- The paper commences with an analysis of the model contained in the Draft Guide. This consists of a literature review of South African statutory law, published articles and textbooks.
- The paper subsequently proposes an alternative model to determine when an arrangement should be disclosed.
- Lastly, the accuracy, completeness and usability of the alternative model are tested in a survey conducted among tax partners at a sample of leading audit and legal firms.

## 2. THE DRAFT GUIDE MODEL

### 2.1 Introduction

In the original *Reportable Arrangements Guide* (SARS, 2005), a decision tree (or flowchart) is provided to assist the taxpayer in determining whether or not an arrangement is reportable. However, this flowchart is outdated as it still refers to the repealed section 76A requirements and does not take into account the new sections 80M to 80T of the Act. In an attempt to provide greater clarity on the majority of the issues that are likely to arise in practice due to the 'new' reportable arrangements provisions, SARS (2010:31) included an updated flowchart in its Draft Guide to enable taxpayers to determine when an arrangement should be disclosed to the Commissioner.

De Koker (2010:16) states that the interpretation by SARS of any provisions of the Act will not influence the courts to place a construction upon that provision that the language of the section will not allow. The court noted, however, in *ITC 1572 (56 SATC 175)* [at page 186] that:

Departmental practice is not necessarily, of course, an indication of what the law means. However, it seems to me that the departmental practice is a very sensible approach to what should be done in this type of case. Plainly the procedure and the practice laid down by the Commissioner in that regard, is, if nothing else, commercial wisdom and good sense.

In light of the above, even though SARS has not released an Interpretation Note or even a finalised, updated guide that refers to the amended RA provisions, the Draft Guide might give an indication of determining when an arrangement should be disclosed to SARS. Unfortunately, due to the lack of any response document and SARS' inability to disclose any particulars about comments received (and the parties who commented) on the Draft Guide, only the comments made by SAICA were obtained. An extensive Internet search was conducted, but SAICA was the only roleplayer to publish submissions to SARS on its website. At this stage, no other commentary is publicly available. As such, this paper will include SARS' interpretation of the relevant terminology, including the practice prescribed by the Draft Guide.

It is pertinent at this stage to refer briefly to the proposed Tax Administration Bill (TAB), which was introduced in Parliament on 23 June 2011. According to the Draft Explanatory Memorandum on the Draft Tax Administration Bill (SARS, 2009:1), the drafting of the TAB was announced in the

2005 Budget Review as a project to incorporate into one piece of legislation certain generic administrative provisions, which are currently duplicated in the different tax Acts.

In terms of the proposed TAB, the RA provisions will be removed from the Act and will henceforth be included as sections 34 to 39 in Part B of Chapter 4 'Returns and Records' of the TAB. The penalty provision of section 80S of the Act will be included as section 212 in Part B 'Fixed Amount Penalties' of Chapter 15 'Administrative Non-compliance Penalties' of the TAB. Except for the penalty provision and the definition of 'arrangement', the remainder of the RA provisions are transferred verbatim from the Act to the TAB. Due to the fact that, at the time this research was conducted, the TAB was not yet enacted, only sections 80M to 80T of the Act are referred to throughout this paper. Accordingly, the survey which was conducted among tax partners at a sample of audit and legal firms also referred to sections 80M to 80T.

## 2.2 Analysing the Draft Guide model

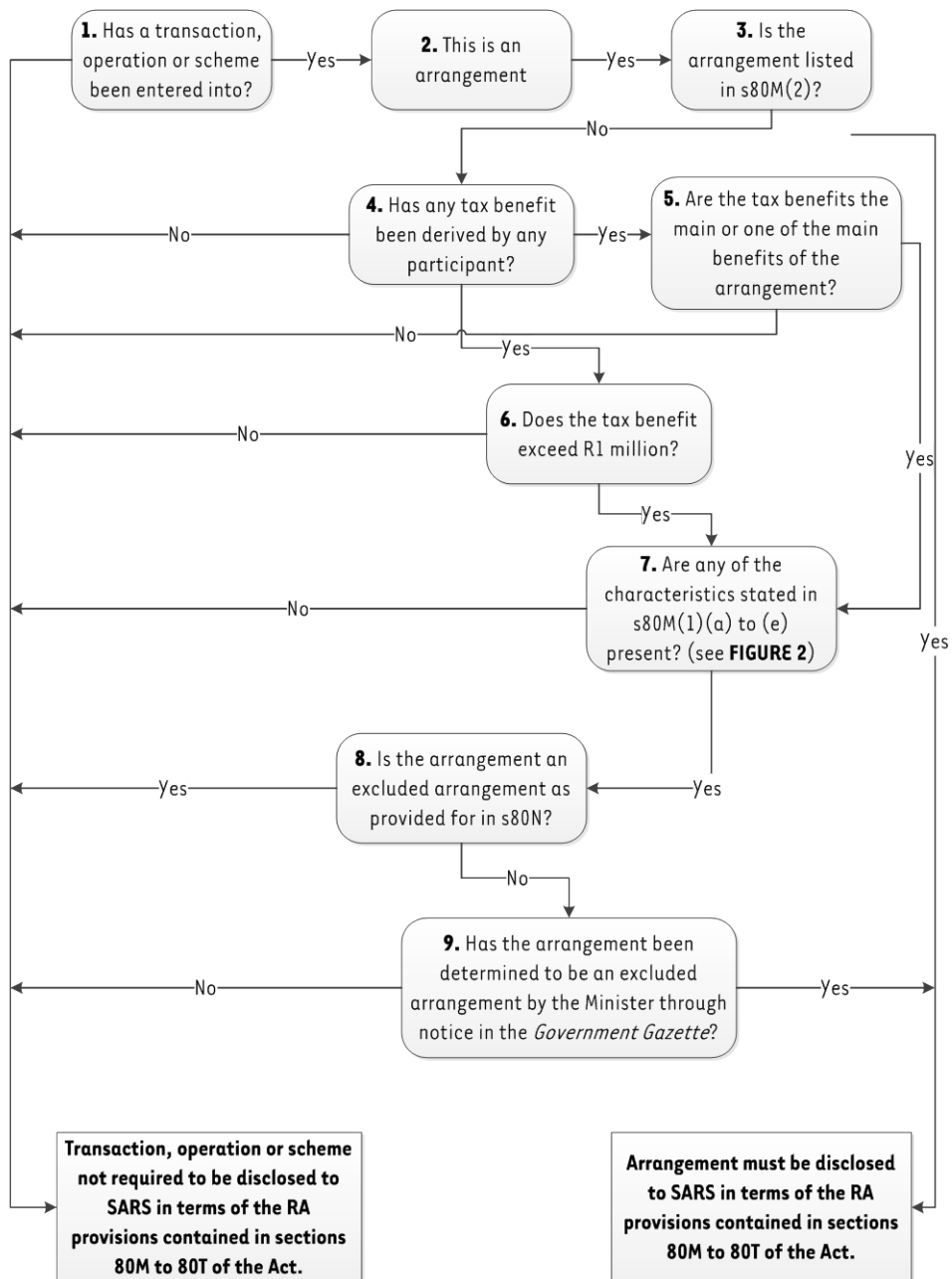
The Draft Guide model (SARS, 2010:31) consists of nine text boxes, which are to be addressed in a specific order. It is submitted that the model is not user-friendly and is not arranged in the optimal order. Tax practitioners following this model may spend precious time answering certain questions that were unnecessary to address in the first place. As a result, taxpayers may incur unnecessary charges when attempting to comply with the RA provisions. **FIGURE 1** is an exact copy of the Draft Guide model and all the wording was copied verbatim. For the sake of clarity, numbers were inserted in the text boxes, but the Draft Guide model is unaltered in all other respects.

### 2.2.1 Text box 1 and 2: 'Has a transaction, operation or scheme been entered into?'

An arrangement is defined in section 80T so as to include any transaction, operation or scheme. Question one is not problematic as the term is defined and adequately addressed in the Draft Guide. This is also the correct starting point for the decision tree, as there would be no potential RA if no arrangement was entered into. If the answer to this question is 'yes', the model states in the second text box 'This is an arrangement'. Text box 2 makes a statement and does not pose a question. Yet, the arrow flowing from text box 2 indicates 'yes', despite the fact that no question was posed. It is proposed that a better phrasing of text box 1 would be: 'Has an arrangement been entered into?' The second text box should then be deleted.

### 2.2.2 Text box 3: 'Is the arrangement listed in s80M(2)?'

The model indicates that if the arrangement is listed in section 80M(2), the arrangement should be disclosed. It is submitted that this depiction is incorrect. Section 80N(4) – by way of the *Government Gazette* (No. 30941 of 1 April 2008, Volume 514) – excludes any arrangement where the tax benefit is not the main or one of the main benefits or where the tax benefit does not exceed R1 million. Thus, irrespective of which category an arrangement falls into, namely sections 80M(1) or (2), the section 80N(4) exclusions prevail.



**FIGURE 1: The Draft Guide Model (SARS, 2010:31)**

**Source:** SARS Draft Guide to Reportable Arrangements (SARS, 2010:31)

*\*Note, that for the sake of clarity, the researcher has inserted numbers in the text boxes. The model is unaltered in all other respects. All the wording was copied verbatim.*

However, the Draft Guide model does not allow for these exclusion provisions to apply to a section 80M(2) RA. SAICA (2010a) is also of the view that the Act and the Draft Guide are potentially inconsistent and that this discrepancy should be addressed in greater detail. It is proposed that this question be moved and addressed after text box 6 (refer to paragraph 2.2.3 below), i.e. after it has been determined whether or not a tax benefit was obtained and whether the section 80N(4) exclusions were applicable.

### **2.2.3 Text box 4: ‘Has any tax benefit been derived by any participant?’**

If the answer to question three above is negative, question four addresses whether or not a tax benefit (as defined) was derived. It is submitted that the subsequent order of the questions in text boxes 4, 5 and 6 is incorrect. The reasons for this assertion are set out in paragraph 2.2.4.

### **2.2.4 Text box 5: ‘Are the tax benefits the main or one of the main benefits of the arrangement?’ and Text box 6: ‘Does the tax benefit exceed R1 million?’**

Text boxes 5 and 6 are related to text box 4 and refer to the section 80N(4) exclusions already mentioned. If no tax benefit was derived, then the arrangement is not reportable – in this case the model at text box 4 is correct. However, if a tax benefit was derived, the arrows flowing from text box 4 to text boxes 5 and 6 both state ‘yes’. It is unclear which question should be addressed first. Despite the fact that text boxes 5 and 6 must both be addressed, the current order is unclear and potentially misleading.

If the tax benefit is not the main or one of the main benefits (at text box 5), the model correctly indicates that the arrangement is not reportable. However, if the answer is ‘yes’, the arrow flows directly from text box 5 to 7 and does not allow for the R1 million exclusion in text box 6 to apply. It is submitted that this treatment is incorrect as the notice in the *Government Gazette* allows for two exceptions: either the tax benefit is not the main benefit or the tax benefit is below R1 million.

It is proposed that text boxes 5 and 6 be combined in one question that is addressed after text box 4. Thus, if either of the Gazetted exclusions is applicable, the arrangement is not reportable. If neither of the exclusions applies, text box 7 should then be addressed. Furthermore, text box 5 refers to ‘tax benefits’. Although probably just a typing error, the plural use of the word ‘benefits’ is incorrect, due to the fact that the *Government Gazette* uses the singular word ‘benefit’ and also because ‘benefits’ (plural) cannot be the ‘main benefit’ (singular) of the arrangement.

### **2.2.5 Text box 7: ‘Are any of the characteristics stated in s80M(1)(a) to (e) present? (see FIGURE 2)’**

The Draft Guide contains two flowcharts. The second flowchart (which is referred to in text box 7) and which appears in the Draft Guide (SARS, 2010:32) seems to be aimed at further elucidating the first flowchart. However, and this view is supported by SAICA (2010a), these two models are substantively identical. It is proposed that the second model be deleted as it does not provide any additional guidance to the section 80M(1) RA.

If any one of the five scenarios in section 80M(1) is applicable, the arrangement is potentially reportable and the model then correctly flows to text box 8. If none of the scenarios apply, the model correctly indicates that the arrangement is not reportable.

### **2.2.6 Text box 8: ‘Is the arrangement an excluded arrangement as provided for in s80N?’**

Section 80N(2) contains ‘stand-alone’ requirements that must first be met in order for an arrangement to be excluded. Furthermore, section 80N(3) negates the exclusions if the main (or one of the main) benefits was to obtain or enhance a tax benefit.

It is submitted that the wording in text box 8 is incomplete. Text box 8 correctly indicates that if an arrangement is excluded, it is not reportable. However, the question in text box 8 refers to section 80N as a whole, but text box 9 again refers to the Gazetted exclusions of section 80N(4). The model thus duplicates the question in text box 8 by once again referring to section 80N in text box 9.

It is proposed that the wording of text box 8 should be more specific and refer to sections 80N(1), (2) and (3) and not to section 80N as a whole. The final text box then correctly refers to the section 80N(4) exclusions.

### **2.2.7 Text box 9: ‘Has the arrangement been determined to be an excluded arrangement by the Minister through notice in the Government Gazette?’**

As discussed in paragraph 2.2.6 above, text boxes 8 and 9 should refer to the particular subsections of section 80N. It is proposed that the reference to section 80N(4) be inserted in this text box 9. It is submitted that there are two errors pertaining to the final question in text box 9. These are:

- (a) The section 80N(4) exclusions in text box 9 are addressed earlier in the model by text boxes 5 and 6. The model thus repeats a question that has already been addressed.
- (b) The ‘yes’ and ‘no’ answers to this last question have been transposed. The model incorrectly indicates that if the arrangement was excluded by the Minister, it must be disclosed as a RA.

It is evident from the above analysis that the Draft Guide model contains numerous anomalies which makes it inappropriate for use by taxpayers. An alternative model is presented in the next section.

## **3. THE PROPOSED ALTERNATIVE MODEL**

The model developed in this study is adapted from the Draft Guide model. **FIGURE 2** contains the alternative model and poses seven questions to be addressed in that particular order to determine whether or not an arrangement is reportable. The model developed in this study is similar to the Draft Guide model, but the questions are presented in a revised order with the primary focus on the section 80N exclusions.

It is submitted that the revised order (whereby the taxpayer first seeks to apply the exclusions) will result in less time wasted on addressing unnecessary questions where it is clear from the outset that the arrangement is non-reportable. The specific scenarios of section 80M(1) are addressed in the last question, as these are the most onerous, time-consuming (and, therefore, most expensive) aspects in the model to address.

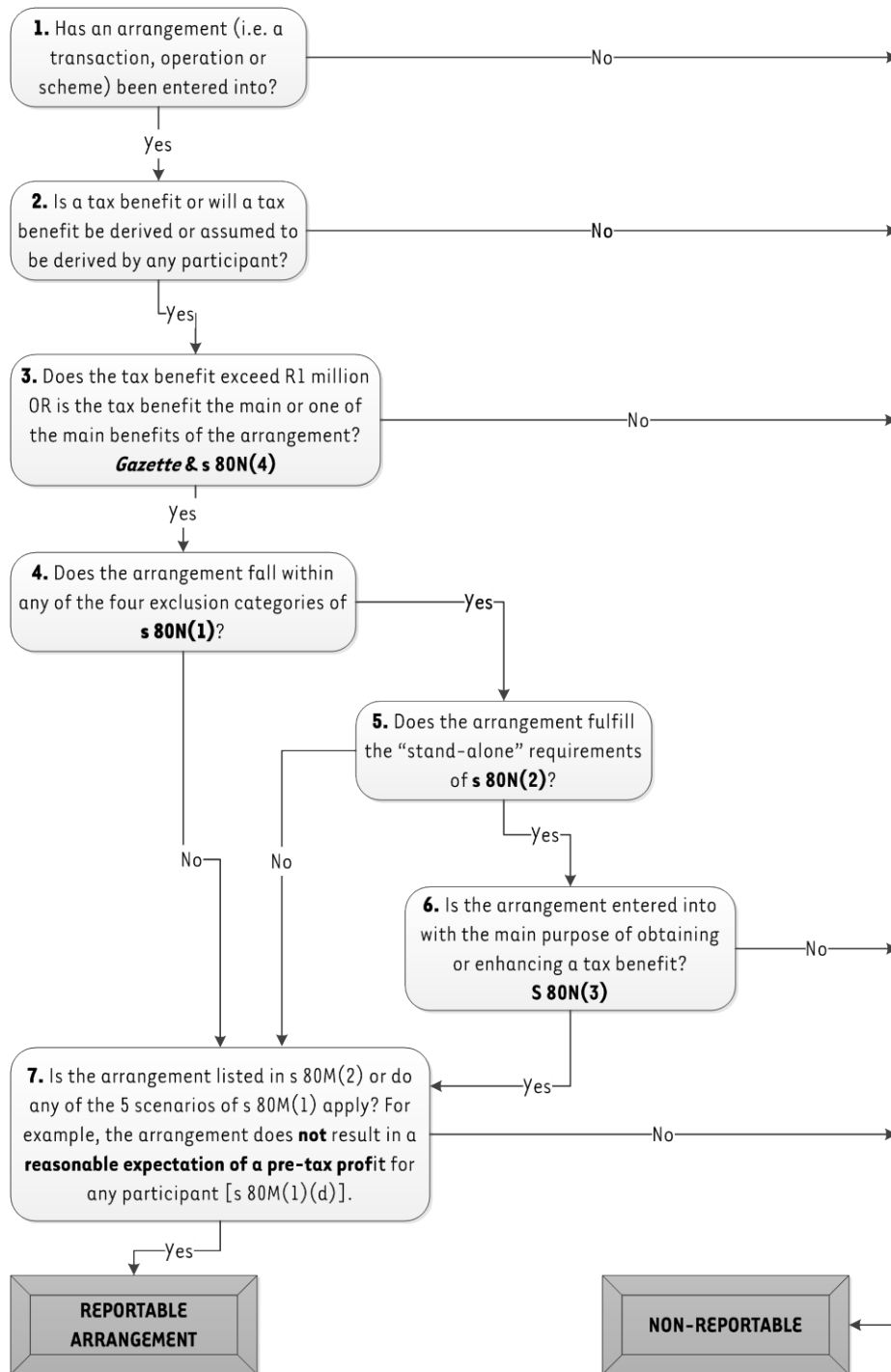


FIGURE 2: The alternative model

Source: Authors



It may be evident at an earlier stage of the model that the participant in the arrangement qualifies for exclusion. In such a case, by leaving this question to last, there would no need to determine whether or not any of the scenarios of section 80M(1) is applicable. The taxpayer could, therefore, avoid spending valuable time and money deciding whether the arrangement is reportable.

### **3.1 Question 1: Has an arrangement been entered into?**

An arrangement is defined in section 80T so as to include any transaction, operation or scheme. If an arrangement was entered into, the next step is to determine whether or not a tax benefit was obtained. Obviously, if no arrangement was entered into, the arrangement is automatically non-reportable.

### **3.2 Question 2: Is a tax benefit or will a tax benefit be derived or assumed to be derived by any participant?**

The section 80T definition of a 'tax benefit' includes any avoidance, postponement or reduction of any liability for tax. If no tax benefit was obtained, the arrangement is already non-reportable at this stage. In the Draft Guide model, this question was only posed after it was determined whether or not the arrangement was listed in section 80M(2). By rearranging the questions in the proposed model, any arrangement may be excluded from being reportable if it complies with the exclusion provisions found in the following question.

### **3.3 Question 3: Does the tax benefit exceed R1 million or is the tax benefit the main or one of the main benefits of the arrangement?**

The third question is posed earlier than in the case of the Draft Guide model. It is proposed that it is less time-consuming and thus more cost-effective to apply the exclusions at this point than later on.

Section 80N(4) (by way of the *Government Gazette*) excludes any arrangement where the tax benefit is not the main or one of the main benefits or where the tax benefit does not exceed R1 million. In the Draft Guide model the two exclusions are listed separately. It was proposed in paragraph 2.2.4 that the two questions be combined as the section 80N(4) exclusion contains an 'either...or' requirement.

If the tax benefit does not exceed R1 million or the tax benefit is not the main or one of the main benefits of the arrangement, then the arrangement is non-reportable and there is no need to work through the rest of the model. If neither of the two section 80N(4) exclusions are applicable, question four must be addressed.

### **3.4 Question 4: Does the arrangement fall within any of the four exclusion categories of section 80N(1)?**

Question four refers to the 'plain-vanilla' transactions listed in section 80N(1) and is not to be confused with the Gazetted exclusions of section 80N(4) contained in question three. If none of the section 80N(1) exclusions apply, the transaction could be regarded as reportable (if the remaining provisions of sections 80M(1) or (2) are complied with). If, however, any of the

section 80N(1) exclusions are applicable, the arrangement must still meet the requirements of sections 80N(2) and (3). These requirements are addressed by questions five and six respectively.

### **3.5 Question 5: Does the arrangement fulfil the stand-alone requirements of section 80N(2)?**

Section 80N(2) contains 'stand-alone' requirements that must first be met in order for an arrangement to be excluded. Furthermore, section 80N(3) negates the exclusions if the main (or one of the main) benefits was to obtain or enhance a tax benefit. If the arrangement is directly or indirectly dependent upon any other arrangement, the stand-alone requirement is not met and the arrangement is potentially reportable. If the arrangement complies with section 80N(2), question six must then be addressed.

### **3.6 Question 6: Is the arrangement entered into with the main purpose of obtaining or enhancing a tax benefit?**

Section 80N(3) determines that the excluded list of section 80N(1) does not apply to any arrangement that is entered into with the main purpose of obtaining or enhancing a tax benefit. If the taxpayer can prove that the arrangement was not entered into with the main purpose of obtaining or enhancing a tax benefit, then that arrangement is non-reportable. Failing this, the arrangement is considered to be a RA if question seven is answered in the positive.

### **3.7 Question 7: Is the arrangement listed in section 80M(2) or do any of the five scenarios of section 80M(1) apply?**

Question 7 determines, for example, that an arrangement is reportable in terms of section 80M(1)(a) if the participant has no reasonable expectation of a pre-tax profit resulting from that arrangement. If the participant does have a reasonable expectation, the arrangement is non-reportable. If, however, the 'reasonable expectation of a pre-tax profit' requirement is not met, the answer to question 7 is 'yes'. The arrangement is then reportable and the disclosure obligation of section 800 must be complied with. The same holds true for any of the other four scenarios in section 80M(1) as well as the arrangements listed in section 80M(2).

Having developed the workable model, it was necessary to test its accuracy, completeness and ease-of-use. This was done by means of a survey among tax partners at a sample of leading audit and legal firms.

## **4. RESULTS OF THE EMPIRICAL STUDY**

### **4.1 Background to the sample selection**

The unit of analysis and the population consist of highly qualified professionals who are experts in the field of tax. As was the case with Venter and Stiglingh's (2006a; 2006b) study, the purpose of the survey conducted was to test the conclusions reached in the literature study against the opinions of tax specialists in South Africa. A similar methodology is adopted in this study, but with the following differences in the approach:

*(a) Accounting lecturers and partners specialising in technical accounting matters*

In Venter and Stiglingh's survey (2006a:105; 2006b:113), the accounting lecturers and the partners specialising in technical accounting matters were chosen as they were actively involved with accounting standards on a day-to-day basis and were expected to have in-depth knowledge of the accounting requirements of IAS 12 Income Taxes (which interacts with the Secondary Tax on Companies (STC) requirements of the Act). However, in this study, the focus is entirely on a taxation topic, viz. the RA provisions. An in-depth accounting knowledge is, therefore, not necessary to understand this tax topic.

The RA provisions are presently excluded from SAICA's list of examinable pronouncements for prospective chartered accountants (SAICA, 2010b; 2011). It was, therefore, considered most likely that these provisions would not be a priority for accounting academics. Accordingly, university lecturers and accounting partners were not included in the sample for this study, as their inclusion would probably not have resulted in an increase in the quality of answers received to the questionnaire.

*(b) Tax partners at leading audit and legal firms*

As was the case in Venter and Stiglingh's study, tax partners are included in this study, as they are indeed expected to be actively involved with taxation legislation and should have in-depth knowledge of compliance with the RA provisions. Tax partners at audit, as well as, legal firms were included in the survey.

However, whereas Venter and Stiglingh's sample included seven tax partners, the sample in this study includes 40 tax partners from audit and legal firms. The basis for the selection of the sample is explained below.

## **4.2 The sample**

### **4.2.1 Non-probability sampling**

This study made use of non-probability sampling, and more specifically, judgement sampling. Due to the fact that probability sampling is based on the concept of random selection, proponents of probability sampling could argue that non-probability sampling is arbitrary and subjective, as, with the latter, one chooses the sample with a certain pattern in mind. Although a random sample will give a true cross section of the population, this is not the objective of the present research. The objective is to test the accuracy, completeness and usability of the proposed model.

Judgement sampling is one of the two types of purposive sampling (the other type being quota sampling). According to Cooper and Schindler (2011:385), judgement sampling occurs when a researcher selects sample members to conform to some criterion.

It was noted that one of the ways to qualify for the non-disclosure of an arrangement is if the tax benefit does not exceed R1 million (section 80N(4)). It would be expected that larger companies would fall within the ambit of the RA provisions more often, as they are more likely to conclude transactions with tax benefits exceeding R1 million.

Therefore, it could be argued that the persons best able to address the statements in the questionnaire are those tax professionals who are actively involved in complex, technical tax matters and who are involved in providing tax advice for larger companies. Moreover, tax partners or directors are frequently individuals who have obtained advanced tertiary

qualifications and who have many years of practical experience in complicated tax issues. They are, therefore, best suited to provide commentary on the subjective interpretation of tax provisions.

Based on the above arguments, the criteria for the selection of the sample are:

- Tax partners or directors at
- Leading audit and legal firms.

As will be seen from the next paragraph, the sample selected includes all of the audit firms which audit companies listed on the Johannesburg Stock Exchange (JSE) as well as the ten largest audit firms globally. The sample also includes the ten largest South African legal firms. Non-probability sampling, specifically judgement sampling, is, therefore, considered to be both appropriate and adequate for this present study. This is also in line with the methodology followed by Venter and Stiglingh, wherein the eight largest audit firms were identified.

#### **4.2.2 Audit firms selected for the sample**

This study comprises a sample of 30 audit firms. These firms were selected on the following bases:

- A listing of the top ten audit firms in the world, based on the most recent available fee income figures (for 2009 and in US dollars), was obtained from World Accounting Intelligence (2011). All of the top ten global firms have offices in South Africa. The so-called 'Big Four' audit firms are naturally included in this list.
- A list of JSE accredited auditors was obtained from the JSE website (JSE, 2011a; 2011b). This study only includes South African audit firms registered in terms of the Independent Regulatory Board for Auditors (IRBA).
- The final sample of audit firms (after removing duplicate entries in the above selections) is, therefore, a combination of the global top-ten audit firms and the JSE list of accredited auditors.

#### **4.2.3 Legal firms selected for the sample**

This study also comprises a sample of 10 legal firms. These firms were selected on the following basis:

- A listing of the ten largest legal firms in South Africa, based on the most recent available number of attorneys in their employ (at the time when the survey was conducted), was obtained from Internet searches. Wikipedia (2011) combined the information of major South African legal firms by using data from their websites to compile a listing of the rankings.

### **4.3 Background to the questionnaire**

The tax partners of the audit and legal firms in South Africa were identified either from information contained on the websites of the firms or by means of a telephone call to the firms to obtain the names and e-mail addresses of the relevant parties. Where a firm did not have a specialist tax partner or department, the questionnaire was sent to the contact partner with a request to forward it to the most appropriate (senior) individual in the firm.

The partners were initially contacted by a telephone call to determine their willingness to participate in the survey; those that could not be reached telephonically, were contacted via e-mail. The questionnaires were distributed to the parties by e-mail. Respondents returned the completed questionnaires via e-mail or fax (directly to the researcher).

#### 4.3.1 Composition of the questionnaire

Another document, e-mailed in conjunction with the questionnaire, was included to present a general background on the topic. Due to the fact that the questionnaire included questions on SARS's Draft Guide model, an exact copy of the Draft Guide model was included in the background document, as well as the link to the original document on SARS's website.

The first part of the questionnaire (Part A) consisted of general questions about the profile of the respondent. The second part (Part B) contained 12 questions relating to the terminology in sections 80M to 80T (which is beyond the scope of this paper). The third part (Part C) consisted of 18 questions (of which 14 are addressed in this paper) which analysed the Draft Guide model and compared it with the workable model proposed in this study. The proposed model was referred to as the 'Alternative' model in the questionnaire.

#### 4.3.2 Profile of respondents

The profile of the respondents was as follows:

**TABLE 1: Profile of respondents**

	<i>Audit firms (n=12)</i>	<i>Legal firms (n=5)</i>	<i>Total (n=17)</i>
	%	%	%
Tax director	25	80	41
Tax partner	17	20	18
Tax manager	25	0	18
Other	33	0	23
Total	100	100	100

**Source:** Authors' calculations

- 59% of the respondents are partners or directors at their firms, while 18% are tax managers. Where the tax partner was unable (for example, due to time constraints) to complete the questionnaire, it was requested that the questionnaire be forwarded to an appropriate senior staff member. Senior staff members who did not hold office as tax partner, director or manager, but who had practical experience with the RA provisions, were grouped together in the category 'Other'; examples include the position of audit partner (where firms did not have a designated tax department), tax administrator and consulting counsel;
- 29% of the respondents have less than ten years' experience in South African tax legislation, 24% have between 10 and 15 years' experience and 47% have more than 15 years' experience; and

- 53% of the respondents considered their knowledge of the RA provisions to be 'good', 29% considered it to be 'fair', while 18% considered their knowledge to be 'poor'.

### 4.3.3 Response rate

In total, 40 questionnaires were distributed – 30 to audit firms and 10 to legal firms. The response rate in both categories is set out in **TABLE 2**.

**TABLE 2: Response rate**

	<i>Actual number of responses</i>	<i>Response rate %</i>
Audit firms	12	40
Legal firms	5	50
Total responses	17	43

**Source:** *Authors' calculations*

Questionnaires that were not completed by the deadline were followed up with additional e-mails and/or telephone calls. Although a higher response rate in empirical studies of this nature would be preferable, it was not the intention of this study to acquire results that give a true cross section of the population (refer to the earlier discussion of judgement sampling in paragraph 4.2.1). Instead, this study relies on the quality of feedback received from the respondents; the majority (71%) of respondents have at least 10 years' of experience in South African tax legislation, while 82% considered their knowledge of the RA provisions as good to fair (see 4.3.2 above). In light of the expertise of the respondents, it can, therefore, be assumed that their responses are of great value and add credibility to the results. The response rate of 43% is accordingly considered to be adequate.

## 4.4 Statistical summary of results

The tables below set out the results of the responses received to the questionnaire.

### Question 4.4.1

Text box 2 of the Draft Guide model makes a statement and does not pose a question. Yet, the arrow flowing from text box 2 indicates 'yes', despite the fact that no question was posed.

*A better phrasing of text box 1 would be: 'Has an arrangement been entered into?' and the second text box must then be deleted. Do you agree with this statement?*

**TABLE 3: Results of Question 4.4.1**

	<i>Audit firms</i> ( <i>n</i> =12)	<i>Legal firms</i> ( <i>n</i> =5)	<i>Total</i> ( <i>n</i> =17)
	%	%	%
Totally agree	33	40	35
Agree	50	60	53
Neutral	0	0	0
Disagree	17	0	12
Totally disagree	0	0	0
Question not answered by respondent	0	0	0
Total	100	100	100

**Source:** Authors' calculations

A significant majority of respondents (88%) agreed or totally agreed with the conclusions drawn from the literature study (see 2.2.1), namely that a better phrasing of text box 1 of the Draft Guide model would be: 'Has an arrangement been entered into?' and that the second text box had to be deleted.

#### Question 4.4.2

Text box 3 of the Draft Guide model indicates that if the arrangement is listed in section 80M(2), the arrangement should be disclosed. The section 80N(4) exclusions (by way of the *Government Gazette*) excludes any arrangement where the tax benefit is not the main or one of the main benefits or where the tax benefit does not exceed R1 million.

*Irrespective of which category an arrangement falls into, namely sections 80M(1) or (2), the section 80N(4) exclusions prevail and the depiction in text box 3 (the 'yes' arrow) is therefore incorrect. Do you agree with this statement?*

**TABLE 4: Results of question 4.4.2**

	<i>Audit firms</i> ( <i>n</i> =12)	<i>Legal firms</i> ( <i>n</i> =5)	<i>Total</i> ( <i>n</i> =17)
	%	%	%
Totally agree	58	60	59
Agree	17	40	23
Neutral	25	0	18
Disagree	0	0	0
Totally disagree	0	0	0
Question not answered by respondent	0	0	0
Total	100	100	100

**Source:** Authors' calculations

A high percentage of respondents (82%) agreed or totally agreed with the conclusions drawn from the literature study (see 2.2.2), namely that the 'yes' arrow of text box 3 of the Draft Guide model is incorrect, as the section 80N(4) exclusions prevail irrespective of which category an arrangement falls into.

#### Question 4.4.3

Text boxes 5 and 6 are related to text box 4 and refer to the section 80N(4) exclusions already mentioned. If no tax benefit was derived, then the arrangement is not reportable – in this case the model at text box 4 is correct. However, if a tax benefit was derived, the arrows flowing from text box 4 to text boxes 5 and 6 both state 'yes'.

*Despite the fact that text boxes 5 and 6 must both be addressed, it is unclear which question should be addressed first and the order of the questions is thus potentially misleading. Do you agree with this statement?*

A significant majority of respondents (82%) agreed or totally agreed with the conclusions drawn from the literature study (see 2.2.4), namely that the order of the questions in text boxes 5 and 6 of the Draft Guide model are potentially misleading, as it is unclear which question should be addressed first.

**TABLE 5: Results of question 4.4.3**

	Audit firms (n=12)	Legal firms (n=5)	Total (n=17)
	%	%	%
Totally agree	25	60	35
Agree	58	20	47
Neutral	17	0	12
Disagree	0	20	6
Totally disagree	0	0	0
Question not answered by respondent	0	0	0
Total	100	100	100

**Source:** Authors' calculations

#### Question 4.4.4

The Draft Guide model correctly indicates (at text box 5) that the arrangement is not reportable if the tax benefit is not the main or one of the main benefits. However, if the answer is 'yes', the arrow flows directly from text box 5 to 7 and does not allow for the R1 million exclusion in text box 6 to apply.

*This treatment is incorrect as the notice in the Government Gazette allows for two exceptions: either the tax benefit is not the main benefit or the tax benefit does not exceed R1 million. Do you agree with this statement?*



**TABLE 6: Results of question 4.4.4**

	<i>Audit firms (n=12)</i>	<i>Legal firms (n=5)</i>	<i>Total (n=17)</i>
	%	%	%
Totally agree	50	60	53
Agree	50	40	47
Neutral	0	0	0
Disagree	0	0	0
Totally disagree	0	0	0
Question not answered by respondent	0	0	0
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>

**Source:** Authors' calculations

All of the respondents (100%) agreed or totally agreed with the conclusions drawn from the literature study (see 2.2.4), namely that the R1 million exclusion in text box 6 of the Draft Guide model is incorrectly omitted if the answer to the question in text box 5 is 'yes' (as the arrow flows directly from text box 5 to text box 7).

The results of the questionnaire, therefore, appear to corroborate the proposal made in 2.2.4, i.e. that text boxes 5 and 6 should be combined in one question that is addressed after text box 4. Thus, if either of the Gazetted exclusions is applicable, the arrangement is not reportable. This proposal is utilised in Question 3 of the workable model.

#### Question 4.4.5

Text box 5 of the Draft Guide model refers to the 'tax benefits'. *Although probably just a typing error, the plural use of the word 'benefits' is incorrect, due to the fact that the Government Gazette uses the singular word 'benefit' and also because 'benefits' (plural) cannot be 'the main benefit' (singular) of the arrangement.* Do you agree with this statement?

**TABLE 7: Results of Question 4.4.5**

	<i>Audit firms (n=12) %</i>	<i>Legal firms (n=5) %</i>	<i>Total (n=17) %</i>
Totally agree	42	60	47
Agree	42	20	35
Neutral	16	20	18
Disagree	0	0	0
Totally disagree	0	0	0
Question not answered by respondent	0	0	0
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>

**Source:** Authors' calculations

A high percentage of respondents (82%) agreed or totally agreed with the conclusions drawn from the literature study (see 2.2.4), namely that the plural use of the word 'benefits' is incorrect, due to the fact that the *Government Gazette* uses the singular word 'benefit' and also because 'benefits' (plural) cannot be 'the main benefit' (singular) of the arrangement.

#### Question 4.4.6

Text box 8 of the Draft Guide model correctly indicates that if an arrangement is excluded, it is not reportable. However, the question in text box 8 refers to section 80N as a whole, but text box 9 again refers to the Gazetted exclusions of section 80N(4).

*The Draft Guide model duplicates the question in text box 8 by once again referring to section 80N in text box 9; the wording of text box 8 should, therefore, be more specific and refer to sections 80N(1), (2) and (3) and not to section 80N as a whole. Do you agree with this statement?*

**TABLE 8: Results of question 4.4.6**

	<i>Audit firms (n=12)</i>	<i>Legal firms (n=5)</i>	<i>Total (n=17)</i>
	%	%	%
Totally agree	33	60	41
Agree	59	20	47
Neutral	0	20	6
Disagree	8	0	6
Totally disagree	0	0	0
Question not answered by respondent	0	0	0
Total	100	100	100

**Source:** Authors' calculations

A significant majority of respondents (88%) agreed or totally agreed with the conclusions drawn from the literature study (see 2.2.6), namely that the wording of text box 8 in the Draft Guide model should be more specific and should refer to sections 80N(1), (2) and (3) individually and not to section 80N as a whole. The results of the questionnaire, therefore, appear to corroborate the use of the three separate text boxes in the workable model in section 3 of this paper, each one addressing a requirement of section 80N.

#### Question 4.4.7

*The 'yes' and 'no' answers to the last question (in text box 9) of the Draft Guide model have been transposed, as the model incorrectly indicates that if the arrangement was excluded by the Minister, it must be disclosed as a reportable arrangement.*

Do you agree with this statement?

**TABLE 9: Results of Question 4.4.7**

	<i>Audit firms (n=12)</i>	<i>Legal firms (n=5)</i>	<i>Total (n=17)</i>
	%	%	%
Totally agree	67	40	59
Agree	25	60	35
Neutral	0	0	0
Disagree	8	0	6
Totally disagree	0	0	0
Question not answered by respondent	0	0	0
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>

**Source:** *Authors' calculations*

An overwhelming majority of respondents (94%) agreed or totally agreed with the research findings of the literature study (see 2.2.7), namely that the 'yes' and 'no' answers to text box 9 of the Draft Guide model have been transposed, as the model incorrectly indicates that if the arrangement was excluded by the Minister, it must be disclosed as a RA.

Question 4.4.8

*The Draft Guide model contains numerous anomalies and as such is flawed and inappropriate for use by taxpayers.*

Do you agree with this statement?

**TABLE 10: Results of question 4.4.8**

	<i>Audit firms (n=12)</i>	<i>Legal firms (n=5)</i>	<i>Total (n=17)</i>
	%	%	%
Totally agree	42	60	47
Agree	42	40	41
Neutral	8	0	6
Disagree	8	0	6
Totally disagree	0	0	0
Question not answered by respondent	0	0	0
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>

**Source:** *Authors' calculations*

The vast majority of respondents (88%) agreed or totally agreed with the conclusions drawn from the literature study, namely that, due to numerous anomalies, the Draft Guide model is flawed and inappropriate for use by taxpayers.

Question 4.4.9:

The Alternative Model proposed in this questionnaire presents the questions in a revised order (as compared with the Draft Guide model) whereby the first questions to address relate to the section 80N exclusions.

*The revised order of the Alternative Model (whereby the taxpayer first seeks to apply the exclusions) will result in less time wasted on addressing unnecessary questions later in the model where it is clear from the outset that the arrangement is non-reportable.*

Do you agree with this statement?

**TABLE 11: Results of question 4.4.9**

	Audit firms (n=12)	Legal firms (n=5)	Total (n=17)
	%	%	%
Totally agree	50	60	53
Agree	42	40	41
Neutral	0	0	0
Disagree	8	0	6
Totally disagree	0	0	0
Question not answered by respondent	0	0	0
Total	100	100	100

**Source:** Authors' calculations

An overwhelming majority of respondents (94%) agreed or totally agreed with the submission made in the literature study, namely that the revised order of the workable model will result in less time wasted on addressing unnecessary questions later in the model where it is clear from the outset that the arrangement is non-reportable.

Question 4.4.10

Questions 4, 5 and 6 of the Alternative Model expound on the Draft Guide model's text box 8 where reference was only made to section 80N.

*Due to the relative complexity of the section 80N exclusions, the Alternative Model provides better guidance as it states each exclusion requirement as a separate question.*

**TABLE 12: Results of question 4.4.10**

	<i>Audit firms (n=12)</i>	<i>Legal firms (n=5)</i>	<i>Total (n=17)</i>
	%	%	%
Totally agree	33	60	41
Agree	67	40	59
Neutral	0	0	0
Disagree	0	0	0
Totally disagree	0	0	0
Question not answered by respondent	0	0	0
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>

**Source:** *Authors' calculations*

All of the respondents (100%) agreed or totally agreed with the submission made in the literature study, namely that, due to the relative complexity of the section 80N exclusions, by stating each exclusion requirement as a separate question, the workable model provides better guidance.

#### Question 4.4.11

Question 7 of the Alternative Model refers to any of the five scenarios of section 80M(1). One such scenario is the 'reasonable expectation of a pre-tax profit' requirement as contained in section 80M(1)(d).

*By leaving this question for last, the taxpayer might be able to determine earlier on in the model that the arrangement is not reportable and could, therefore, be prevented from spending valuable time and money on obtaining costly tax advice to determine whether there is a 'reasonable expectation of a pre-tax profit'.*

Do you agree with this statement?

**TABLE 13: Results of question 4.4.11**

	<i>Audit firms (n=12) %</i>	<i>Legal firms (n=5) %</i>	<i>Total (n=17) %</i>
Totally agree	17	0	12
Agree	42	60	47
Neutral	33	20	29
Disagree	8	20	12
Totally disagree	0	0	0
Question not answered by respondent	0	0	0
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>

**Source:** *Authors' calculations*

The majority of the respondents (59%) agreed or totally agreed with the submission made in the literature study, namely that by leaving the five scenarios of section 80M(1) (for example, the 'reasonable expectation of a pre-tax profit' requirement) for last in the workable model, the taxpayer might be able to determine earlier on in the model that the arrangement is not reportable. This, in turn, corroborates the submission that the Workable Model could prevent a taxpayer from spending valuable time and money on obtaining costly tax advice to determine whether an arrangement is reportable.

Question 4.4.12:

*Do you consider the Alternative Model to be more accurate than the Draft Guide model?*

**TABLE 14: Results of question 4.4.12**

	<i>Audit firms (n=12)</i>	<i>Legal firms (n=5)</i>	<i>Total (n=17)</i>
	%	%	%
Yes	92	100	94
No	0	0	0
Don't know	8	0	6
Question not answered by respondent	0	0	0
Total	100	100	100

**Source:** *Authors' calculations*

An overwhelming majority of respondents (94%) considered the Workable Model to be more accurate than the Draft Guide model, whereas 6% of the respondents did not know the answer to this question.

Question 4.4.13:

*Do you consider the Alternative Model to be more helpful than the Draft Guide model?*

**TABLE 15: Results of question 4.4.13**

	<i>Audit firms (n=12)</i>	<i>Legal firms (n=5)</i>	<i>Total (n=17)</i>
	%	%	%
Yes	92	80	88
No	0	0	0
Don't know	8	20	12
Question not answered by respondent	0	0	0
Total	100	100	100

**Source:** *Authors' calculations*

A significant majority of respondents (88%) considered the Workable Model to be more helpful than the Draft Guide model, whereas 12% of the respondents did not know the answer to this question.

Question 4.4.14

*Do you consider the Alternative Model to be more user-friendly than the Draft Guide model?*

**TABLE 16: Results of question 4.4.14**

	<i>Audit firms (n=12)</i>	<i>Legal firms (n=5)</i>	<i>Total (n=17)</i>
	%	%	%
Yes	92	100	94
No	0	0	0
Don't know	8	0	6
Question not answered by respondent	0	0	0
Total	100	100	100

*Source: Authors' calculations*

An overwhelming majority of respondents (94%) considered the Workable Model to be more user-friendly than the Draft Guide model, whereas 6% of the respondents did not know the answer to this question.

## 4.5 Findings of the empirical study

In all of the questions, the majority of respondents agreed with the conclusions drawn from the literature study. Notably, compared with SARS's Draft Guide model, an overwhelming majority of respondents (94%) considered the proposed model to be more accurate and user-friendly and a significant majority (88%) considered the proposed model to be more helpful. The results of the empirical study corroborate the submission that the Alternative Model is a workable model which can serve as a usable guide for South African taxpayers in the identification and application of the RA provisions.

## 5. CONCLUSION

The Organisation for Economic Cooperation and Development (OECD) warns that tax avoidance and tax evasion threaten government revenues throughout the world (OECD 2011:3). SARS will in all likelihood come under increasing pressure from South Africa's trade and investment partners to cultivate a cooperative tax environment. The RA provisions and other non-compliance measures will probably fall under SARS's spotlight to a greater extent in the future. Despite SARS's (2010:5) intention for the flowchart to simplify decision-making, it is questionable whether their Draft Guide and model have, in fact, provided greater certainty to participants and promoters in determining whether arrangements should be disclosed to the Commissioner of SARS.

Until such time as SARS adequately addresses the discrepancies in the Draft Guide and issues a properly revised guide, it is incumbent upon taxpayers to carefully consider whether their arrangements fall within the ambit of sections 80M to 80T. It is hoped that the results of this study will assist in affording taxpayers greater clarity on the identification and application of the RA provisions. Also, the Workable Model proposed in this study should be of value to taxpayers when considering the implications of the RA provisions.

### Acknowledgement

This paper is based on chapters of an unpublished dissertation for the M.Com (Taxation) degree at the College of Accounting at the University of Cape Town, titled "A critical analysis of the reportable arrangements provisions of the Income Tax Act, focusing on section 80M(1)(d)". Thanks is extended to Prof Martin Kidd, director of Stellenbosch University's Centre for Statistical Consultation, for his assistance in the statistical analysis of the survey conducted as part of this dissertation.

### LIST OF REFERENCES

- Cooper, D.R. & Schindler, P.S. (2011). *Business Research Methods*, 11<sup>th</sup> ed. New York: McGraw-Hill.
- De Koker, A.P. (2010). *Silke on South African Income Tax*. Durban: LexisNexis.
- ITC 1572 (56 SATC 175)
- Johannesburg Stock Exchange (JSE). (2011a). *JSE Limited Listing Requirements*, 2<sup>nd</sup> edition. Durban: LexisNexis.
- Johannesburg Stock Exchange (JSE). (2011b). *The JSE list of Accredited Auditors*. [Online] Available: <http://www.jse.co.za>. (Accessed 8 May 2011).
- Organisation for Economic Cooperation and Development (OECD). (2011). *The Global Forum on Transparency and Exchange of Information for Tax Purposes*. [Online] Available: <http://www.oecd.org/dataoecd/32/45/43757434.pdf>. (Accessed 1 May 2011).
- South Africa. (2006). *The Revenue Laws Second Amendment Act, Act 21 of 2006*. Pretoria: Government Printer.
- South Africa. (2008). *Government Gazette, No. 30941, Volume 514, 1 April 2008*. Pretoria: Government Printer.
- South Africa. (2010). *The Draft Tax Administration Bill, B11-2011*. Pretoria: Government Printer.
- South Africa. (2010). *The Income Tax Act, Act 58 of 1962*. Pretoria: Government Printer.
- South African Institute of Chartered Accountants (SAICA). (2004). *Call for Comment: Draft Reportable Arrangement Brochure*. [Online] Available: <https://www.saica.co.za/TechnicalInformation/Taxation/ContactwithStakeholders/SubmissionstoSARS/Archives/tabid/1121/language/en-ZA/Default.aspx> (Accessed 19 June 2009).
- South African Institute of Chartered Accountants (SAICA). (2007a). *Section 80M of the Income Tax Act No. 58 of 1962: Examples of Transactions to be Included in an "Excluded List of Transactions"*. [Online] Available: <https://www.saica.co.za/tabid/740/itemid/273/language/en-US/Submissions-to-SARS.aspx> (Accessed 18 June 2009).



- South African Institute of Chartered Accountants (SAICA). (2007b). *Call for Comment: Reportable Arrangements – Details of Routine Transactions*. [Online] Available: <https://www.saica.co.za/tabid/740/itemid/273/language/en-US/Submissions-to-SARS.aspx> (Accessed 18 June 2010).
- South African Institute of Chartered Accountants (SAICA). (2008). *Comments on the Definition of “Promoter” as Contained in Section 80T of the Income Tax Act, No 58 of 1962 and Other Issues*. [Online] Available: <https://www.saica.co.za/tabid/740/itemid/273/language/en-US/Submissions-to-SARS.aspx> (Accessed 18 June 2010).
- South African Institute of Chartered Accountants (SAICA). (2010a). *Call for Comment: Draft Guide to Reportable Arrangements*. [Online] Available: <https://www.saica.co.za/tabid/740/itemid/273/language/en-US/Submissions-to-SARS.aspx> (Accessed 27 May 2010).
- South African Institute of Chartered Accountants (SAICA). (2010b). *Examinable Taxation Pronouncements Qualifying Examination Part I January 2011*. [Online] Available: <https://www.saica.co.za/LearnersStudents/Examinations/Informationonwhatwillbeexamined/ExaminablePronouncements/tabid/488/language/en-ZA/Default.aspx> (Accessed 8 May 2011).
- South African Institute of Chartered Accountants (SAICA). (2011). *Examinable Taxation Pronouncements Qualifying Examination Part I January 2012*. [Online] Available: <https://www.saica.co.za/LearnersStudents/Examinations/Informationonwhatwillbeexamined/ExaminablePronouncements/tabid/488/language/en-ZA/Default.aspx> (Accessed 8 May 2011).
- South African Revenue Service (SARS). (2003). *Explanatory Memorandum on the Revenue Laws Amendment Bill*. [Online] Available: <http://www.sars.gov.za/home.asp?pid=2631> (Accessed 22 January 2010).
- South African Revenue Service (SARS). (2005). *Reportable Arrangements Guide*. [Online] Available: <http://www.sars.gov.za/home.asp?pid=4&cx=009878640050894574201%3Aku-btv50zym&cof=FORID%3A10%3BNB%3A1&ie=UTF-8&q=reportable+arrangement&sa=> (Accessed 20 June 2010).
- South African Revenue Service (SARS). (2009). *Draft Explanatory Memorandum on the Draft Tax Administration Bill*. [Online] Available: <http://www.sars.gov.za/home.asp?pid=2631>. (Accessed 19 July 2011).
- South African Revenue Service (SARS). (2010). *Draft Guide to Reportable Arrangements*. [Online] Available: <http://www.sars.gov.za/home.asp?pid=4&cx=009878640050894574201%3Aku-btv50zym&cof=FORID%3A10%3BNB%3A1&ie=UTF-8&q=reportable+arrangement&sa=> (Accessed 27 May 2010).
- Venter, E.R. & Stiglingh, M. (2006a). The Timing of the Recognition of a Liability for Secondary Tax on Companies in Accordance with International Financial Reporting Standards. *South African Journal of Accounting Research*, 20 (1), pp. 83–118.
- Venter, E.R. & Stiglingh, M. (2006b). Recognising an STC Liability Versus Recognising a Deferred Tax Asset for Unused STC Credits According to the IASB framework: a Comparison. *Meditari Accountancy Research*, 14 (1), pp. 103–120.
- Wikipedia. (2011). *Big Five Law Firms*. [Online] Available: [http://en.wikipedia.org/wiki/Big\\_Five\\_law\\_firms](http://en.wikipedia.org/wiki/Big_Five_law_firms). (Accessed 17 May 2011).
- World Accounting Intelligence. (2011). *Top Global Networks / Associations by Income: 2009*. [Online] Available: <http://firm-rankings.vrl-financial-news.com>. (Accessed 7 May 2011).