PROPOSED DRAFT

PROFESSIONAL ETHICS IN RELATION TO TAXATION
FOREWORD

This guidance, written by the professional bodies for their members working in tax, sets out the Fundamental Principles and Standards of behaviour that members are expected to follow.

Tax practitioners operate in a complex business and financial environment. The increasing public focus on the role of taxation in wider society means a greater interest in the actions of tax practitioners and their clients. The tax system is necessary to fund public services and for the health of our economy and society. A strong, competent and self-disciplined tax profession is vital to its successful operation and serves the public interest by allowing the citizen proper and effective representation in one of their most significant interactions with the State.

Tax practitioners among other things:

- help taxpayers to comply with their tax obligations so that they pay the right amount of tax at the right time and thereby help and encourage compliance;

- help protect them from possible penalties and sanctions for non-compliance which might otherwise arise;

- assist those who have not been fully compliant to become so;

- act in the interests of clients by advising taxpayers on the reliefs and incentives which Parliament has introduced, recognising the economic
and social objectives for their introduction and thereby helping to support growth and competitiveness;

- advise clients of the tax consequences (for themselves, their families, affiliates, customers, employees, owners or other stakeholders) of actions that they have taken, or propose to take, especially in circumstances where the law may be unclear, outdated, or inconsistent;

- advise taxpayers on how such tax liabilities and compliance costs can be mitigated by making reasonable and appropriate use of the legislative framework and the choices available, particularly where transactions or arrangements can reasonably be structured in different ways with different tax consequences; and

- advise clients on how to resolve lawfully and effectively legitimate differences of view with the tax authorities (or sometimes, stakeholders or other taxpayers).

Tax practitioners have a responsible role to play in serving their clients while upholding the profession’s reputation and taking account of the wider public interest. However, the knowledge and skills required by tax practitioners is capable of being abused. The complexities and uncertainties of the system may sometimes appear to deliver tax outcomes for clients that would never have been intended. Supposed ‘solutions’ to reduce tax liabilities, often using highly contrived and artificial arrangements, are sometimes developed and then promoted to taxpayers which on closer scrutiny are often held not to work. Activities of this nature undermine rather than serve the public interest.
This guide seeks to address this particular challenge and clarify the behaviour and standards expected of members when working in tax.
PART 1: INTRODUCTION

1. SCOPE

The purpose of Professional Conduct in Relation to Taxation (PCRT) is to assist and advise members on their professional conduct in relation to taxation, and particularly in the tripartite relationship between a member, client and SARS.

Part 2 explains the principles which govern the conduct of members. Part 3 applies these principles to the day-to-day work of a tax practitioners. Part 4 applies the principles to more specialist situations.

The issues addressed in Chapters 3 -11 are not intended to be, nor should they be interpreted as, an exhaustive list of all circumstances experienced by a member which may pose threats to compliance with the Fundamental Principles. Consequently, it is not sufficient for a member merely to comply with the examples presented; rather he must consider and observe the Fundamental Principles across all his professional activities.

This guidance includes practical advice. If in doubt about the ethical or legal considerations of a particular case, a member should seek advice from his professional body and, where appropriate, his legal advisers. The professional bodies take no responsibility for failure to seek advice where appropriate.

A member must at all times fulfil his obligations under the anti-money laundering legislation. Anti-money laundering issues are not covered in detail in this guide.

Nothing in PCRT overrides legal professional privilege. Similarly, nothing in PCRT shall override a member’s professional duties or be interpreted so as to give rise to
any conflict under general law, statutory regulation, or professional regulation of Tax Practitioners. In the event of any conflict general law, statutory regulation or such professional regulation shall prevail. For these purposes a conflict shall be considered to arise at least where such law, statutory or such professional regulation to which members are subject would prevent compliance with what would otherwise be required by PCRT.

2. STATUS

The guidance has been prepared based on the guidance of the:

- Association of Taxation Technicians
- Chartered Institute of Taxation

While every care has been taken in the preparation of this guide SAIT does not undertake a duty of care or otherwise for any loss or damage occasioned by reliance on this guide. Practical guidance cannot and should not be taken to substitute appropriate legal advice.

3. APPLICATION TO ALL MEMBERS

Whilst the content of this guidance is primarily applicable to members in professional practice, the principles apply to all members who practise in tax including:

- Employees attending to the tax affairs of their employer or of a client;
- Those dealing with the tax affairs of themselves or others such as family, friends, charities etc whether or not for payment; and
Where a member's employer is not prepared to follow the ethical approach set out in this guide (despite the member's reasonable attempts to persuade him to do so) the member should consider seeking legal advice. Further guidance can be found on the SAIT website.

4. **INTERPRETATION**

In this guidance 'Client' includes, where the context requires, 'former client'. ‘Member’ (and ‘members’) includes ‘firm’ or ‘practice’ and the staff thereof.

For simplicity ‘he/his is used throughout but should be taken to include she/her. Words in the singular include the plural and words in the plural include the singular.

**PART 2: FUNDAMENTAL PRINCIPLES AND STANDARDS**

1. **THE FUNDAMENTAL PRINCIPLES**

Ethical behaviour in the tax profession is critical. The work carried out by a member needs to be trusted by society at large as well as by clients and other stakeholders. What a member does reflects not just on themselves but on the profession as a whole.

A member must comply with the following Fundamental Principles:

- **Integrity:** To be straightforward and honest in all professional and business relationships.
• Objectivity: To not allow bias, conflict of interest or undue influence of others to override professional or business judgements.

• Professional competence and due care: To maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques and act diligently and in accordance with applicable technical and professional standards.

• Confidentiality: To respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the member or third parties.

• Professional behaviour: To comply with relevant laws and regulations and avoid any action that discredits the profession.

Each of these Fundamental Principles is discussed in more detail below in the context of taxation services.

1.1. Integrity

A member must act honestly in all his dealings with his clients, all tax authorities and other interested parties, and do nothing knowingly or carelessly that might mislead either by commission or omission.

1.2. Objectivity
A member may be exposed to situations that could impair his objectivity. It is impracticable to define and prescribe all such situations. Relationships which bias or unduly influence the professional judgement of the member must be avoided.

A member must explain to his client the material risks of the tax planning or tax positions and the basis on which the advice is given.

A member must always disclose to his client if he is receiving commission, incentives or any other advantage and the amounts he receives from a third party relating to the matter upon which he is advising his client. He must also follow his professional body’s rules on disclosure of and accounting for commission.

### 1.3. Professional competence and due care

A member has a professional duty to carry out his work within the scope of his engagement and with the requisite skill and care. A member should take care not to stray beyond the agreed terms of the engagement; if he does exceed the scope he should agree revised terms with his client and check that his professional indemnity insurance covers the enhanced work.

A member is free to choose whether or not to act for a client both generally and as regards specific activities. However, where a member chooses to limit or amend the scope of services he provides to a client he should make this clear in writing.

When advising a client, a member has a duty to serve that client’s interests within the relevant legal and regulatory framework.

A member must carry out his work with a proper regard for the technical and professional standards expected. In particular, a member must not undertake
professional work which he is not competent to perform unless he obtains appropriate assistance from a suitably qualified specialist.

A member who is giving what he believes to be a significant opinion to a client should consider obtaining a second opinion to support the advice. Where the second opinion is to be obtained externally, due regard must be had to client confidentiality.

Advice should be given in the context of the commercial and other non-tax objectives and the facts and circumstances of the client.

On occasions there may be more than one tenable interpretation of the law. Each case should be considered on its own individual facts and circumstances.

1.4. Confidentiality

Confidentiality is a professional principle and is also a legally enforceable contractual obligation. It may be an express term of the engagement letter between the member and the client. Where it is not an express term, a court would in most circumstances treat confidentiality as an implied contractual term.

A member may only disclose information without his client's consent when there is an express legal or professional right or duty to disclose.

The duty of confidentiality is rigorously safeguarded by the courts. Disclosure of confidential material in a member's own interest must be made only where it is considered adequate, relevant and reasonably necessary for the administration of justice - in other words, when a member considers that it would otherwise impair
the pursuit of his legitimate interests and rights if he was prevented from disclosing the information in all the circumstances. Only the minimum amount of information necessary to protect those interests may be disclosed. Examples of such circumstances may include, but are not limited to, the following:

- To enable a member to defend himself against a criminal charge or to clear himself of suspicion;
- To enable a member to defend himself in disciplinary proceedings;
- To resist proceedings for a penalty, or civil or criminal proceedings in respect of a taxation offence, for example in a case where it is suggested that a member knowingly engaged in dishonest conduct with a view to bringing about a loss of tax revenue;
- To resist a legal action made against him by a client or third party;
- To enable a member to sue for unpaid fees;
- To enable a member to sue for defamation.

If there is any doubt that the abovementioned circumstances would apply, or there is the risk of challenge by a client or employer, a member is strongly recommended to seek legal advice.

The anti-money laundering regime provides a statutory code to determine when a disclosure must be made. While this is a mandatory regime, it also gives a structure for the assessment of the public interest in a tax context, including which of the following should take precedence, in a particular set of circumstances:
• The public interest in reporting knowledge or suspicions of criminal activity to the authorities; or

• The public interest in clients receiving advice in confidence.

1.5. Professional behaviour

A member must always act in a way that will not bring him or his professional body into disrepute.

A member must behave with courtesy and consideration towards all with whom he comes into contact in a professional capacity.

A member must comply with all relevant legal and regulatory obligations when dealing with a client’s tax affairs and assist his clients to do the same. A member who has reason to believe that proposed arrangements are, or may be, tax evasion must strongly advise clients in writing not to enter into them. If a client chooses to ignore that advice, it is difficult to envisage situations where it would be appropriate for a member to continue to act other than in rectifying the client’s affairs.

Serving the interests of his clients will, on occasion, bring a member into disagreement or conflict with SARS. A member should manage such disagreements or conflicts in an open, constructive, courteous and professional manner. However, a member should serve his clients’ interests as robustly as circumstances warrant whilst applying these principles.

A member should consider whether any tax arrangements with which he might be associated on his own behalf or on behalf of a client might bring the member
and the profession into disrepute. In this regard, members are referred to the standards for tax planning set out in below.

A member’s own tax affairs should be kept up to date. Neglect of a member’s own affairs could raise doubts within SARS as to the standard of the member’s professional work and could bring him or his professional body into disrepute. Indeed, SARS requires the SAIT audit to include a maintenance check for tax practitioner status.

A member should ensure that his internal and external communications including those using social media are consistent with the principles in this guidance and in particular confidentiality.

2. THE STANDARDS FOR TAX PLANNING

In order to protect the reputation of members, the wider profession and ensure that public interest concerns South-African members should observe when advising on tax planning. These standards seek to build on the Fundamental Principles set out above, focusing in particular on integrity, professional competence and behaviour. These Standards are a supplement to, and not a substitute for, the five Fundamental Principles.

The Standards are set out below.

- Client Specific: Tax planning must be specific to the particular client's facts and circumstances. Clients must be alerted to the wider risks and the implications of any courses of action.
• Lawful: At all times members must act lawfully and with integrity and expect the same from their clients. Tax planning should be based on a realistic assessment of the facts and on a credible view of the law. Members should draw their clients’ attention to where the law is materially uncertain, for example because SARS is known to take a different view of the law. Members should consider taking further advice appropriate to the risks and circumstances of the particular case, for example where litigation is likely.

• Disclosure and transparency: Tax advice must not rely for its effectiveness on SARS having less than the relevant facts. Any disclosure must fairly represent all relevant facts.

• Tax planning arrangements: Members must not create, encourage or promote tax planning arrangements or structures that i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation and/or ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation.

• Professional judgement and appropriate documentation: Applying these requirements to particular client advisory situations requires members to exercise professional judgement on a number of matters. Members should keep notes on a timely basis of the rationale for the judgments exercised in seeking to adhere to these requirements.

Further guidance on these Standards are discussed in more detail below.

2.1. Client Specific
The risks referred to in this standard are those which are directly attributable to the planning and could be reasonably foreseeable by the member. There would not normally be a duty to comment on, for example, the commercial risk of the underlying transaction. The obligations of the member to the client continue to be governed by the engagement letter.

Where wider risks should be highlighted, the member may either advise on them, or identify them as matters on which separate advice should be sought by the client, depending on the scope of the member’s practice and of the engagement.

Generic opinions or advice that does not take into account the position of specific taxpayers (or a narrowly defined group of taxpayers such as a group of employees of the same company) pose particular risks. Members are entitled to make reasonable assumptions in giving advice (for example, where it would be reasonable on the facts to assume that the taxpayer(s) is/are SA resident), but assumptions should not be relied upon which are known to be unrealistic or unreasonable. If advice is generic, and/or depends on certain assumptions, this fact and the need for specific advice to be taken before acting should be highlighted with sufficient prominence to prevent any misunderstandings arising. Members should consider including in their advice the assumptions relief on and the potential impact of a change in the assumptions made and/or the circumstances which might require specific or updated advice to be obtained.

2.2. Lawful

The requirement to advise clients on material uncertainty in the law (including where SARS takes a different view) applies even if the practical likelihood of SARS intervention is considered low. Clients should be told what would be reasonable, at the time of the transaction, to expect SARS to believe the application of the law to
be (assuming SARS was fully apprised of all the facts of the transaction). Where the likely view of SARS is uncertain or not known, the member should include this fact as part of their advice.

The fact that the member may disagree with SARS on a matter is not of itself indicative of behaviour that might breach these standards. A member may reasonably believe that an SARS view is wrong in law but, if so, the client should be alerted to the fact that SARS holds a different view of the law and should be advised of the risks and likely costs that might be incurred in order to determine any dispute.

2.3. Disclosure and transparency

Disclosure should be made whenever required by law and fuller disclosure must be recommended to clients wherever it is appropriate given a wider relationship or dialogue with SARS relevant to that client. What is actually to be disclosed will inevitably reflect a professional judgement taking into account all relevant facts and law specific to the case in question and what the client consents should be disclosed.

2.4. Tax planning arrangements

Where a member has a genuine and reasonable uncertainty as to whether particular planning is in breach of this Standard, the member should:

- document the detailed reasoning and evidence sufficiently to be able to demonstrate why they took the view that any planning was not in breach of this Standard;
• include in their client advice an assessment of uncertainties and risks involved in the planning see Standard Lawful above; and

• include in their client advice an assessment of the relevant disclosures that should be made to SARS in order to enable it, should it wish to do so, to make any reasonable enquiries – see Standard Disclosure and transparency above.

2.5. Professional judgement and appropriate documentation

Members are not required to complete paperwork for its own sake, but they should be prepared to identify, support and where appropriate defend the judgements they made in applying these requirements to their work.

Where the judgements made are reasonable, notes taken on a timely basis are likely to be the most convincing way of demonstrating compliance with the principles after the event, to the benefit of the member and the client and to satisfy any wider public concerns.
PART 3: GENERAL GUIDANCE

1. TAX RETURNS

1.1. Definition of tax return (return)

For the purposes of this Chapter, the term ‘return’ includes any form, declaration, document or online submission or other manner of submission of data that is prepared on behalf of the client for the purposes of disclosing to any taxing authority details that are to be used in the calculation of tax due by a client or a refund of tax due to the client or for other official purposes and, for example, include, without limitation:

- Income Tax;
- VAT and Customs returns;
- PAYE;
- Estate Duty returns;
- Securities Tax; and
- Transfer Duty.

A letter giving details in respect of a return or as an amendment to a return including, for example, any voluntary disclosure of an error should be dealt with as if it was a return.
1.2. Responsibilities (taxpayer’s and member’s)

1.2.1. Taxpayer’s responsibility

The taxpayer has primary responsibility to submit correct and complete returns to the best of his knowledge and belief.

1.2.2. Member’s responsibility

A member who prepares a return on behalf of a client is responsible to the client for the accuracy of the return based on the information provided.

In dealing with SARS in relation to a client’s tax affairs a member must bear in mind his duty of confidentiality to the client and that he is acting as the agent of his client. He has a duty to act in the best interests of his client.

A member must act in good faith in dealings with SARS in accordance with the fundamental principle of integrity. In particular the member must take reasonable care and exercise appropriate professional scepticism when making statements or asserting facts on behalf of a client. Where acting as a tax agent, a member is not required to audit the figures in the books and records provided or verify information provided by a client or by a third party. However, a member should take care not to be associated with the presentation of facts he knows or believes to be incorrect or misleading nor to assert tax positions in a tax return which he considers have no sustainable basis.
When a member is communicating with SARS, he should consider whether he needs to make it clear to what extent he is relying on information which has been supplied by the client or a third party.

1.3. Disclosure

If a client is unwilling to include in a tax return the minimum information required by law, the member should follow the guidance in Chapter 5 Irregularities. 3.12 - 3.18 below give guidance on some of the more common areas of uncertainty over disclosure.

In general, it is likely to be in a client's own interests to ensure that factors relevant to his tax liability are adequately disclosed to SARS because:

- his relationship with SARS is more likely to be on a satisfactory footing if he can demonstrate good faith in his dealings with them; and

- he will reduce the risk of a discovery or further assessment and may reduce exposure to interest and penalties.

It may be advisable to consider fuller disclosure than is strictly necessary. The factors involved in making this decision include:

- The terms of the applicable law;

- The view taken by the member;

- The extent of any doubt that exists;
• The manner in which disclosure is to be made; and

• The size and gravity of the item in question.

When advocating fuller disclosure than is strictly necessary a member should ensure that his client is adequately aware of the issues involved and their potential implications. Fuller disclosure should not be made unless the client consents to the level of disclosure.

Cases will arise where there is doubt as to the correct treatment of an item of income or expenditure, or the computation of a gain or allowance. In such cases a member ought to consider carefully whether additional disclosure, if any, might be advisable.

A member who is uncertain whether his client should disclose a particular item or of its treatment should consider taking further advice before reaching a decision. He should use his best endeavours to ensure that the client understands the issues, implications and the proposed course of action. Such a decision may have to be justified at a later date, so the member’s files should contain sufficient evidence to support the position taken, including timely notes of discussions with the client and/or with other advisers, copies of any second opinion obtained and the client’s final decision. A failure to take reasonable care may result in SARS imposing a penalty if an error is identified after an enquiry.

1.4. Practice Generally Prevailing

Whilst it is reasonable in most circumstances to rely on SARS published PGP, a member should be aware that the Tribunal and the Courts will apply the law even if this conflicts with SARS PGP.
1.5. The GAAR

The GAAR applies on a self-assessment basis. A member should consider whether the GAAR could apply when completing a tax return. Application of the GAAR is difficult and if the position is not clear then the client should be advised that specialist assistance or a second opinion is necessary.

Where it is uncertain whether the GAAR applies the member should consider recommending additional and appropriate disclosure. Where the client disagrees, the member should clearly record his advice and consider whether he can act as agent.

1.6. Approval of tax returns

It is essential that the member informs the client of the client’s duty to review his tax return before it is submitted.

The member should draw the client’s attention to the responsibility which the client is taking in approving the return as correct and complete. Attention should be drawn to any judgemental areas or positions reflected in the return to ensure that the client is aware of these and their implications before he approves the return.

A member should obtain evidence of the client’s approval of the return in electronic or non-electronic form.

1.7. Exceptions

Where a return is not reviewed by the client before submission, then, because of the risk to the adviser, the terms of the engagement should make clear that returns
are completed on the basis of the information provided by the client and the client is no less responsible for errors in returns which have been prepared on the basis of that information than if he had approved and signed the returns personally.

1.8. Signing tax returns

A member intending to sign tax returns in a representative capacity should carefully consider:

- His legal authority to do so;

- The process whereby the client will review and take responsibility for the contents of the return; and

- Any legal implications of signing the return for both the practice and the individual signatory.

1.9. Electronic filing of tax returns

Tax administration systems are increasingly moving to mandatory electronic filing of tax returns.

Ideally a member will explicitly file in his capacity as agent. In some cases SARS will issue a pin code to the client for the agent to use. A member is advised to use the facilities provided for agents and to avoid knowing or using the client’s personal access credentials wherever possible.

A member should keep his access credentials safe from unauthorised use and consider periodic change of passwords.
A member must not allow another person to use the member's efiling profile, unless the person acts under the member's supervision who has assigned or approved the assignment of those functions to that person.

If electronic filing causes a member to become involved in the payment or repayment of tax, the member should ensure he fully understands his role and responsibilities.

A member should ensure that his role and responsibilities and those of his client in relation to the electronic filing process are clearly set out and understood by the client. This is ideally achieved through the engagement letter.

Electronic filing systems are constantly evolving, and a member should ensure his procedures are updated as and when appropriate.

2. TAX ADVICE

2.1. Introduction

Giving tax advice covers a variety of activities. It can involve advising a client on a choice afforded to him by legislation, for example, whether to establish a business as a sole proprietor, partnership or company. It could be advising on the tax implications of buying or selling an asset or business or advising on succession planning.

For the most part clients are seeking advice on how to structure their affairs, either personal or commercial, in a way that is tax efficient and ensures that they comply with their legal and regulatory requirements. Transactions based on advice which
is centred around non-tax objectives are less likely to attract scrutiny or criticism from stakeholders and are much more likely to withstand challenge by SARS.

2.2. Tax evasion

A member must never be knowingly involved in tax evasion, although, of course, it is appropriate to act for a client who is rectifying their affairs.

The OECD has defined “tax evasion” as encompassing “illegal arrangements through or by means of which liability to tax is hidden or ignored,” that is, arrangements in which “the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities”. In an income tax context, it typically involves the non-payment of a tax that would properly be chargeable if the taxpayer made a full and true disclosure of income and allowable deductions. Common examples of tax evasion include a deliberate failure by a “cash” business to report the full amount of revenue received or the deliberate claiming of a deduction by a business for an expenditure it has neither incurred nor paid.

From the OECD, International Tax Terms for the Participants in the OECD Programme of Cooperation with Non-OECD Economies.

2.3. Tax planning

In contrast to tax evasion, tax planning is legal. Taxpayers are entitled to enter into transactions that reduce tax or to take interpretations of legislation that SARS may not agree with. If SARS wishes to challenge a particular transaction or interpretation, it may amend the return or issue an assessment accordingly. The client may then appeal against SARS’s decision through the tax tribunal and courts
if necessary, with the associated costs and disruption. Ultimately only the courts can determine whether a particular piece of tax planning is legally effective or not. However, a member should always advise the client that there may be wider reputational issues in such circumstances.

Some tax strategies have been the subject of heated public debate, raising ethical challenges. Involvement in certain arrangements could subject the client and the member to significantly greater compliance requirements, scrutiny or investigation as well as criticism from the media, government and other stakeholders and difficulties in obtaining professional indemnity insurance cover. Members should consider the potential negative impact of their actions on the public perception of the integrity of the tax profession more generally.

2.4. Tax avoidance

The definition of ‘avoidance’ is an evolving area that can depend on the tax legislation, the intention of Parliament, interpretations in case law, the view of SARS and the varying perceptions of different stakeholders and is discussed further below.

2.4.1. Tax planning vs tax avoidance?

Despite attempts by courts over the years to elucidate tax ‘avoidance’ and to distinguish this from acceptable tax planning or mitigation, there is no widely accepted definition.
Publicly, the term ‘avoidance’ is used in the context of a wide range of activities, be it multinational structuring or entering contrived tax-motivated schemes. The application of one word to a range of activities and behaviours oversimplifies the concept and has led to confusion.

Tax planning is an exercise undertaken to minimize a tax liability through the best use of all available allowances, deductions, exclusions or exemptions, to reduce income and / or capital gains.

2.4.2. What is SARS’s view?

SARS uses the term “impermissible tax avoidance”, in general, to refer to artificial or contrived arrangements, with little or no actual economic impact upon the taxpayer, that are usually designed to manipulate or exploit perceived “loopholes” in the tax laws in order to achieve results that conflict with or defeat the intention of Parliament. The term arrangements that embody the common characteristics of the “abusive avoidance schemes”.

The term ‘impermissible avoidance arrangements’ in defined in section 80A of the Income Tax Act. This section provides the basic test for determining whether or not an avoidance arrangement is impermissible. In particular, the section would apply if there is (1) an arrangement; (2) a tax benefit attributable to that arrangement; (3) a “tax avoidance” purpose; and (4) any one or more “tainted elements”.

The tainted elements use the terms “abnormality” and “non-arm’s length rights and obligations” and contains two elements that targets avoidance arrangements that lack commercial substance or would frustrate the purpose of any provision(s) of the Act.
SARS agrees that “tax planning” is concerned with the organisation of a taxpayer’s affairs (or the structuring of transactions) so that they give rise to the minimum tax liability within the law without resort to the sort of “impermissible tax avoidance” just described. It is similar to the concept of “tax mitigation” described by Lord Templeman:

“Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability. [The General Anti-Avoidance Rule] does not apply to tax mitigation because the taxpayer’s advantage is not derived from an arrangement but from the reduction of income which he accepts or the expenditure which he incurs”.

In short, the “hallmark of tax mitigation is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option”.

According to Judge Mothle and Judge Makgoka, for the minority in Sasol Oil v CSARS (923/2017) [2018] ZASCA 153 (9 November 2018), the “courts have not hesitated to express a strong view against disguised transactions, as in the English case of Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes) [1992] 2 All ER 275 (HL) at 295, where the House of Lords expressed a view thus:

‘Unacceptable tax avoidance [which] typically involves the creation of complex artificial structures by which, as though by the wave of a magic wand, the taxpayer conjures out of the air a loss or a gain, or expenditure, or whatever it may be, which otherwise would never have existed. These structures are designed to achieve an adventitious tax benefit for the
taxpayer, and in truth are no more than raids on the public funds at the expense of the general body of taxpayers, and as such are unacceptable.’

2.5. The GAAR

Judge Lewis repeated her view in Sasol Oil v CSARS (923/2017) [2018] ZASCA 153 as follows:

'It is trite that a taxpayer may organize his financial affairs in such a way as to pay the least tax permissible. There is, in principle, nothing wrong with arrangements that are tax effective. But there is something wrong with dressing up or disguising a transaction to make it appear to be something that it is not, especially if that has the purpose of tax evasion, or the avoidance of a peremptory rule of law.' (See paragraph 63).

Judge Wallis, in Commissioner SARS v Bosch (394/2013) [2014] ZASCA 171 (19 November 2014) ‘... there is nothing impermissible about arranging one's affairs so as to minimise one's tax liability, in other words, in tax avoidance.”

Judge Lewis explains the two scenarios of tax avoidance and tax evasion as follows:

'A transaction is not necessarily a disguised one because it is devised for the purpose of evading the prohibition in the Act or avoiding liability for the tax imposed by it. A transaction devised for that purpose, if the parties honestly intend it to have effect according to its tenor, is interpreted by the Courts according to its tenor, and then the only question is whether, so interpreted, it falls within or without the prohibition or tax.”
A disguised transaction in the sense in which the words are used above is something different. In essence it is a dishonest transaction: dishonest, in as much as the parties to it do not really intend it to have, inter partes, the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties. The parties wish to hide the fact that their real agreement or transaction falls within the prohibition or is subject to the tax, and so they dress it up in a guise which conveys the impression that it is outside of the prohibition or not subject to the tax. Such a transaction is said to be in fraudem legis and is interpreted by the Courts in accordance with what is found to be the real agreement or transaction between the parties.'

2.6. The responsibility of a member in giving tax planning advice

Members should refer to the Standards of tax advice set out in section two. A member is required to act with professional competence and due care within the scope of his engagement letter.

A member should understand his client’s expectations around tax advice or tax planning and ensure that engagement letters reflect the member’s role and responsibilities, including limitations in or amendments to that role.

A member does not have to advise on or recommend tax planning which he does not consider to be appropriate or otherwise does not align with his own business principles and ethics. However, in this situation the member may need to ensure that the advice he does not wish to give is outside the scope of his engagement (see 4.26). If the member may owe a legal duty of care to the client to advise in this area, the member should ensure that he complies with this by, for example, advising the client that there are opportunities that the client could undertake,
even though the member is unwilling to assist, and recommending that the client seeks alternative advice. Any such discussions should be well documented by the member.

Ultimately it is the client’s decision as to what planning is appropriate having received advice and taking into account their own broader commercial objectives and ethical stance. However, the member should ensure that the client is made aware of the risks and rewards of any planning, including that there may be adverse reputational consequences. It is advisable to ensure that the basis for recommended tax planning is clearly identified in documentation.

Occasionally a client may advise a member that he intends to proceed with a tax planning arrangement without taking full advice from him on the relevant issues or despite the advice the member has given. In such cases the member should warn the client of the potential risks of proceeding without full advice and ensure that the restriction in the scope of the member’s advice is recorded in writing.

Where a client wishes to pursue a claim for a tax advantage which the member feels has no sustainable basis the member should refer to Chapter 5 Irregularities for further guidance.

If Counsel’s opinion is sought on the planning the member should consider including the question as to whether in Counsel’s view the GAAR could apply to the transaction.

It should be noted that any legal opinion provided, for example by Counsel, will be based on the assumptions stated in the instructions for the opinion and on execution of the arrangement exactly as stated. SARS and the courts will not be constrained by these assumptions. For an opinion to be of value, it needs to
consider the full scope of the transaction and not only selected parts thereof as this could be misleading to the client.

2.7. The different roles of a Tax Adviser

A member may be involved in tax planning arrangements in the following ways:

- Advising on a planning arrangement.
- Introducing another adviser’s planning arrangement.
- Providing a second opinion on a third party’s planning arrangement.
- Compliance services in relation to a return which includes a planning arrangement.

A member should always make a record of any advice given.

2.8. Primary adviser on a planning arrangement

When a member advises on a planning arrangement the member should advise of the risks and implications as outlined below and should only recommend the planning for the client’s consideration based on a balanced view taking into account any potential risks.
The member should also carefully consider the risks, both reputational and financial, of advising on the arrangement.

Any tax advice on planning should consider all the risks and implications. These may include:

- Technical considerations
- The strength of the legal interpretation relied upon.
- The potential application of the GAAR.
- The risk of counteraction. This may occur before the planning is completed or potentially there may be retrospective counteraction at a later date.
- The risk of challenge by SARS. Such challenge may relate to the legal interpretation relied upon but may alternatively relate to the construction of the facts, including the implementation of the planning.
- The risk and inherent uncertainty of litigation.
- The probability of the planning being overturned by the courts if litigated and the potential ultimate downside should the client be unsuccessful.

2.9. Practical considerations

The issues involved in the implementation of the planning arrangement.
The implications for the client, including the obligations of the client in relation to their tax return, if the planning requires any obligation to disclose and the potential for an accelerated payment notice or partner payment notice.

The reputational risk to the client and the member of the planning in the public arena.

The stress, cost and wider personal or business implications to the client in the event of a prolonged dispute with SARS. This may involve unwelcomed publicity, costs, expenses and loss of management time over a significant period.

If the client tenders for government contracts, the potential impact of the proposed tax planning on tendering for and retaining public sector contracts.

Whether the arrangements are in line with any applicable code of conduct or ethical guidelines or stances.

A member may advise on steps to manage elements of the risk if the client chooses to proceed. For example, the merits with client consent of a full disclosure of the arrangements to SARS in advance of implementation even if not required by law.

Depending on whether it is within the scope of his engagement letter with the client the member may wish to suggest alternative arrangements.

2.10. Introducing another adviser’s planning arrangement

A member may be invited to introduce his clients to an arrangement from another source. The member may be paid a commission for making such introductions which must be disclosed and accounted for in line with the member’s professional
body’s rules. Members should note that such an agreement may be viewed as suspect by clients, SARS and/or the public.

If a member does not have the expertise to assess the transaction and advise the client on the potential risks or if the other adviser does not release all the legal opinions and implementation details to allow the member to analyse the arrangement, the member should inform the client that he is not able to advise on the arrangement. Where appropriate the member should advise the client to consider very carefully the risks.

The member should also consider whether including the relevant tax advantage in a tax return would have a sustainable basis. If there is no sustainable basis the member should not recommend the planning.

2.11. Providing a second opinion on a third party’s tax planning arrangement

A client may ask a member to advise on an arrangement offered to the client by another adviser. No commissions should be accepted where a member is providing tax advice on a third party’s arrangement as it would undermine the member’s objectivity.

The member should consider carefully whether he is qualified to advise the client on the potential technical and reputational risks and rewards of the arrangement. If the member does not have the relevant experience, he should seek specialist support or recommend that the client obtains advice elsewhere. The member may
be able to advise on the practical issues involved in participation in a tax planning arrangement, whilst advising the client to take advice elsewhere on the technical merits of the legal interpretation relied upon.

If the member does not have the relevant expertise and/or the implementation details to allow an assessment to be made, the member should inform the client that they cannot advise on the arrangement and the member should document this.

2.12. Compliance services in relation to returns that include a tax advantage

A client may have implemented an arrangement offered by another adviser and the member has not been involved in implementing the arrangement. Subsequently the client may ask the member to enter the arrangement on his tax return. In this case the member may wish to advise on the potential risk of a challenge.

A member should not include within the tax return a claim for a tax advantage which he considers has no sustainable basis based on the information provided to him.

If the client provides inadequate information, then the member should make a request for further information which will enable him to confirm that there is a sustainable filing position. If no further information is forthcoming, the member should refrain from including a claim for a tax advantage on the tax return, document his decision and explain his reasons to the client. If additional information is received but it is too complex or outside the member’s level of expertise to allow any reasonable assessment to be made, he should seek specialist support or recommend that the client obtains advice elsewhere.
PART 4: GUIDANCE ON SPECIFIC CIRCUMSTANCES

1. IRREGULARITIES

1.1. Introduction

For the purposes of this Chapter, the term ‘irregularity’ is intended to include all errors whether the error is made by the client, the member, SARS or any other party involved in a client's tax affairs.

In the course of a member's relationship with the client, the member may become aware of possible irregularities in the client's tax affairs. The client should be informed of any irregularities as soon as the member has such knowledge.

Where the irregularity has resulted in the client paying too much tax, the member should advise the client about requesting a refund claim, having regard to any relevant time limits.

In all cases where SARS has sent an over-payment to the member, the member must return the excess to SARS as soon as practicable.

The rest of this Chapter deals solely with situations where sums may be due to SARS.

A member must act correctly from the outset in terms of sums due to SARS. A member should keep sufficient appropriate records of discussions and advice. When dealing with irregularities of this nature, the member should:

- If necessary, so long as he continues to act for the client, seek to persuade the client to behave correctly;
Take care not to appear to be assisting a client to plan or commit any criminal offence or to conceal any offence which has been committed; and

In appropriate situations, or where in doubt, discuss the client’s situation with a colleague an independent third party (having due regard to client confidentiality).

In any situation where a member has concerns about his own position, he should take specialist legal advice. Concerns might arise, for example, where a client appears to have used the member to assist in the commission of a criminal offence in such a way that doubt could arise as to whether the member had acted honestly and in good faith.

1.2. Establishing the facts

A member is not under a duty to make enquiries to identify irregularities which are not related to the work in respect of which he has been engaged. However, if the member does become aware of any irregularity in a client’s tax affairs, he should follow this guidance - whether in relation to a matter on which he has acted or not.

A member who suspects that an irregularity may have occurred should discuss this with the client to remove or confirm the suspicion. He should take into account the fact that he may not be aware of all the facts and circumstances and may not, therefore, be able to reach a conclusion.

Where the client provides an explanation for the apparent irregularity to the satisfaction of the member, the member is free to continue to act for that client.
If a member is in doubt as to whether there is an irregularity, the member should consider seeking specialist advice. In some situations, the client may wish to seek (or the member should recommend) a second opinion.

Whether the member decides to continue to act for the client or not, the member should protect his position and record his compliance with this guidance by documenting:

- The discussions he has had with his client, any colleague, specialist and/or SARS;
- The client’s explanations; and
- His conclusion and the reasons for reaching that conclusion.

It may be appropriate to confirm the facts in writing with the client.

1.3. **Is the irregularity trivial**

As a general principle, all known irregularities should be corrected. Isolated errors should be ignored where the tax effect is no more than minimal, say up to R1000. Small irregularities of this nature will probably cost SARS and the client more to process than they are worth.

1.4. **Is specific authorisation by the client required to disclose an irregularity**

A member must ensure that he has authority to disclose an error to SARS. This could be specific authority agreed with the client or a general authority contained in a letter of engagement. If in any doubt or if the amount of tax involved is material, the member should confirm the position with the client.
A member must have the client’s authority to agree a negotiated figure following disclosure of the facts and circumstances.

1.5.  [### Process if there is a possible irregularity]

1.5.1.  **Stage 1: Asking the client for authority to disclose**

A member should encourage the client to make a timely disclosure. The member should advise the client of his obligations under the relevant tax legislation and refer, as relevant, to interest, surcharges, penalties and the rules concerning the delayed correction of innocent errors.

1.5.2.  **Stage 2: Advising the client of the consequences of failure to disclose**

Where it appears that the client is reluctant to authorise disclosure of the irregularity to SARS, the member should explain to the client:

- The potential consequences of non-disclosure;
- The potential benefit of making a voluntary disclosure especially as regards reduced penalties; and
- SARS’s wide-ranging powers to obtain information from taxpayers, their agents and third parties available.
This will also include the member explaining that he will:

- Be required to put his advice that disclosure is required in writing;
- Be obliged to cease to act: and in some circumstances to disassociate himself from any further work done, should disclosure not be made. The member should not be involved in any further work that would be perceived as endorsing the irregularity or any future work that would repeat these irregularities.

1.5.3. **Stage 3: Advising the client in writing of the consequences of failure to disclose**

Where the client remains unwilling to make a full disclosure to SARS, the member should ensure that his conduct and advice are such as to prevent his own probity being called into question. It is essential therefore to advise the client in writing, setting out the facts as understood by the member, confirming to the client the member’s advice to disclose and the consequences of non-disclosure.

If, after being advised in writing, the client prevaricates about making a full disclosure, the member must consider at which point the prevarication should be treated as a refusal to disclose. In certain cases, the member may decide to cease his activities with his client due to the seriousness of the situation. In these situations, the member should inform the client of his decision in writing.

1.6. **[### Actions where the client refuses to disclose]**
1.6.1. **Ceasing to act**

It should be noted that if SARS were to realise that the member had continued to act after becoming aware of such undisclosed errors, the member’s relationship with SARS would be prejudiced. SARS might, in some circumstances, even consider the member to be knowingly or carelessly concerned in the commission of an offence or be engaged in dishonest conduct.

1.6.2. **Withdrawing reports signed by the member**

Where a member has undertaken work to verify or audit accounts or statements which carry a report signed by the member, which is subsequently found to be misleading, the work should be withdrawn where possible.

If the member does not have his client's consent to withdraw, he should write to the client and explicitly ask for permission to withdraw the report. If unsuccessful, he should then obtain specialist legal advice as to what action he should take.

1.7. **Professional enquiry (also known as professional clearance)**

Having ceased to act, the member may be approached by a prospective adviser for information relevant to the decision of whether to accept the appointment or not.

Before responding to a request for information from a prospective adviser, a member must ensure that he has authority from the former client to disclose all
the information needed and reasonably requested by the prospective adviser to enable the prospective advisor to decide whether to accept the work.

If the client refuses permission to the member to discuss all or part of his affairs, the member should inform the prospective adviser of this fact. It is then up to the prospective adviser to make enquiries from the client as to the reasons for such a refusal.