

# Code of Conduct in Relation to Taxation

## Code of Professional Conduct in Relation to Taxation

### 1. Preamble

1.1 The Board of the Institute has identified skills (education), integrity and excellence as the pre-eminent professional attributes of Tax Professionals (hereafter referred to as 'members') in South Africa. The Board is also committed, in the interests of the tax profession and South Africa as a whole, to enhancing these qualities in all members by providing appropriate guidance.

1.2 A member of the Institute is required to comply with the following fundamental principles:

#### Integrity

A professional tax practitioner should be straightforward and honest in all professional and business relationships.

#### Objectivity

A member should not allow bias, conflict of interest or undue influence of others to override professional or business judgments.

#### Professional Competence and Due Care

A member has a continuing duty 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. A member should act diligently and in accordance with applicable technical and professional standards when providing professional services.

## Confidentiality

A member must respect the confidentiality of information acquired as a result of professional and business relationships and should 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.

Confidential information acquired as a result of professional and business relationships should not be used for the personal advantage of the professional tax practitioner or third parties.

## Professional Behavior

A member should comply with relevant laws and regulations and should avoid any action that discredits the tax profession.

- 1.3 A member's primary duty is to ensure that his actions comply with all laws and regulations, including personal tax affairs, and owes a contractual duty to the client to act for him with the requisite degree of skill and care, and the contractual relationship should therefore be governed by a letter of engagement. The member also has duties to the country and the *fiscus*, notably of compliance with the law and the honest presentation of taxpayer client's affairs.
- 1.4 It is the taxpayer's responsibility to ensure that returns made to the tax authorities are correct and complete and the member must assist him to fully disclose facts in relation thereto.
- 1.5 Where a member becomes aware that irregularities have occurred in relation to a client's tax affairs, he should advise the client of the consequences, and the manner of disclosure.
- 1.6 Where a client refuses to follow the advice of a member in relation to issues involving disclosure, the member must consider whether he should continue the engagement.
- 1.7 Members must comply with statutory duties of legal disclosure where they have proof or suspicions of criminal activity.

1.8 When approached for information on a client's affairs by another member, a fellow Tax Professional or third party, the member should ensure that he has his client's authority before making any disclosure, unless if required by law to do so.

1.9 This Code is established on the basis that unless a limitation is specifically stated, the Code is equally valid for all members, whether in public practice as registered tax practitioner, commerce, business, public sector or academia.

## 2. Meaning of Profession

2.1 A profession is distinguished by certain characteristics including, but not limited to the:

2.1.1 mastery of a particular intellectual skill, acquired by training and education;

2.1.2 acceptance of duties to society as a whole in addition to duties to the client or employer;

2.1.3 an outlook which is essentially objective;

2.1.4 rendering personal services to a high standard of conduct and performance

## 3. Purpose of Code

3.1 A distinguishing mark of the tax profession is its acceptance of the responsibility to act in the interest of client taxpayers'. South Africa, however, comes from a past characterized by inequalities and discrimination, which requires a holistic approach to the challenges faced by South African society and economy; Government need to deliver change to those who need it most, with revenue collection being the main source of this development agenda.

3.2 Members' responsibility therefore is not exclusively to satisfy the needs of an individual taxpayer or employer, but to the development of the tax profession and the democratization of the country as a whole. This democratic outlook therefore requires that a member should observe and comply with the ethical requirements of this Code, the laws of the Republic and refrain from engaging in impermissible tax avoidance schemes.

3.3 The Code is binding on all members and is therefore intended for a range of circumstances.

## 4. Fundamental Principles General

### Principles General

- 4.1 A member's most important duty is to ensure that his actions comply with the law. This requires that he complies with any direct obligation imposed upon him by statute or common law to do or refrain from particular actions and that he does not assist his client in the commission of any act which breaches the client's legal obligations (for example the provision of inaccurate accounts or misleading representations on transactions). Subject to that overriding duty, he owes a contractual duty to carry out the tasks that he has agreed to do with the requisite skill and care.
- 4.2 The discharge of this duty will often require the member to advise the client of the client's obligations under the relevant tax legislation and the consequences of non-compliance. Whether the client follows the member's advice is ultimately the client's decision. If, however, the client decides not to act in accordance with the member's advice as to his obligations, then the member must ensure that he does not take any steps which assist the client in that noncompliance because that would be in breach of the member's duty not to assist in what is likely to be an unlawful act and would in itself be an unlawful act.
- 4.3 Subject to the foregoing, the member owes his client a duty to act in his best interests in carrying out his client's instructions. In so doing a member has 'one client at a time' and he should not feel precluded from acting for a client in a particular manner which is lawful simply because such a practice, if it became widespread, might make SARS' job more difficult or would not be a manner in which other clients would wish to act.
- 4.4 A member's duty towards the tax authorities is to comply with the appropriate legislation and the common law when dealing on behalf of a client with a matter which is governed by tax law. In all dealings relating to the tax authorities, a member must act honestly and do nothing that might mislead the authorities.

4.5 Members must not knowingly be associated with reports, returns, communications or other information where the he believes that the information:

- 4.5.1 contains a materially false or misleading statement;
- 4.5.2 contains statements or information furnished recklessly;
- 4.5.3 omits or obscures information required to be included where such omission or obscurity would be misleading.

When a tax 'registered practitioner' becomes aware that the above has occurred he must cease to represent the taxpayer concerned if the taxpayer does not remedy the situation.

### Professional Competence

4.6 Members in public practice, including 'registered tax practitioners,' must:

- 4.6.1 attain and maintain knowledge and skills relevant to the service provided to clients;
- 4.6.2 take reasonable care in ascertaining a client's state of being made on behalf of the client;
- 4.6.3 ensure that taxation laws are applied correctly and lawfully to the circumstances of the particular client;
- 4.6.4 not knowingly obstruct the proper administration of the tax laws;
- 4.6.5 ensure that they advise their clients of their rights and obligations under the taxation laws in the country;
- 4.6.6 exercise due diligence and care in their interaction with SARS on behalf of their clients. Members should refer to the SA Tax Standards. Members should bear in mind that an engagement letter once agreed with a client is a contract and should be aware and make a note of any variations that have subsequently been made whether orally or in writing.

## Relationship with the client

4.7 In dealing with a client's taxation affairs a member's role is often that of agent but he may be acting as principal in an advisory capacity. The contractual relationship should be governed by an appropriate letter of engagement in order that the scope of both the member's and the client's responsibilities are made clear. Members are strongly urged to include in the letter of engagement a statement to the following effect:

*"We will observe the professional rules and practice guidelines of our professional Institute and accept instructions to act for you on the basis that we will act in accordance with those guidelines."*

4.8 Members should refer to the standard SATS1000 issued May 2011 and ensure engagement letters are obtained. Members should bear in mind that an engagement letter once agreed with a client is a contract and should be aware and make a note of any variations that have subsequently been made whether orally or in writing.

4.9 Every contractual relationship should be covered; if the member acts for a partnership and also for one or more of the partners, then the partnership and each partner acted for are separate clients for the purposes of these guidelines. Likewise, if the member acts for a husband and wife, each is a separate client.

4.10 If the client is a body corporate, the client is the company and not the directors. Where a default of any kind is discovered, the matter should be raised at the appropriate level in the client organisation.

4.11 A member should deal with taxation work only on the basis that the client is prepared to make full disclosure to him. Such disclosures are governed by confidentiality as an implied contractual term.

4.12 This Code explain the position of members if a client refuses to act in accordance with the member's advice, for example where the client has unreasonably delayed either the production of information needed for the preparation of returns or accounts or full disclosure of irregularities. The member should consider whether to continue to act for the client but should note the recommendations contained in the Code regarding termination of relationships with the client.

4.13 If a member believes that a relationship with a client has been or is likely to be terminated, whether by the client or by the member, the member needs to take extra care to make clear to the client in writing what matters within the terms of the engagement have been dealt with and what remains to be done, and by what date it should be done, and also what further action the member will, or will not, take.

4.14 A member is advised to keep detailed notes (preferably typed) of meetings and telephone conversations with his clients,

SARS and any other third parties regarding his clients' affairs. By this means the member may protect himself in the event of a subsequent dispute over what was said at the time and, in the case of what the member perceives to be important meetings and conversations, he should consider ensuring that such notes are signed and dated by the originator.

4.15 It would be prudent for a member either to write to the client confirming oral advice as a matter of course or at least to make a note on file of advice given and he should consider sending a copy of that note to the client for his information and comment. This will allow the client a chance to correct any mistaken assumptions set out in the note and to have a written record of the advice given. Exceptionally, where it is felt that the note is of particular importance, it may be sensible to have the creation of the file note witnessed.

4.16 Members will from time to time find themselves having to advise on matters which require specialist knowledge. In such circumstances they should be careful not to go beyond their own level of competence and, if necessary, should seek help from a specialist in the field.

4.17 Members must maintain the confidentiality of their employer and clients and should not disclose information to a third party without an employer or client's permission, unless there is a legal obligation to do so.

4.18 Information disclosed by employer or client should not be used by the member for personal gain or advantage.

## Tax planning and Tax avoidance

- 4.19** Tax avoidance is legal and is to be distinguished from evasion which is illegal. All taxpayers have the right to arrange their affairs under the law to minimize their liability to tax. A basic example of legitimate tax planning would involve a taxpayer's decision to operate a new business as a company or sole proprietorship.
- 4.20** A member must carefully consider and document the merits of arrangements which may be considered impermissible tax avoidance as envisaged in sections 80A to 80L in the Income Tax Act No. 58 of 1962. A scheme which depends fundamentally on concealment from the tax authorities may very well amount to tax evasion and is a prohibited practice.
- 4.21** Internationally, tax authorities object to arrangements set up for no purpose other than to avoid tax, as such artificial arrangements that are fundamentally different from choosing one commercial approach which generates a lower tax liability than another, or the mere organisation of a taxpayer's affairs in such a way as to minimize tax, a practice permitted. This is a difficult and controversial area, where the approach of the Courts has changed over time. Members must carefully consider and document considerations and advice to clients.
- 4.22** Tax planning, or tax mitigation, 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". In *CIR v Challenge Corporation* [1987] AC 155 Lord Templeman described tax mitigation as follows:

*'Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assess- able 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'.*

4.23 Impermissible tax avoidance in general, 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 certainly includes, but is not limited to, arrangements that embody the common characteristics of the “abusive avoidance schemes”. Members must carefully consider and document considerations and advice to clients.

4.24 Members must consider the dicta of Lord Hofman in *MacNiven v Westmoreland Investment* [2001] STC 237 at page 257:

*'If the question is whether a given transaction is such as to attract a statutory benefit, such as a grant or assistance like legal aid, or a statutory burden, such as income tax, I do not think it promotes clarity of thought to use terms like stratagem or device. The question is simply whether upon its true construction, the statute applies to the transaction. Tax avoidance schemes are perhaps the best example. They either work (Inland Revenue Commissioners v. Duke of Westminster [1936] A.C.1) or they do not (Furniss v. Dawson [1984] A.C.474). If they do not work, the reason, as my noble and learned friend, Lord Steyn, pointed out in Inland Revenue Commissioners v. McGuckian [1997] 1 W.L.R.991, 1000, is simply that upon the true construction of the statute, the transaction which was designed to avoid the charge to tax actually comes within it. It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes.'*

## Disclosure

4.25 In all tax matters, the member must act in good faith in dealings with SARS, in particular the member must take reasonable care when making statements or asserting facts on behalf of a client, and must not knowingly obstruct the proper administration of tax laws.

## Files and working papers

4.26 Members must keep proper working papers and files of professional work done to support, for example, the tax return, opinion and other advice given. Members must comply with the SA Tax Standards. It is also compulsory to perform a critical evaluation and apply professional scepticism to the information submitted to the member. For example, a member should scrutinise the bank statements of client taxpayers' for completeness of income declared.

## Responses to request for information by SARS and third parties

4.27 The starting point is that a member owes his employer or client a contractual duty of confidentiality. Although the employer or client's consent to the disclosure of relevant information is normally implied, if there is a real doubt about the information which the member proposes to disclose, it is advised that the member obtain the client taxpayer's consent, unless required by law otherwise.

## Legal professional privilege ('LPP')

4.28 Members must comply with the common law requirement of legal professional privilege as set out under this section

4.29 Under South African law a taxpayer could also refuse to disclose information to SARS should such information be protected. One of the grounds on which a taxpayer may refuse to disclose information under South African law is the so-called legal professional privilege. Legal professional privilege clearly forms an integral part of South African law; however, the precise ambit of this privilege is not always clear.

- 4.30 Schwikkard & Van der Merwe op cit 135–6 which indicate that four requirements have to be met before legal professional privilege may be claimed, namely:
- 4.30.1 the communications that are sought to be protected must have been made to a legal advisor acting in a professional capacity;
  - 4.30.2 the information must have been supplied in confidence;
  - 4.30.3 the information must have been supplied for the purpose of pending litigation or for the purpose of obtaining professional advice; The client must claim the privilege.
- 4.31 In *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) the court accepted that legal professional privilege also applied where an advocate in employment of a firm of auditors gave legal advice to a client.
- 4.32 This position was confirmed in *Mohamed v President of the Republic of South Africa and others* 2001 (2) SA 1145 (C), but held that in-house legal advisers should remain scrupulously aware of the distinction between communications made in that capacity, which would enjoy the protection of legal professional privilege, and communications not made in that capacity, which would not be privileged.
- 4.33 The mere fact that a lawyer member is in possession of confidential information, for example where a non-lawyer member such as an auditor hands over to a lawyer a file containing confidential information, does not create a legal professional privilege (*R v Davies* 1956 (3) SA 52 (A)), as the lawyer member was not consulted to obtain legal advice.
- 4.34 In *Chantrey Martin & Co v Martin* [1953] 2 All ER 691 the Court of Appeal held that communications by and to a chartered accountant were not protected by legal professional privilege.

## Irregularities and errors

4.35 A member must consider the concept of a 'true and fair view' and the fact that it incorporates the concept of materiality. Whether an amount is to be regarded as material depends upon the facts and circumstances in each case, and the consideration must be documented in working paper files. An amount which is not regarded as material for audit purposes may still be material for tax purposes. The concept of a 'true and fair view' incorporates the concept of materiality. Whether an amount is to be regarded as material depends upon the facts and circumstances in each case. An amount which is not regarded as material for audit purposes may still be material for tax purposes.

## Money laundering

4.36 4.36 Members must consider the money laundering statutory reporting requirements. Where members become aware of tax irregularities, they must consider that under the money laundering legislation, fiscal offences can amount to money laundering and act appropriately.

4.37 Members must consider that tax-related offences involve evasion and not avoidance and are not in a special category. Members must consider that tax evasion is a crime, the proceeds of which have to be treated in exactly the same way as those from drug trafficking, theft, fraud, etc. Offences may relate to direct tax such as income tax, or they may relate to indirect tax such as VAT.

4.38 A member who has knowledge of or reasonable grounds for suspecting money laundering must consider whether he has an obligation to make a report to the appropriate authorities.

## Members in employment

4.39 Whilst these guidelines are addressed primarily to members in practice, they apply equally to members employed in professional practice, business and academia.

## Constitution of the Republic of South Africa Act 108 of 1996 ('Constitution')

4.40 Members must consider that the Constitution is the supreme law of the Republic, any law or conduct inconsistent with it is invalid. Of particular significance to members, which must be considered, are the fundamental rights laid down in chapter two of the Bill of Rights, namely:

- 4.40.1 the right to privacy;
- 4.40.2 the right to property and the right not to be deprived of property except in terms of law of general application;
- 4.40.3 no law may permit the arbitrary deprivation of property;
- 4.40.4 the right of access to information held by the State or by another person.
- 4.40.5 a member are not allowed practice discrimination against any person based on race, colour, religion sex, marital status, age or origin in engagement, promotion, dismissal, salary, transfer, training or other practices relating to employment.

## Publicity, Advertising and Solicitation

4.41 A member in public practice ordinarily offers a wide range of professional services and products. For their practices to be conducted in a business-like manner and to compete effectively with individuals and organisations offering similar services and products, it is necessary for the public to be informed of the services and products on offer.

4.42 Publicity and advertising by all members of all services and products is therefore permitted.

4.43 A member preparing or authorising the issue of material for the purpose of publicity, advertising, direct mailing or cold calling of his services and products should do so with a due sense of responsibility to the tax profession and to the public as a whole. In particular, such material should be aimed at informing the public in an objective manner and be in good taste both as to content and presentation. The medium used by the member must be consistent with the dignity of the profession.

4.44 Advertisements should conform to the accepted norms of legality, decency, honesty and truthfulness.

4.45 A member will be personally responsible for ensuring that the provisions of this section are complied with, and that what is published about him or his firm complies with this Code. A member will also be personally responsible for ensuring that all publicity, advertising, direct mailing and cold calling is subject to the limitations and requirements of this Code.

4.46 Direct mailing by all members pertaining to any services and products, is permitted, and provided it complies with the all laws and regulations in South Africa.

4.47 A member may not continue to address direct mail material, for the purpose of offering to perform professional work, to a recipient who has asked him to desist.

#### Responsibilities to colleagues

4.48 A member should conduct himself in a manner which will promote cooperation and good relations between members and within the broader accountancy, legal and tax professions.

4.49 While the Code prescribes certain specific actions in the area of relationships with colleagues, it should be understood that these prescriptions do not define the limits of desirable intra-professional conduct. Such conduct should encompass the professional consideration and courtesies which members would like to have fellow professionals extend to him.

4.50 A member are not allowed to criticise another professional.

4.51 It is natural that a member in public practice will seek to develop his practice. However, in doing so he should not seek to displace another professional in a client relationship by means which will lessen the effectiveness of technical performance, and in particular the integrity and objectivity of opinions or impinge upon the rights of third parties to reliable information. Further, a member should not act in any way that reflects negatively on the profession.

#### Continuing Professional Development ('CPD')

4.52 A member needs to plan and follow a program of lifelong learning. At a minimum, members need to comply with the required CPD By-Law V of the Institute.

## Tax Compliance

4.53 Members must be compliant in their personal tax affairs before attempting to advise or assist the public. Members are required to obtain and submit to the Institute, a tax clearance certificate for “good standing” on an annual basis by 31 January. Members are required to obtain tax clearance certificates for “good standing” on an annual basis.

## Fees

4.54 Fees charged by a member, including a registered tax practitioner, for work undertaken on behalf of a client must be commensurate with the nature and complexity of the task at hand.

4.55 The charging of a contingency fee, for the completion of tax returns, is not an acceptable form of remuneration for tax practitioners. The principles of the Contingency Fees Act, 1997, should be considered when a contingency fee is to be agreed upon in other circumstances.