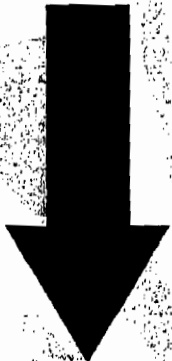


# SARS clamps down



## on transfer pricing disclosures



**N**ew disclosure requirements for companies relating to transfer pricing have recently been issued by SARS. And those companies who don't comply with these requirements will face criminal charges.

The main new requirement is that it is compulsory for all companies with international transactions with related companies and persons, to attach a transfer pricing policy document to the IT14 Form for submission to SARS. In terms of the wording of section 65, it's clear that SARS has an absolute discretion to require companies to do this. Section 75 essentially prescribes penalties for non-compliance with these formalities in the form of a fine or imprisonment for a maximum of 24 months. These new requirements apply to all companies, irrespective of their size.

policy document. Although South Africa has had this legislation in place since 31 July 1995, SARS has been slow in issuing detailed transfer pricing compliance guidelines. For example, SARS only issued a Practice Note in this regard some four years later, which did not contain any such requirement.

The first mention of the requirement to submit a transfer pricing policy document was in the 2002 Income Tax: Information Brochure (IT14B), in which the company was required to "furnish" its transfer pricing policy if it had any international transactions with a connected person.

Until last year, it was unclear whether it was compulsory to have a transfer pricing

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However, the 2002 IT14 Form didn't refer to the Information Brochure when stipulating what supporting schedules were required to be submitted with the return, which resulted in uncertainty as to whether taxpayers were required to submit their transfer pricing policy documents with the 2002 IT14 Form. This, despite the fact that in terms of section 65 of the Income Tax Act, the Commissioner is entitled to prescribe any information necessary to come to an assessment of tax due.

This uncertainty continued in relation to the 2003 IT14 Form. The Income Tax Guide 2003 is also numbered IT14, supporting the argument that the tax return and the brochure are one and the same document. The 2003 tax return also specifically refers to the schedules requested in the Income Tax Guide. This also forms part of the declaration of the public officer that all the information, as well as the details and schedules requested have been furnished. So SARS has argued that it was compulsory to attach a transfer pricing policy document to the 2003 IT14. Many advisors did not agree with SARS, as the actual 2003 IT14 form did not require the company to attach its transfer pricing policy document.

**It is now compulsory to submit a transfer pricing policy document, failing which, penalties will apply.**

The new 2004 IT14 Form itself, in part 15, now clarifies the position by requiring the company to furnish the information stipulated in the accompanying brochures. This fact, together with declarations for 2004 which are similar to those described in respect of the 2003 IT14 Form, makes it clear that it is now compulsory to submit a transfer pricing policy document, failing which, penalties will apply.

SARS has also, through SAICA, recently issued a notice that with effect from tax years commencing on or after 1 January 2004, where the Commissioner has prescribed

a certain form or has stipulated that a particular schedule of information must be attached to the tax return, and where the taxpayer has ignored this requirement, SARS will regard that particular tax return as not having been submitted. SARS is empowered to do this in terms of section 65 read with section 74A of the Income Tax Act. The result would be the same in that the stipulated penalties could be imposed.

Now that it is clearly obligatory to prepare and submit a transfer pricing policy document, the question that arises is: What exactly is a transfer pricing policy document? It is not defined in the Income Tax Act and is only mentioned once in SARS Practice Note 7 on Transfer Pricing. It is also not described in the SARS Information on Income Tax brochure.

According to Olivier *et al* in the book *International Tax: A South African Perspective*, in terms of SARS's documentation guidelines and the latest general questionnaires sent to taxpayers, a transfer pricing policy document should include:

- An identification of the relevant transactions in terms of international agreements with connected parties, and the extent of any other commercial or financial relations with connected persons within the scope of section 31;
- Copies of the international agreements entered into with connected parties;
- A description of the nature and terms, including prices, of all relevant transactions, including a series of transactions and any off-setting transactions;
- The method that has been used to arrive at the nature and terms of the relevant transaction, including transactions and to the particular circumstances;
- An explanation of the process used to select and apply the method used, to

establish the transfer prices, and the reason why it is considered to provide a result that is consistent with the arm's length principle;

- Information relied upon in arriving at the arm's length terms such as commercial agreements with third parties, financial information, budgets and forecasts; and
- Details of any circumstances that may have influenced the prices that have been set.

The above guidelines of what a transfer pricing policy document should contain are not law and a certain amount of uncertainty therefore remains.

From the above, it is clear that the income tax disclosure requirements for corporate taxpayers have increased substantially, and companies will have to commence preparing their transfer pricing policy documents immediately in order to prevent the imposition of penalties.

Thankfully, the above relatively onerous transfer pricing disclosure requirements only apply to companies, and not to individuals and trusts. <sup>ASA</sup>

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