

**THE REGULATION OF TAX PRACTITIONERS IN SOUTH
AFRICA: A PROPOSED MODEL**

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ABSTRACT

Tax practitioners in South Africa have been operating in an unregulated tax industry. This has allowed certain tax practitioners to fail in their duties to their clients, as many do not have to abide by any code of conduct or ethical principles, to the detriment of the public. Other than the provisions in the Income Tax Act, 58 of 1962, there has been no regulation. As a result of losses suffered by taxpayers either through the incompetence, ignorance or negligence of a tax practitioner, as substantiated by case law, and increased costs borne by the South African Revenue Services due to unnecessary queries and tax disputes, the Minister of Finance, Trevor Manuel, introduced the concept of tax industry regulation in his Budget Speech in 2002. This resulted in the introduction of section 67A into the Income Tax Act, providing for a registration process for tax practitioners. All practising tax practitioners were required to register with the Commissioner for the South African Revenue Services by 30 June 2005. In addition, a discussion paper was issued in 2002 setting out the proposal of the Revenue Services to regulate the tax industry through the formation of an Association of Tax Practitioners. This proposal includes various contentious issues and casts significant doubt on whether the proposed model is the most suitable. The goal of the research was therefore to evaluate the current status of tax advisory services in order to demonstrate the need for regulation and to compare the proposed SARS model with two established regulatory authorities: the Estate Agency Affairs Board and the Australian Tax Agents Board. A conceptual model for regulation was developed in order to test all the models against a simple regulatory framework to determine whether each was aligned to certain best practices proposed in this framework. The research methodology was qualitative in nature, involving the critical interpretation of documentary data and data generated during a public discussion forum of tax practitioners. It was concluded that the SARS proposal is too prescriptive and, at the same time, too broad in its scope. In order to address the key objective, identified as protection of the taxpaying public, a simplified regulation procedure was recommended, which would adhere to the proposed regulatory framework.

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CHAPTER 1 – INTRODUCTION: CONTEXT, GOALS AND RESEARCH METHODS

Introduction and background

The proposed regulation of tax practitioners in South Africa was first introduced by Trevor Manuel in his budget speech in 2002, in which he indicated “that the South African Revenue Services (SARS) would initiate discussions on the appropriate regulation of tax consultants and advisors in South Africa in order to promote compliance and ensure that taxpayers receive advice consistent with tax legislation” (SARS, 2005a:1). This subsequently resulted in an amendment to the Income Tax Act 58 of 1962 (the Act), by the introduction of section 67A into the Act, through the Revenue Laws Amendment Act, 2004, promulgated on 24 January 2005. Section 67A (1) of the Act reads as follows:

Every natural person who (a) provides advice to any other person with respect to the application of the Act administered by the Commissioner; or (b) completes or assists in completing any document to be submitted to the Commissioner by any other person in terms of such Act, must register with the Commissioner as a tax practitioner in such form as the Commissioner may determine ...

This registration of tax practitioners is the first step to be taken in the ultimate regulation of the tax industry. Once SARS has collected this data they have “indicated that their intention is to establish a tax board that will regulate tax practitioners and legislation effecting this regulation will be introduced at a later state, possibly late in 2005” (Smith, 2005:1). Regulation of the tax industry in South Africa could have many benefits and should aim to achieve these. One benefit is that regulation might be able to assist SARS in the policing of compliance and prevent the overburdening of the tax courts with unnecessary tax disputes, thereby increasing efficiency and saving money for all parties. In addition it could help to protect taxpayers by ensuring that responsible, ethical and correct tax advice is provided on tax matters and to protect ethical tax practitioners from

unqualified tax practitioners who previously may have deprived them of work or damaged the reputation of tax practitioners in general through unscrupulous tax advice. SARS issued a discussion paper in 2002 setting out its proposal relating to how the tax industry should be regulated. The foundation of this proposal was that a “regulated professional monopoly for tax practices, similar to the professional monopoly that auditors and lawyers enjoy in many countries” (Du Plessis, 2003:9) be established. It was proposed that an Association of Tax Practitioners (the Association) be formed that would have “its own legal persona and would be run by the stakeholders themselves. SARS would be an important stakeholder but would not be the regulator” (SARS, 2002b:14). The discussion paper went on to state how the Board governing the Association would be represented and operated, what the objectives of the Board would be, of particular relevance being that the Board is “to co-operate at all times with SARS and the National Treasury” (SARS, 2002b:14), the various categories of membership within the Association and qualifications or experience necessary to become a member.

This proposal contained various contentious issues and caused many areas of concern for both taxpayers and tax practitioners relating to the possible impact of this regulation. It lacked key elements in certain areas. For example, in an article by PriceWaterhouseCoopers (2005:6-7) the writer referred to the fact that “nowhere in the literature thus far provided by SARS on the proposed regulation of tax practitioners is it expressly stated that one of the objectives is to subject tax practitioners to sanctions if they advise or assist their clients in relation to tax avoidance schemes”. The concern was expressed that SARS would possibly include additional objectives once the registration process had been completed and then later disclose additional requirements attached to regulation. These various issues therefore cast significant doubt on whether the proposed SARS model is in fact the most suitable model for South Africa. A comment made by Izel Du Plessis (2003:9) is that “an important function of the regulation of tax practitioners is to strike an appropriate balance between loyalty to the tax system and the client ... it also has several other objectives, such as protecting clients from unscrupulous or incompetent tax practitioners”. She further stated that the “current proposal tends to over-compensate for past wrongs and leans towards being too severe, which may in itself

render the proposal non-executable in practice”. With the possibility of the current proposal being non-executable it is therefore necessary to consider alternative models and evaluate their effectiveness in achieving the regulation of the tax profession in South Africa. The South African Institute of Chartered Accountants (SAICA) took the initiative in conducting regional visits with members to discuss various aspects of the proposed regulation in order to put forward recommendations to SARS on how to amend the proposed model to better fit South Africa and to achieve the desired outcomes. SAICA used the Estate Agency Affairs Board (EAAB) as the regulatory model as a basis for comparison with the model that SARS has envisaged. In the Proposed Regulation of Tax Practitioners Discussion Document issued by SAICA (2005:1) it clarified the purpose of the EAAB in that:

The EAAB states that its role is neither to protect the regulated industry nor to protect the consumers at all cost. Instead, its role is to protect the public interest by assuring every individual’s right to justice and equal treatment whether that individual is a consumer or estate agent practitioner.

In terms of the Estate Agency Affairs Act, 112 of 1976, the objects of the board are to “(a) maintain and promote the standard of conduct of estate agents, and (b) regulate the activities of estate agents”.

A further model on which SAICA based its discussions was that of the Tax Agent’s Board in Australia. This Board is more functional than that of the EAAB and sets out general responsibilities of tax agents, their qualification requirements, certain disqualifications and punishments for offences. It is responsible for determining “the suitability of applicants to be registered as tax agents, dealing with complaints about tax agents and ensuring that proper standards are maintained across the tax agent profession” (Australian Tax Agent’s Board: 2005).

In addition, besides the evaluation of the SARS proposal against the abovementioned two existing authorities, the researcher considered it to be necessary to establish a framework

for the regulation of the tax industry, against which the various regulatory models could be evaluated. This would help to determine if the proposals are in compliance with the best practices suggested by the framework and assist in the identification of gaps or weaknesses contained in each proposal. This will aid in demonstrating the most appropriate model on which to base tax regulation in South Africa, with the possibility of the SARS model being non-executable in practice as mentioned above.

The problem, however, remains that after three years of discussions there is still no certainty as to what the regulation will ultimately entail and how the regulating body will be operated and governed. In addition, tax practitioners have no clarity as to who would be entitled to solicit for tax advisory services and once registered as a tax practitioner up to what level advice could be provided. This gives rise to serious concerns for chartered accountants, lawyers and members of other accounting institutes. In addition it is uncertain what protection the new legislation would provide to the taxpayer to ensure that he or she would now be getting a professional service different from what was provided before. It was emphasised in a SAICA tax update seminar conducted in 2005 that over the years many taxpayers had fallen victim to poor tax advice. This is further corroborated by Professor George Goldswain in his research thesis entitled “Remission of Penalties in Income Tax Matters”, in which he made reference to a number of tax cases where the taxpayer had suffered as a direct result of poor or negligent advice on behalf of the advisor. One such case referred to in the thesis (2003:108 and 109) is that of *CIR vs BP Miller*¹ where:

the taxpayer, a pharmacist, appointed a certain firm of accountants on the advice of his bankers to oversee his business accounts and to attend to his income tax returns. He testified that he gave his accountants all the information they required. However, when he was investigated, he realised that the correct figures had not been disclosed in this tax returns. The Special Court determined the penalty with reference to the fact that the taxpayer at all times relied on his accountants and made all documentary evidence and bank statements available to

¹ 56 SATC 1

them. The Cape Provincial Division confirmed the Special Court's decision, which was to remit the penalty imposed by the Commissioner from approximately R250 000 (a 100% penalty or 50% remission) to approximately R125 000 (a 50% penalty or 75% remission).

Ongoing allegations of abuse by tax practitioners appear to emphasise the need for regulation. On the other hand, there may be advantages as well as disadvantages for taxpayers in an unregulated profession.

It is therefore the uncertainty and the flaws in the current SARS proposal that led to this research on the regulation of the tax industry. The research evaluates the proposed model of regulation, explores alternative models that could be implemented and compares the alternative models and that of SARS against a simple regulatory framework. The research attempts to highlight the most appropriate model that would seek to be to the benefit of both the taxpayer and tax practitioner in South Africa and achieve desired outcomes such as the protection of taxpayers, assisting SARS with regard to compliance and the protection of ethical tax practitioners from the unscrupulous, amongst others.

Goals of the research

The goals of the research were:

1. to evaluate the current situation of an unregulated tax profession in South Africa, in order to demonstrate the need for regulation to offer protection to all the interested parties in the system;
2. to develop a basic regulatory framework against which the other regulatory models could be evaluated;

3. to analyse the proposed SARS model for regulation and to compare it with the EAAB model and the regulation methods used by the Australian Tax Agents' Board;
4. to test all the models being evaluated against the desired outcome of "achieving balance : a balance between abuse and monopoly, a balance between market forces and legislation and a balance between the interests of SARS, taxpayers and tax practitioners" (Du Plessis, 2003:9) through the use of the simple regulatory framework; and
5. to recommend the most appropriate model for the regulation of tax practitioners in South Africa.

Research methods, procedures and techniques

The research methodology was qualitative in nature, involving the critical interpretation of documentary data and data generated at a discussion forum of tax practitioners.

The data and the methods used to collect and generate the data were as follows:

- documentary records, principally
 - the Discussion Paper issued by SARS on the regulation of tax practitioners;
 - the Estate Agency Affairs Act, 112 of 1976;
 - documents relating to the regulation of tax practitioners in Australia;
 - the codes of conduct of professional bodies in South Africa, including SAICA and the legal profession amongst others; and
 - the Income Tax Act.
- a synopsis of the views of presenters and participants at a discussion forum on the regulation of tax practitioners, held in the Eastern Cape with tax practitioners and SAICA.

The data was subjected to an in-depth analysis in order to identify common and contrasting themes and relationships between themes with which to inform the process of identifying a model most appropriate to address the issues revealed by the analysis.

Conclusion

This chapter has provided an overview of the issues at hand relating to the regulation of tax practitioners, a synopsis of the research topic and problems surrounding the area of research. It provided background information as to why this area of research was chosen, what the goals of the research were and the methods and procedures utilised to conduct the research. The next chapter explores in further detail the background to the regulation process by investigating the current status of the tax profession, identifying why the need for regulation arose and the steps taken thus far in the regulation process.

Each of the chapters that follow discuss the various components of the research process:

- evaluating the SARS regulation model against a basic regulatory framework developed by the researcher for this purpose;
- evaluating the Estate Agency Affairs Board model and comparing it with the SARS model;
- evaluating the Australian Tax Agents Board model and comparing it with the SARS model;
- comparing all three models with the conceptual regulatory framework; and
- making recommendations for a regulation model that will meet the needs of the South African taxpaying public and address the concerns expressed by persons and bodies in writing and in a discussion forum.

CHAPTER 2 – THE CURRENT STATUS OF TAX ADVISORY SERVICES IN SOUTH AFRICA AND THE FIRST STEPS TO REGULATION

Introduction

As discussed in the preceding chapter, the need for the regulation of the tax industry was announced by Trevor Manuel in his budget speech of 2002 where he indicated that regulation of the tax industry was necessary in order to “promote compliance and ensure that taxpayers receive advice consistent with tax legislation” (SARS, 2005a:1). His announcement therefore created the impression that problems were being experienced with the current system and that taxpayers were not, in all instances, receiving advice consistent with tax legislation. This chapter aims to explore the current tax advisory system and to identify why the need arose for the regulation of the tax industry.

The current tax advisory system

Historically South Africa has followed an unstructured approach to the regulation of tax services and “many tax practitioners have abused this situation” (Du Plessis, 2003:4). A large number of tax practitioners are not required to be registered with a professional organisation such as SAICA or the South African Law Society and therefore do not have to abide by any code of conduct or ethical principles. A further significant problem according to SARS (2002b:2) is that “no minimum standard in respect of qualifications or experience is required for tax practitioners” to operate and provide advice. Tax practitioners range from those who are qualified chartered accountants, advocates and lawyers to those who might have a bachelor of commerce degree, a diploma or simply a matriculation certificate. Due to the fact that anyone in South Africa is allowed to provide tax advice and practise as a tax practitioner, taxpayers have little protection from those unprofessional advisors who provide advice and once payment is received, disappear before SARS can start investigating and making enquiries. The fact that not every tax practitioner has a degree does not make those without a degree incompetent, as many may have been practising in the tax arena for years and have more practical

experience than those with a degree. It is, however, the few unscrupulous tax advisors who are abusing the system that would require regulation to be instituted in order to offer better protection to the taxpayers and uphold the good name of tax professionals. If there are errors in a tax return either through deliberate misstatements or negligence, this has consequences for both SARS and the taxpayer. "From SARS's perspective this means a great deal of time and energy is spent unnecessarily and inefficiently in correcting errors made or addressing the unprofessional conduct of a small but significant number of tax practitioners" (SARS, 2002b:2). This results in the wastage of money collected from the general body of taxpayers, which could be applied more effectively by the State.

Secondly, "from a taxpayer's perspective the unprofessional conduct of a tax practitioner may place either his or her funds and good reputation at risk" (SARS, 2002b:2). In most cases a taxpayer would seek tax advice from a 'professional' in order to arrange his or her tax affairs in such a manner so that he or she would be able to avoid tax legally. This desire to pay less tax is what unscrupulous tax advisers could take advantage of. The technical quality of advice provided in order to ease the taxpayer's burden and thus save money is not normally questioned by the taxpayer as the 'professional' is deemed to have the requisite knowledge. If this advice, however, proves to be incorrect, it is the taxpayer in most instances who will face the wrath of SARS, as the taxpayer is ultimately responsible for the information in his or her tax return. As soon as the taxpayer is found by SARS to be providing incorrect information, he or she could be labeled by SARS as unethical and placed under its 'watchful eye'. SARS (2002b:2) further states that "the South African Institute of Chartered Accountants has noted that it has received 'many complaints' from members of the public for poor performance or other problems encountered with accountants related to people not registered with SAICA". The consequences of an unregulated tax industry was emphasised in a SAICA tax update seminar conducted in 2005 (SAICA, 2005:79), where "war stories" of unregulated tax advisors were related. The presenter made anecdotal reference to cases of blatant theft of tax payments, to grossly negligent preparation of tax returns and to giving advice "that would have failed a first year tax student". In addition, case law has accumulated over the years recording evidence of instances where a taxpayer has suffered either through

the incompetence, ignorance or negligence of a tax practitioner. Goldswain (2003), in his thesis entitled “Remission of Penalties in Income Tax Matters” made reference to a number of these cases. One such case documented in the research Goldswain (2003:102 and 103) is *CIR vs Da Costa*² where:

the taxpayer, an immigrant of humble origin, entrusted his tax affairs to a firm of accountants that used a “short cut” method to determine his income. As a result, there was an under-declaration of income. Although conceding that the taxpayer had no intention to deceive, the Commissioner submitted that the taxpayer should be penalised for the deceit of his agents.

The Special Court found that the deceit of the accountants should be imputed to the taxpayer, but found at the same time that the reliance by the taxpayer on the accountant was an “extenuating circumstance” and substantially remitted the 100% penalty imposed by the Commissioner.

The Appellate Division was not convinced that the deceit of the accountant should be attributed to the taxpayer in the circumstances, but found that it was not necessary to decide the point, because the penalty imposed by the Special Court was reasonable. The Special Court had imposed a penalty of R3 000 in the place of the 100% penalty of approximately R16 000 imposed by the Commissioner.

In a further special court case, *ITC 1540*³, the taxpayer’s defense was that the non-disclosure of certain revenue was as a result of the “dishonesty and incompetence of his previous accountant” (Goldswain, 2003:108). The penalty in this case was reduced by 15 percent, but in this instance the “incompetence of the previous accountant was not specifically mentioned as one of the circumstances that contributed towards the remission of the penalty” (Goldswain, 2003:108).

² 47 SATC 87

³ 54 SATC 400

Due to the fact that the final responsibility for the tax return legally rests with the taxpayer, as the tax consultant bears limited responsibility, in the types of cases mentioned above the taxpayer carries the burden of defense against an attack by SARS and tries to recover what he or she can from the advisor. It was further emphasised in the SAICA tax update seminar (SAICA, 2005:79) that over the years many taxpayers have fallen victim to poor tax advice, which makes it difficult for another professional consultant to effect “damage control” and to try and plead with the SARS officials to “go easy” on the taxpayer who in good faith had accepted the advice provided by the unscrupulous tax advisor. In the United States case of *Estate Sprull v Commissioner*⁴ the court had the following to say:

When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a “second opinion”, would nullify the very purpose of seeking the advice of a presumed expert in the first place ...

Taxpayers, in good faith, rely on the expertise of the professional and are not expected to question the advice provided. This approach, however, cannot be followed in an unregulated environment as there is no distinction between the competency and ethics of various people providing advice. Those looking simply to make money could take advantage of the lack of regulation and the good faith of taxpayers.

Current measures providing recourse for taxpayers

Although South Africa does not regulate tax practitioners in the sense of a code of conduct or a qualification requirement, certain provisions contained in tax legislation may be applied in respect of tax practitioners acting on behalf of the taxpayer. For example, section 73 of the Act deals with the duty of a person who prepares accounts on behalf of

⁴ 88 TC 1197 (1987).

another person in support of a tax return and the requirements to be complied with by this individual. Section 73 reads as follows:

- (1) If any person submits in support of any return furnished by him under this Act any balance sheet, statement of assets and liabilities or account prepared by any other person, he shall, if the Commissioner so requires, submit a certificate or statement by such other person recording the extent of the examination by such other person of the books of account and of the documents from which the books of account were written up, and recording in so far as may be ascertained by such examination, whether or not the entries in such books and documents disclose the true nature of any transaction, receipt, accrual, payment or debit.
- (2) Any person who has prepared any balance sheet, statement of assets and liabilities or account for any other person shall, at the request of such other person, furnish him with the certificate or statement required under subsection (1).

This section therefore offers some protection to the taxpayer in that the individual preparing the supporting documentation takes responsibility for this documentation and provides a statement confirming this to the Commissioner. Should the taxpayer suffer a loss as a direct result of relying on such evidence, the Commissioner may consider that extenuating circumstances exist and accordingly reduce the penalty to be imposed.

In addition to the above section, the annual income tax return submitted by all taxpayers itself contains a section where it requires the person who prepared the return or supporting schedules on the taxpayer's behalf to sign the return and complete a declaration.

Section 75 of the Act sets out the penalty that will be imposed if any of the following occur:

- (a) any person who neglects to furnish, file or submit any return or document as

- and when required by or under this Act; or
- (aA) any person who fails to register as a taxpayer or to inform the Commissioner of any change in address as contemplated in section 67; ...
 - (d) fails to show in any return prepared or rendered by him on behalf of any other person any portion of the gross income received by or accrued to or in favour of such other person or fails to disclose to the Commissioner when preparing or making such return, any facts which, if so disclosed, might result in increased taxation; ...
 - (g) submits or furnishes a false certificate or statement under section *seventy-three*; ...
- shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 24 months.

In addition to the above sections, where a tax practitioner is a member of a profession, a complaint can be lodged with the professional institution for investigation and possible disciplinary action may result. If the taxpayer is a victim of unsolicited tax advice “the South African Revenue Services (SARS) or a taxpayer may report unprofessional conduct of that practitioner to the profession to which he or she belongs. Unfortunately, however, existing codes of professional conduct are not normally tax specific and professional bodies may encounter difficulties when prosecuting misconduct with specific reference to tax” (SARS, 2002b:2). Section 105A(2) of the Act currently provides some recourse for a taxpayer receiving advice from a professional. Section 105A(2) of the Act reads as follows:

Where any person who carries on any profession, calling or occupation in respect of which a controlling body⁵ has been established has, in relation to the affairs of any taxpayer, done or omitted to do anything which in the opinion of the Commissioner –

- (a) was intended to enable or assist such taxpayer to avoid or unduly postpone the performance of any duty or obligation

⁵ Any professional association, body or board that has been established.

imposed on such taxpayer by or under this Act, or by reason of negligence on the part of such person resulted in the avoidance or undue postponement of the performance of such duty or obligation; and

- (b) constitutes a contravention of any rule or code of conduct laid down by the controlling body which may result in disciplinary action being taken against such person by that body,

the Commissioner may lodge a complaint with the said controlling body.

Section 105A(4) of the Act provides further that “the complaint shall be considered by the controlling body to which it is made and may be dealt with by it in such manner as the controlling body in terms of its rules sees fit”. For example, if a taxpayer received advice from a chartered accountant which was incorrect, the taxpayer would have the right to lodge a complaint with the Commissioner who would in turn inform SAICA. In terms of section 105(A) (4) SAICA would deal with the complaint in such manner as it would see fit. The problem, however, remains that most controlling bodies have a code of conduct which in itself prohibits members from unlawfully soliciting tax advice and provides recourse to clients of its members should any suffering occur. In most instances, however, “complainants are not always aware of the code of professional conduct binding a member of a particular profession. Without this knowledge complainants are not in a position to evaluate whether a tax practitioner’s conduct is in breach of the particular code of professional conduct that might bind him/her” (SARS, 2002b:2). For example, there is specific reference made to tax practice in the code of conduct that is required to be upheld by chartered accountants. Section 6 of the SAICA code of professional conduct (2002:20-23) dealing with tax practice encompasses the following onerous requirements:

1. A tax consultant should put forward the best position in favour of a client, provided he/she does so:
 - 1.1 with professional competence, integrity and objectivity,

1.2 within the bounds of the law.

Doubt may be resolved in favour of the client/employer if there is reasonable support for the position.

2. A member (etcetera) should ensure that the client/employer understands that:
 - 2.1 tax services and advice offered may be challenged where they are based on opinion rather than fact, as is often the case,
 - 2.2 responsibility for the content of the tax return rests with the client/employer even where the return has been prepared by the member.
3. Material matters relating to tax advice/opinions given to client/employer, should be recorded in writing.
4. A member should not be associated with any return or communication which is suspected to:
 - 4.1 contain false or misleading statements,
 - 4.2 contain statements or information furnished recklessly with regard as to their truth or falsity,
 - 4.3 omit or obscure information in such a way as to mislead the revenue authorities.
5. A member may use estimates in the preparation of tax returns, if:
 - 5.1 exact data cannot be obtained,
 - 5.2 such estimates are generally acceptable,
 - 5.3 it is made clear in the returns that they are estimates and not exact figures,
 - 5.4 he or she is satisfied as to the reasonableness of the estimate.
6. In preparing a tax return, a member may rely on information furnished by the client/employer, provided:
 - 6.1 the information appears reasonable;
 - 6.2 the member makes use of the client/employer's returns for prior years where feasible;
 - 6.3 The member makes reasonable enquiries when information appears incorrect or incomplete.

Members are, however encouraged [not required] to:

- request the supply of supporting data,
 - make reference to relevant books and records of the business operations.
7. Where a member learns of a material error or omission relating to tax returns of prior years, the client/employer should be advised promptly, to disclose this to the Receiver,
 - 7.1 The member may not personally inform the Receiver without the permission to do so from the client/employer.
 8. Where such an error is not corrected, the member should :
 - 8.1 decline to perform further services related to the erroneous information,
 - 8.2 consider resigning from the relevant client/employer, and
 - 8.3 follow the process recommended in (2.3) above relating to the resolution of ethical conflicts.
 9. Where the member continues to act for the client/employer, he/she should attempt to ensure that the error is not repeated in subsequent tax returns.

If any of the above requirements are not upheld by a tax practitioner bound by this code, the taxpayer has a right to lodge a complaint with the professional body. The professional body would then seek suitable disciplinary action. The problem, however, remains that where a tax practitioner does not belong to a profession then he or she can solicit any type of tax advisory work that he or she wishes and the only recourse available to the taxpayer in this instance is civil action for damages if loss is suffered. Where the tax advisor is a “man of straw”, this would provide no protection against such a loss. The Commissioner will therefore not be able to apply the provisions as set out in section 105A(4) of the Act, to these tax practitioners and it is this group of unregulated tax practitioners that would represent a more serious concern for taxpayers.

The first step to regulation

As highlighted in the preceding paragraphs the current tax advisory system has little or no regulation and offers limited protection for taxpayers. The factors identified above and the fact that South Africa requires a well-functioning tax system in order to be fully effective, brought about the need for regulation of the tax industry. The first step taken after the announcement of the regulation by Trevor Manuel in his budget speech of 2002 was a subsequent amendment to the Act, by the introduction of section 67A, through the Revenue Laws Amendment Act, 2004 promulgated on 24 January 2005. Section 67A (1) of the Act reads as follows:

Every natural person who (a) provides advice to any other person with respect to the application of the Act administered by the Commissioner; or (b) completes or assists in completing any document to be submitted to the Commissioner by any other person in terms of such Act, must register with the Commissioner as a tax practitioner in such form as the Commissioner may determine ...

In terms of this section all existing tax consultants and advisors were required to be registered with SARS by the 30 June 2005. Persons providing tax advice for the first time are required to register within 30 days of doing so. Section 67A(2), subsequently amended by the Revenue Laws Second Amendment Bill (2005) released on 7 November 2005, also provides details of individuals who are not required to register, namely a person who:

- a) provides advice or completes or assists in completing any document, as contemplated in subsection (1), solely for no consideration to that person or his or her employer or a connected person in relation to that employer or that person;
- b) provides advice contemplated in subsection (1) solely in anticipation of or in the course of any litigation to which the Commissioner is a party or where the Commissioner is a complainant;

- c) provides advice contemplated in subsection (1) solely as a incidental or subordinate part of providing goods or other services to another person;
- d) provides advice or completes or assists in completing any document, as contemplated in subsection (1) solely –
 - i. to or in respect of the employer by whom that person is employed on a full-time basis or to or in respect of that employer and connected persons in relation to that employer; or
 - ii. under the direct supervision of any person who is registered as a tax practitioner in terms of subsection (1); or
- e) provides advice solely with respect to the application of the Customs and Excise Act, 1964 (Act No. 91 of 1964), or completes or assists in completing any documents for purposes of that Act.

Section 67A therefore defines a tax practitioner by specifying the functions of such a person: providing advice in relation to any taxation act and completing or assisting to complete any document to be submitted to the Commissioner. It is noteworthy that only natural persons are required to register and this raises questions relating to the status of incorporated bodies providing tax services.

In order to assist with the registration process, SARS developed a registration form called a TP-1 in 2005 for the specific purpose of registering as a tax practitioner or changing registered particulars. The information required to be completed on this form are: the personal particulars of the tax practitioner, the income tax reference number and the date of commencement of completion of tax returns or the provision of advice to the public. In the case of a tax practitioner trading under a business vehicle, for example a close corporation or trust, the details of the business vehicle is required together with the income tax and pay-as-you-earn (PAYE) numbers. The third section of the form requires that the tax practitioner indicate what his or her qualifications are and the highest level obtained at a tertiary institution. Further details requiring completion are particulars of membership with professional bodies including the membership number, the number of clients of the tax practitioner and an indication of the nature of work done. The section

regarding the nature of work is split into four categories: return preparation and completion, planning, opinions and dispute resolution. This is then further split into various tax categories: individuals, provisional tax, trusts, PAYE, customs and estate duty, for example. In addition, the taxpayer is required to indicate his or her major focus area being either return preparation and completion, planning, opinions or dispute resolution and finally a declaration concerning the trueness and correctness of information supplied in the TP-1 form is required to be completed and signed by the tax practitioner. On completion, the tax practitioner can then either submit the form manually or electronically. On receipt SARS will confirm the registration and provide a registration number for the practitioner. This number is to then be utilised on all correspondence with SARS.

A concern raised by a member during the SAICA discussion forum held in 2005 was the uncertainty of what SARS would do with the information once a tax practitioner had registered, specifically with regard to secrecy and the use of information for alternate purposes, for example for SARS to select a sample of tax practitioners and audit these. SARS however, has indicated that the purpose of the registration process is to enable SARS to collect data on the number of existing tax practitioners and details of their qualifications, experience, number of clients, nature of work performed and whether they belong to an existing professional body. This would help SARS in identifying the type of tax practitioner presently providing tax services in South Africa and assist SARS to make better informed decisions regarding the system that would ultimately be used for the regulation of tax practitioners. According to SARS (2005c:1) “no provision is made in the legislation for the refusal of registration of a person who is providing advice in respect of tax matters or who is completing or assisting with the completion of tax documents ... A person’s educational qualifications, experience, type of tax advice or services provided or the volume of services provided, does not affect registration”. In order to ensure that all the necessary information is provided, a penalty for non-registration was introduced and should a tax practitioner not register he or she may face a fine or imprisonment for up to twenty-four months. Once SARS has collected this data they have then “indicated that their intention is to establish a tax board that will regulate

tax practitioners and legislation effecting this regulation will be introduced at a later stage, possibly late in 2005” (Smith, 2005:1). Registration therefore only confirms that a tax practitioner is a “registered tax practitioner with SARS as required by law. It is not an indication of ... competency, level of skills or experience acquired. Hence registration or a registration number may not be used for advertising purposes, to attract, obtain or retain clients” (SARS, 2005d:1).

Conclusion

As discussed in the paragraphs above the regulation of the tax industry could help to enforce a well-functioning tax system in South Africa. In order to be effective tax practitioners will be relied upon heavily as “they play a critical role in assisting the taxpayer to fulfill their complicated tax obligations and often act as intermediaries between taxpayers and tax authorities” (Du Plessis,2003:9). Du Plessis (2003:9) further states that it is “an important function of the regulation to strike an appropriate balance between loyalty to the tax system and the client”. A proposed model on the regulation of the tax industry in South Africa was distributed by SARS in 2002 for comment. This proposed model is evaluated in the following chapter in order to determine if it will have the desired effect and will effectively address the concerns of the taxpayers and the tax practitioners in the country.

CHAPTER 3 – EVALUATION OF THE PROPOSED SARS MODEL OF REGULATION

Introduction

As highlighted in the preceding chapter the need for regulation of the tax industry has arisen due to perceived abuse of the current system by tax practitioners and in order to achieve a well-functioning tax system within South Africa, amongst other factors. Regulation of the industry has many objectives, “such as protecting clients from unscrupulous or incompetent tax practitioners, increasing administrative efficiency and improving the integrity of the tax system” (Du Plessis, 2003:9). In the opinion of the writer of this thesis, regulation will assist SARS in policing compliance and protecting the tax base and will assist to protect the ethical tax practitioners from unqualified tax practitioners who currently deprive them of work and damage their reputation. In addition it could prevent the overburdening of the tax courts with unnecessary tax disputes, thus increasing efficiency and saving money for all parties. The regulation of tax practitioners should also be supported due to the fact that currently “a large number of tax practitioners are not required to be registered with a professional organisation that has professional conduct rules in place as well as disciplinary steps that can be taken against defaulting members” (Dijkman, 2003:1).

This chapter proposes a simple regulatory framework against which various regulation models can be evaluated. The proposed SARS model for regulation is also discussed.

A framework for regulation

The degree to which any industry is regulated lies on a continuum, the extreme points of which are no regulation and full state control. A regulated industry may rely purely on self-regulation which, in its turn, may be voluntary or legislatively imposed. The philosophy underlying the need for regulation is an important consideration: a state which favours strong central control will impose the strongest form of regulation, whilst a state

favouring economic freedom will impose no regulation at all, but would rely on market forces. As taxation revenue constitutes the major source of state revenue in South Africa, the need to protect the tax base would appear to suggest that there would be a tendency towards a stronger form of regulation.

In broad terms, and from the point of view of SARS (refer to Trevor Manuel's 2002 budget speech where the need for regulation was stated as follows: to "promote compliance and ensure that taxpayers receive advice consistent with tax legislation"), the objectives of regulating tax practitioners would appear to be:

- the protection of the tax base; and
- the protection of the taxpaying public.

These would be appropriate regulatory objectives for tax practitioners as well, with the second objective assuming primary importance. In the case of SARS, the first objective would be more important.

In a report commissioned by the *Policy Board for Financial Services and Regulation* (a Ministerial Advisory Board which was created by an Act of Parliament in 1993), Falkena, H. et al (2000:2) stated the view of the Task Team which drew up the report that "the regulating authorities and the regulated parties both have an interest in the creation and maintenance of an effective and efficient system of regulation ...". This opinion was expressed in relation to regulation of the financial sector, but applies equally to the tax system. An effective regulatory system will be one which achieves the objectives of regulation and an efficient system will be cost-effective, in other words, the benefits will exceed the costs. The costs of regulation would comprise the costs of compliance and the costs of non-compliance. Measuring the costs of regulation would not be too difficult, comprising costs relating to the regulation system itself, which would be passed on to the tax clients, as well as the legislative penalties imposed for infringing the regulatory requirements. Measuring the benefits would be far more challenging. The benefits are largely a saving in costs: a saving on penalties for tax infringements which taxpayers

would not have to pay when they are provided with good tax advice and a resulting increase in revenue to the Fiscus, as well as a saving in related costs, including the costs of discovering, investigating and prosecuting tax defaulters.

Falkena, H. et al (2000) express the opinion that the process of regulation involves both the provision of guidance and the imposition of constraints through the following actions:

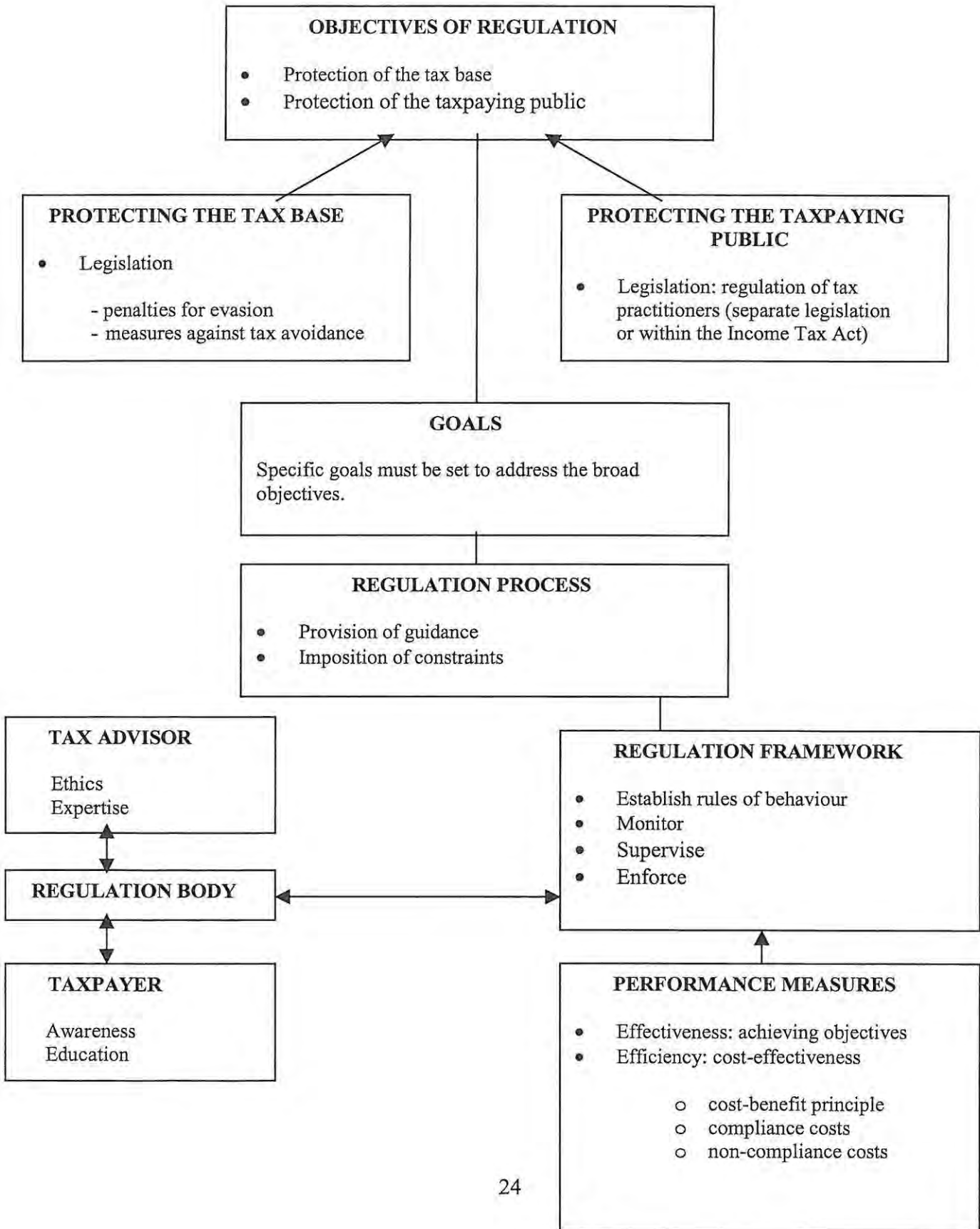
- establishing the rules of behaviour;
- monitoring compliance with the rules;
- a supervisory process; and
- enforcement of the rules in the case of non-compliance.

In the view of the writer, in addition to these specifically regulatory actions, a regulatory framework for taxation should make provision for:

- an ethical code and rules of ethical conduct;
- measures to enhance the level of awareness of the taxpaying public in relation to its rights and duties; and
- measures to ensure an appropriate level of expertise of tax practitioners.

The parameters of a sound regulatory system as discussed above have been set out in a diagrammatic form below.

REGULATION OF TAX PRACTITIONERS



This framework is used in chapter 6 to evaluate the various regulation models discussed in the research.

Spectrum of regulation

As has been stated, there is a spectrum of possible levels on which the tax advisory industry could be regulated, the first being where little or no regulation is enforced. This is the area into which most countries in the world fall. According to Du Plessis (2003:9) it “involves an essentially unregulated tax profession that co-exists with regulated professions such as accountancy and law”. “Market forces are the only mechanism to ensure tax practitioner competence, in that taxpayers wishing to obtain sound tax advice will normally engage a professional person specialising in tax” (SARS, 2002b:4). Examples of such countries falling within this category are the United Kingdom and Ireland. These two countries have a specific tax profession, whereby members are required to demonstrate competency by way of examination or dissertation before being allowed to use the designation of the professional body. Relying on market forces alone requires a willing, informed buyer and a willing seller, who engage in arm’s length transactions. The nature of the market in tax advice is inherently skewed because the buyer (the taxpayer), though willing, may be uninformed and have no basis on which to judge the quality of the service he or she is buying. Advice which may appear to have a high value to the taxpayer in the sense of achieving tax savings, may involve him or her in severe penalties at a later stage, therefore being very poor advisory service. To rely purely on market forces would appear to be insufficient to guarantee that taxpayers receive the correct advice from suitably qualified advisors.

The second level on the spectrum of regulation is where “there is some flexibility over categories of practitioner and their qualification requirements” (SARS, 2002b:4), such as in the United States of America. This form of regulation has the effect of restricting certain activities to “licenced practitioners and members of other regulated professions, and involves a well-developed regulatory framework” (Du Plessis, 2003:9). A fully regulated system, such as that in Australia, China and Germany, “establishes a regulated

professional monopoly for tax practices” (Du Plessis 2003:9) and in most cases this body is often an independent government body separate from the tax administration.

SARS issued a discussion paper in 2002 setting out its proposal as to how the tax industry in South Africa should be regulated. Many institutions, such as SAICA, have supported the regulation process and have provided comments on the SARS proposal as the creation of a formalised tax industry has been viewed as a positive step. Thus far the legal profession has decided to stay outside of the process, as it is of the view that it takes responsibility for its own members and would discipline accordingly. It is the SARS proposal and its objectives that are evaluated in the following paragraphs in order to determine whether this proposal will be the best system to implement in South Africa or whether a better alternative may exist.

The Association of Tax Practitioners

The SARS model proposed that an Association of Tax Practitioners (the Association) be formed in South Africa. It described the Association as being independent from SARS and self-regulated. According to SARS (2002b:14) “this Association would have its own legal persona and would be run by the stakeholders themselves”. Being independent from SARS would enhance the credibility of the Association in that taxpayers would not associate it with SARS, acting as its agents, but would recognise the independence of tax advisors and would be encouraged to make use of the tax practitioners forming part of this Association. In addition, SARS would have a direct link to the body of tax practitioners and the role of the tax practitioner acting as an intermediary between SARS and the taxpayer, would be enhanced. Dijkman J H (2003:2), a legal and ethical director of SAICA, expressed concern “that the establishment of a separate regulatory body for tax practitioners would be a duplication of effort” as it was felt by SAICA that the majority of tax practitioners were already members of other professional bodies. A further submission made by Arendse J (2005:3) referred to the fact that SAICA was of the view that the Association should recognise that its members are already regulated in terms its existing regulatory structures. SAICA further states that “it is essential that a

'level playing field' is maintained. However, within the regulatory framework, recognition should be given to those professional associations that already have a well-established Code of Conduct and properly functioning disciplinary procedures" (Arendse, 2005:3). SAICA is of the opinion that, as its members are already regulated, it would not be necessary for their members to be regulated in terms of this Association. In a recent submission to SARS, however, SAICA has indicated that they "accept that all tax practitioners need to be subject to the same standard of regulation and, therefore, we reluctantly accept the need to ensure that SAICA's regulation of its members is equal to the requirements imposed on all other tax practitioners, although we believe them to very stringent at present" (Arendse, 2005:4).

One alternative would be for the Association to grant exemptions to professionals already regulated by their own professional bodies, provided the levels of regulation are at least as stringent as the level of the Association. Another option would be to create a class of affiliated membership for such professionals. Both alternatives will provide a saving in costs which, in any event, would be passed on to the taxpaying public by way of the fees for professional advice.

Objects of the Association

The discussion document issued by SARS contains, inter alia, fifteen objects governing the Association, each having its own pros and cons. The most onerous of these are discussed below:

- (a) To promote common interests and insist upon a high standard of professional behaviour.

The first object governing the Association, according to SARS (2002b:16) is:

to promote the common interests of tax practitioners throughout the Republic of South Africa by means other than the carrying on by the Association of any

trading or other profit-making activities, or the participation by the Association in any business, profession or occupation carried on by any of its members, or the provision to any of its members of financial assistance or of any premises or continuous services or facilities required by its members for the purpose of carrying on any business, profession or occupation.

This underlines the independency principle of the Association. In other words members must be seen to be independent and must in fact be independent from the stakeholders, SARS and the National Treasury, of the Association. It will be an organisation not for gain and will not provide any assistance to its members in the form of financial or other assistance. It will aim to promote the common interests of tax practitioners. In order to achieve this, another objective links to this one, being the aim of the Association to maintain and preserve the integrity and status of the profession. SARS, in its discussion documents, indicates that the Association will:

take any steps which may be necessary to stop or prevent dishonorable conduct and practices by members, for this purpose to hold enquiries into the conduct of members and to take disciplinary action against members, including the termination of their membership and their expulsion from the Association.

This indicates that the Association will formulate its own code of conduct. The problem, however, is that many members who will form part of the regulatory Board, will already be members of existing professional bodies. Codes of conduct already exist for these professional bodies and SAICA, for example, has a stringent disciplinary process. Similarly, however, a large number of members will not belong to any established professional body. Therefore some form of balance needs to be sought, to avoid duplication of effort. The current proposal therefore tends to over-regulate the members who are already regulated in terms of an existing body, possibly also resulting in higher subscription fees for those members, as fees will be paid to two associations. The positive side of this objective is that by preventing dishonorable conduct of all its members, the Association will assist in the protection of the taxpayers, making it possible

for taxpayers to report any tax practitioner belonging to the Association, where misconduct occurs.

(b) To advance the theory and practice of taxation

A further objective of the Association is to advance the theory and practice of taxation in all respects. This object appears to be vague. It is not clear if this refers to the members of the Association only or if it, in addition, will be applicable to the taxpaying public at large. J H Dijkman, in a submission (2003:3), states that SAICA believes that the advancement of the theory and practice of taxation in relation to the taxpaying public is the “responsibility of our Government”. He further states that “it is important that the responsibilities of Government in improving taxpayer education is not passed on to this body as we do not see this as one of the objects of this body”. This requirement would pose an onerous task for the Association, resulting in higher fees and less focus being placed on the most important object of the Association being that of regulation. Another objective identified that ties in with the advancement of taxation is the proposal by SARS that the Association should “provide for research into taxation and kindred matters and to provide members with information on developments in professional thoughts on methods both inside and outside the Republic of South Africa” (SARS, 2002b:16). Similarly this object is again very onerous which could significantly add to the cost of operating the Association and this cost would again have to be borne by the members of the Association through increased subscriptions, and ultimately their clients. SAICA has indicated that this too is an area of Government responsibility, in that Government carries out its own research before any new tax legislation is introduced or amendments are made. SARS publishes any new developments or legislation on its website which is freely available to all tax practitioners and the tax-paying public. In addition a number of professional bodies to which current tax practitioners belong have a tax page on their websites or in their monthly bulletins, or tax update courses which provide members with the requisite knowledge they need on any tax amendments or legislation which impacts upon the profession. A consideration for the Association could be to provide a portal link

on its website through to the SARS website and the SAICA tax page, as an example. This would significantly decrease costs and the duplication of effort.

(c) To speak with one voice and allow for exchange of views

The proposal states that the Association will aim to speak with one voice. In interpreting this statement it appears as if the Association would want all its members to have the same views and opinions. This however, may not be possible as members forming part of the Association will in most cases already belong to another professional body, which has its own rules and regulations. Members of various bodies may also not express the same views on all tax-related matters. This could possibly be interpreted as providing a mouthpiece for members of the Association, to express their mutually agreed-upon opinion. The proposal that the Association will allow for members to exchange their views on various matters is a good one, however the forum in which to address these views needs to be considered. If the Association wishes to provide courses, seminars and other presentations for members, as stated in the proposal, these could then be used as a platform whereby views could be exchanged. Workshops and functions, however, tend to be very costly and in most cases tax updates or workshops are already offered by other professional institutions. Therefore, in order to minimise the cost to the member, the workshops may need to be consolidated and either the Association take over all training and events or outsource it to the professional bodies who already offer these. Should the Association wish to take on this task it would have to employ trainers or event co-ordinators which would therefore increase costs and again result in increased membership fees and increased fees for clients. In addition, the proposal refers to the provision of courses, seminars and presentations to other professions and the public. This task, however, should rest with the Government, as the Government implements the law and, as such, should provide the knowledge and training to the public on these regulations. The statement by JH Dijkman (2003:10) that “taxpayer education is a crucial element of improved compliance by taxpayers” enforces the idea that taxpayers need to be informed of the regulations. By whom the information should be provided should be carefully considered.

- (d) To co-operate at all times with SARS and the National Treasury and pass comment on actual or impending legislation

The two objectives mentioned above appear to be conflicting. If SARS or National Treasury are the implementers of legislation and the enforcers of compliance with legislation, it does not appear possible for the Association to be able to pass comment on actual or impending legislation and, while cooperating with SARS, to remain independent in this task. It is necessary for the Association to co-operate with these two organs of State by ensuring that the members comply with the legislation imposed by these organs. However, the wording in the object in the proposal reads “to co-operate at all times” (SARS, 2002b:17). If this is indeed the intention the object could be construed to mean that the Association would not be able to express an independent view on any proposed legislation and would not be able to object to it, even if the members fully believe that it would not be in the best interest of the country to implement the new tax legislation. This objective would need to be carefully considered.

The proposal continues to list several other objectives of the Association. Of these, one objective that stands out and is very important, is the objective to “prescribe the qualifications and/or experience to be obtained by any person wishing to become a member” (SARS, 2002b:17). This is discussed in further detail later in this chapter where the admission requirements are reviewed. The remaining objectives are not too onerous and would not have too severe an impact on the costs of membership. Amongst these would be for the Association to apply for membership and co-operate with national and international bodies specific to the interests of the profession, to publish a list of members from time to time, to administer amicable dispute settlements and to do such other things that may be incidental to achieving the objectives of the organisation. It would appear that what the document refers to as objectives are more in the nature of goals established to meet the objectives of protecting the tax base and the taxpaying public.

Composition of the Board

According to the proposal the Association “should be managed by a representative Board drawn from members of the Association who are resident in the Republic together with one representative each nominated by SARS and the National Treasury” (SARS, 2002b:17). SARS and National Treasury, would therefore not act as the regulator of this Board. This is a key element in ensuring that the Association is seen to be and is in fact independent of SARS, thereby providing it with more credibility. It is important that the Board be completely autonomous from SARS. According to SAICA in a further submission (Arendse,2005:3), “if the intention behind the regulation is to protect the public interest, then it is inappropriate for the regulation to be carried out by SARS, as this approach would reduce the regulatory Board to no more than another tax-collection arm”. In addition members of the public would be less likely to use tax practitioners who are regulated by SARS. If some tax practitioners happen to fall outside the regulation, this would then give them an unfair advantage, as members of the public would be more likely to utilise their services. Dijkman, JH in his letter to SARS (2003:4) states that “it is also important that the Board should consist of people with financial and business expertise as well as knowledge of the tax profession, in order to play a meaningful role.” The Board will also need to play a strong oversight role in order to assist the Association in achieving its objectives.

Membership and qualifications

The proposal issued by SARS puts forward a two-tiered membership structure and assists with creating a profession with tiers of regulation. The first tier consists of members entitled to limited practice and the second members entitled to full practice. In order for the Association to function correctly and the regulation to be effective, it is important that different categories of membership be introduced and maintained. The fact that some practitioners carry out compliance work only, this being the completion and submission of various tax-related returns to SARS, whereas others provide opinions or advice, in itself drives the necessity for various categories of membership. It is necessary, however,

to determine whether the proposed two tiers will be effective in catering for the all the current and future tax practitioners.

Members who are entitled to limited practice are only allowed to prepare returns and associated functions. According to SARS (2002b:17):

A member entitled to limited practice is only permitted to represent taxpayers in respect of an application for extension, deferred payment arrangements, query, audit or objection in relation to a return he/she is preparing or prepared and is not permitted to represent taxpayers in respect of any other tax matter.

In addition, these members can only represent the taxpayer for the period covered by the return they have prepared. In order to become a member with limited practice certain entrance requirements have to be met. These entrance requirements are broken down into academic qualification and experience. If an applicant is only going to prepare and file tax returns of individuals who are not directors of companies and who do not earn a taxable income above the marginal tax rate, no academic requirements are necessary. These applicants, however, “must demonstrate that they have completed 2000 hours of relevant South African tax work in the preceding five years” (SARS, 2002b:18). If, however, an applicant is going to prepare and file tax returns for any person other than as mentioned in the first instance above, he or she is required to have passed at least one course in accounting and taxation at any South African university, technikon or another approved institution. In addition, these applicants are required to have completed “1200 hours of relevant South African tax work in the preceding three years” (SARS, 2002b:18). In each instance experience is necessary with regard to relevant tax work. Relevant tax work in terms of the proposal (SARS, 2002b:19) includes:

- (a) completing and submitting any tax return of an individual or any other tax return as permitted respectively;
- (b) responding to queries of a routine nature, for example a request for a schedule of bad debts, raised by SARS regarding any tax administered by SARS; and

- (c) drafting objections to tax assessments of an administrative nature, for example arising out of arithmetic errors.

The second level of membership proposed by SARS is members who would be entitled to full practice. These members would be able to provide a full spectrum of tax-related services, not limited as in the first type of membership mentioned above. Similarly both academic qualifications and experience are a requirement. The minimum academic requirements according to SARS (2002b:18) are:

- (a) A bachelor degree from a South African university or a four year degree from a South African technikon, or an approved equivalent.
- (b) Either as part of the qualification or as extra courses, the applicant must have passed at least two courses in:
 - i. Accounting,
 - ii. Commercial or mercantile law; and
 - iii. South African taxation. (One of these taxation courses should be at fourth year or postgraduate level, for example a Honours degree including taxation, a Higher Diploma including taxation or an Advanced Certificate in Taxation.)
- (c) An applicant is still eligible for admission if only one course has been completed in up to two of the three categories in (b), subject to the increased experience requirements ...

In addition to the above qualification requirements, experience is a necessity. An applicant who has passed two courses in each of the above categories must complete 1200 hours of relevant tax work in South Africa in three preceding years prior to application. "Applicants who have passed one course in one of the categories above and at least two courses in two of the categories above must demonstrate that they have completed 1800 hours of relevant South African tax work in the preceding three years" (SARS, 2002b:19). The qualification and experience requirements appear to have an inverse relationship in this proposal, the more qualified an applicant is, the less

experience is required. This might not necessarily be an advantage as practical experience is required in most instances to test theories and those highly qualified individuals might require just as much experience in dealing with complex tax issues as those with courses in two or three of the categories above requiring 2400 hours of experience. The experience required in order to be accepted as a member entitled to full practice according to SARS (2002b:20) is:

- (a) Completing and submitting income tax returns, other than income tax returns for individuals who are not directors of companies and who earn a taxable income of less than that at which the maximum marginal rate applies;
- (b) Responding to queries raised by SARS, other than queries of a routine nature, for example a request for a schedule of bad debts;
- (c) Drafting objections to tax assessments or decisions, other than objections of an administrative nature, for example arising out of arithmetic errors;
- (d) Preparing for appeals, or assisting in preparing for appeals, in respect of tax assessments or decisions; and
- (e) Giving considered written opinions regarding tax matters.

The experience requirements referred to above do not appear to be exhaustive as no mention is made of experience gained in large corporate tax transactions, international tax such as transfer pricing, estate planning and liquidations, amongst other more complicated tax arenas. Surely some form of experience in these complicated tax arenas would be required for a member to be entitled to full practice in order to make the tiered approach to regulation complete and reliant?

A concern raised in relation to the proposal by Dijkman JH (2003:3) is that “the admission requirements, and particularly proof of previous experience, may be a major obstacle to the inclusion of previously disadvantaged individuals in the regulated tax industry”. Achieving the number of hours of experience set out in the proposal may present a difficulty for some tax practitioners as, in most instances, tax work is not

exclusive and most tax practitioners spend a lot of their time with the provision of other professional services. In addition, if one tax practitioner spends a lot of time in one field of tax work, it may not necessarily make him or her more competent than another practitioner in that field. The proposal requires that proof of hours be maintained. This may also present a problem for professionals as in most instances professionals may not document exactly the number of hours that were spent in a particular area of work. It also refers to “associate members”, the meaning of which is not clear. A possible interpretation of this statement expressed by Dijkman JH (2003:7) is “that members of existing, recognised professional bodies, such as SAICA, be granted associate membership, in view of the fact that SAICA has an existing Code of Professional Conduct, and educational and practical experience requirements”. If a member does indeed become classed as an “associate member” what would this then mean? Would they automatically become members of the Association with lower membership fees? Would they be exempt from meeting the academic and experience requirements? Which body would ultimately prevail over this member should the need for disciplinary enquiry arise? Consistency could become a problem and no guidance has been provided in the proposal as to how the “associate members” would be administered. The proposal appears to contain many gaps in the area of membership and is vague as it does not specify how members will apply, how the administration requirements of overseeing the membership will be addressed, what would happen to current tax practitioners who do not have the required qualifications and how the work actually performed by a limited or full member would be monitored to ensure that it fits within the scope of that membership category.

The proposal also discusses at length the punishable offences of members and how membership could be cancelled.

Punishable offences and cancellation of membership

The discussion document contains a long list of offences that, if committed by the member, will be punishable. The proposal, however, does not detail what the punishment will be. It does state that “the Disciplinary Committee may in its discretion order the cancellation of the membership of any member who is found guilty of committing a punishable offence” (SARS, 2002b:22). However, with each offence being different and in some cases more serious the reader of the proposal would expect the punishment to fit the crime. No mention, however, is made of varying forms of disciplinary action to be taken or the methods or procedures that should be implemented by the disciplinary committee. It also does not elaborate on how monitoring of the members will be maintained or the avenue through which a punishable offence could be reported. Is this not similar to what is currently happening in South Africa under the non-regulated system? The proposal does not seem to offer more protection to the taxpayer, but merely lists an offence that will be punishable, but not how the perpetrator of the offence would be punished. It is also does not make reference to any current tax legislation that relates to punishment of a tax offense. The type of offences that SARS would deem inappropriate and therefore punishable include, inter alia (SARS, 2002b:20):

- (a) In respect of a member entitled to limited practice, performing the following:
 - (i) Representing a client in matters other than those pertaining to the preparation and submission of tax returns, applications for extensions, deferred payment arrangements, queries, audits or objections;
 - (ii) Representing a client concerning a tax liability for a year or period covered by a return not prepared by him or her; or
 - (iii) Signing of any tax return, any request for the extension of time in respect of the submission of any tax return or any deferred payment arrangement on behalf of a client without the express written consent of that client on each occasion;

- (b) Conducting himself or herself with gross negligence in connection with any work performed by him or her in his or her profession or employment;
- (c) Performing the following without exercising due diligence:
 - (i) Preparing or assisting in the preparing, approving, and submission of tax returns, affidavits and other documents relating to tax matters;
 - (ii) Determining the reasonability of oral or written representations made to him or her by clients relating to tax matters; or
 - (iii) Determining the correctness of oral or written representations made by him or her to clients relating to tax matters;
- (d) Unreasonably delaying the prompt disposition of any matter before SARS;
- (e) Knowingly giving false or misleading information in connection with tax matters or participating in such activity;
- (f) Directly or indirectly attempting to influence the official action of SARS employees by the use of threats, false accusations, duress, or coercion, or by offering gifts, favors, or any special inducements;
- (g) Using abusive language, making false accusations and statements knowing them to be false, circulating or publishing malicious or libelous matter, or engaging in any contemptuous conduct in connection with practice before SARS;
- (h) Giving a false opinion knowingly, recklessly, or through gross incompetence; or following a pattern of providing incompetent opinions in questions arising under the tax laws;
- (i) Directly or indirectly paying a person, other than a fellow member, a commission or giving such person monetary or other consideration, as remuneration for bringing the member work, or for inducing other persons to give work to the member;
- (j) Accepting directly or indirectly any commission, brokerage or other remuneration in respect of professional or commercial business referred to others as an incident to his or her service to any client, except with the knowledge and consent of that client;

- (k) Improperly obtaining or attempting to obtain work;
- (l) Soliciting or advertising or canvassing in the Republic (or in any territory outside the Republic designated by the Board from time to time) in any manner not permitted by the Rules or Code of Professional Conduct prescribed by the Board from time to time;
- (m) Willfully refusing or failing to perform or conform with any of the provisions of the By-laws which it is his or her duty to do;
- (n) Committing a breach of any Rule or Code of Professional Conduct prescribed by the Board or, after having been previously warned by the Board or any committee appointed by it, continuing to commit a breach of such Rules or Code of Professional Conduct;
- (o) Unlawfully failing to account for, or unreasonably delaying an accounting for any money or property received for or on behalf of a client or any other person when called upon to do so;
- (p) Conducting himself or herself in a manner which, in the opinion of the Disciplinary Committee, is discreditable, dishonorable, dishonest, irregular or unworthy or which is derogatory to the Association, or tends to bring the profession of tax practitioners into disrepute;
- (q) Without reasonable cause fails to resign from a professional appointment when requested by the client to do so;
- (r) Fails to answer or deal appropriately within a reasonable time any correspondence or other communication from the Association or any other person which requires a reply or response;
- (s) Fails to comply within a reasonable time with an order, requirement or request from the Association; or
- (t) Fails after demand to pay any subscription or any fee, levy or other charge payable to the Association.

The punishable offences mentioned above, are merely listed in the discussion document and no further detail is provided on punishment, other than dismissal of the member from

the Association at the discretion of the committee. It is further stated (SARS, 2002b:22) that cancellation of membership may be effected if a member is:

- (i) Removed from an office of trust on account of misconduct; or
- (ii) Convicted of theft, fraud, forgery, or uttering a forged document or perjury and sentenced in respect thereof to imprisonment without the option of a fine or to a fine of an amount to be determined by the Board...

Other instances, such as sequestration of a member as an example, also will result in cancellation of membership.

The discussion document further states that a code of conduct may be established by the Association and, according to SARS (2002b:23), if established would contain aspects such as:

- (a) Objectives
- (b) Integrity and Objectivity;
- (c) Conflicts of Interest;
- (d) Professional Competence;
- (e) Confidentiality;
- (f) Fees for Professional Services;
- (g) Clients' Monies;
- (h) Recruiting.

Each item is merely listed in the proposal and no further information is provided on each requirement that could be contained in the code of conduct. These headings seem to be very similar to those contained in existing codes of conduct of other professional bodies.

Funding

It has been indicated in the proposal that SARS will fund the regulatory Board for the first year and thereafter that the Board will have to be self funding. There is no clarity

provided in the proposal as to how the self funding will operate and what form of membership fees members could be expected to pay. If the Association is to fulfill all the objectives mentioned above then the cost to the tax practitioners could become very large. This in turn will be passed on to the taxpayer through increased fees. Arendse (2005,7) puts forward a proposal stating that “our view is that the regulatory Board must be streamlined as far as possible to minimise the cost to the tax practitioners, which is one of the key concerns regarding regulation”. She further states that “in essence, all that the regulatory Board should do is to set the criteria for admission, establish a code of professional conduct and a clear constitution, maintain a database of members and act on complaints”. A further suggestion made by Arendse (2005,7) regarding the setting of fees is that “fees paid by tax practitioners, as members of the regulatory Board, should vary according to the extent that they rely on, or make use of, the Board... specifically SAICA members who register with the Board should be on a different fee structure due to the fact the disciplinary measures and regulation will be carried out by SAICA, with the cooperation and oversight of the board, whereas other practitioners who are not otherwise regulated, will be fully reliant on the regulation and disciplinary processes of the board, and their fee structure should be adapted accordingly”.

Conclusion

The SARS discussion document is lengthy and contains many areas of concern, as highlighted in the paragraphs above. Specific problem areas contained in the proposal have been discussed and are summarised below.

Firstly the requirement for the Association to establish its own code of conduct, could result in a duplication of effort, increased costs and possibly a conflict of interest for members of existing professional bodies. Other objectives contained in the proposal which could result in a conflict of interest are the requirement for members of the Association to speak with one voice and to co-operate at all times with SARS and the National Treasury. In some instances it was found, in the opinion of the writer, that the objectives tend to over-regulate members already belonging to other professional bodies.

In addition, other objectives such as “to advance the theory and practice in taxation” and “to provide for research into taxation and kindred matters and to provide members with information on developments in professional thoughts on methods” (SARS, 2002b:17), tend to be vague and onerous which could result in significantly increased costs.

Besides the concerns raised above concerning the objectives, the composition of the Board is questionable. If SARS have a representative on the Board, the public might be less likely to use tax practitioners regulated by SARS and the Board will not be seen to be completely autonomous from SARS. Thirdly the admission requirements concerning qualification and experience need to be reviewed. Achieving the number of hours of experience required may be difficult and proof of experience may be difficult to motivate as, in most instances, tax work is not exclusive. In addition, further guidance is required on the meaning of an “associate member” and who would be given this title and under what circumstances. Two further omissions in the proposal are that of punishment of members and the forms of punishment to be enforced, and the method and extent of the funding of the Association.

With all the above-mentioned contentious areas in mind, SARS has put forward the model as a proposal and called for comments to be made on the proposals set out, or suggestions for alternative models. According to SARS (2002b:23) it invited comments specifically in the areas of:

- (a) The definition of “tax-related services” to be regulated;
- (b) The need for more than one category of tax practitioner;
- (c) Academic requirements;
- (d) Experience requirements;
- (e) Punishable offences; and
- (f) Transitional arrangements.

Comments have been sent in to SARS over the years suggesting that the initial proposal contained many flaws or possibly contained too many onerous requirements. One such comment was from Dijkman J H, (2003:2) in which he stated that:

the purpose of the proposed Association is primarily to regulate tax practitioners, as opposed to being a 'club' established for the benefit of its members and to promote tax practitioners. As such, its primary functions should be limited in order to regulate:

- Entry levels and to set requirements for membership;
- Registration of members and maintaining membership records;
- Monitoring service levels of members; and
- Discipline.

The proposed Association should therefore not get involved with activities more associated with a "club", that is presentations, research, education, newsletters or providing similar membership and public benefits.

The more activities the Association provides, obviously the more it would cost a member and what additional purpose would this serve for a member? The formation of the Association as described in the SARS discussion document would result in a higher cost to the taxpayer, as the member would need to compensate for the increased membership fees by increasing tax compliance and consultancy fees. Due to the fact that the current proposal seems to overcompensate on regulation rather than address the specific needs of regulation, it is necessary to explore alternative models that could perhaps have a more appropriate effect and approach to regulation.

CHAPTER 4 – EVALUATION OF THE MODEL OF THE ESTATE AGENCY AFFAIRS BOARD AND COMPARISON WITH THE SARS MODEL

Introduction

As was discussed in the preceding chapter, the proposal issued by SARS for the regulation of the tax advisory profession contained lengthy and onerous requirements. In addition it left many unanswered questions and a great uncertainty as to how the Association would ultimately operate once established and whether, possibly, the objectives were too detailed and should be less prescriptive and more focused in order to achieve the desired goal of regulation. SARS had previously indicated that the model closest to that which it wished to create for tax industry regulation was that of the Estate Agency Affairs Board (EAAB). This chapter therefore explores this model and determines whether, in fact, the proposal drafted by SARS aligned itself closely to the EAAB model and whether any differences give scope to improve the regulation model of SARS.

Establishment of the EAAB

According to the skills work plan of the EAAB (2005a:2) “the EAAB was established by an Act of Parliament on the 5 July 1976 after an extensive investigation into the necessity or otherwise of doing so. The Department of Trade and Industry had become convinced that the self-regulation of the industry was not to the benefit of consumers. It had become apparent that statutory regulation was required to maintain and promote the integrity of estate agency, and consequently the interests of consumers”. The EAAB was therefore formed and operates in terms of the Estate Agency Affairs Act No. 112 of 1976 (the EAA Act). The EAA Act has been amended occasionally from its inception “in order to afford additional protection to consumers and to effectively regulate the industry” (EAAB, 2005a:2). The last amendment occurred in 1998 “when the name of the EAAB was change to the Estate Agency Affairs Board, in order to remove the

common misconception that the Board was constituted to protect estate agents rather than to regulate the industry to the benefit of estate agents and consumers alike” (EAAB, 2005a:2). According to SAICA (2005:1) the purpose of the EAAB is to “regulate the estate agency industry by licensing practitioners”. The vision of the EAAB as expressed in its skills work plan (2005a:2) is:

to ensure that consumers are fully protected in their dealings with estate agents and understand their rights, transactions, obligations and ethical behavior.

In promoting and maintaining the standard of conduct of estate agents, the Board will also ensure proper compliance by estate agents with the provisions of the Estate Agency Affairs Act and the Code of Conduct and protect consumers against unprofessional estate agents.

The mission is similarly expressed in this document as being “to promote and improve the quality standard of estate agents in general, having due regard to the public interest” (EAAB, 2005a:2). The Board therefore has a clearly established vision and mission which are aligned to its main purpose, being that of regulation of estate agents to protect clients. This clear direction is lacking in the SARS proposal, the vision and mission of the Association are not clearly stipulated. Objectives are listed, but no clear understanding is given as to the overall purpose of the Association. A vision and mission of an organisation help to establish focus and create strategic alignment. This would need to be carefully considered and thought out in the final draft proposal or legislation governing the implementation of the Association and its objectives.

Requirements of the EAA Act

According to SAICA (2005:1) there are certain stipulations contained in the EAA Act which “require that practitioners meet certain standards in order to become licensed and prohibits unethical conduct in the practice of estate agency”. The EAA Act contains the following key requirements that would be applicable to a proposal concerning the regulation of tax practitioners:

(a) Constitution of the board

The EAA Act reads as follows:

- (1) The board shall consist of fifteen members appointed under subsection (2) by the Minister.
- (2) The Minister shall appoint as members of the Board-
 - (a) five members from the estate agents' industry;
 - (b) five members from civil society, representing consumer interest; and
 - (c) five members from related professions and institutions such as the legal profession, financial institutions, property owners and developers.

The EAA Act further stipulates the period for holding of office, the terms under which a member may be appointed and the terms under which a member will be required to vacate his or her office. In terms of the EAA Act there are set guidelines as to who may become a member, how many members should be representative of the board and instances in which membership will be cancelled. The SARS proposal, however, contains a paragraph consisting of three lines providing no indication as to how many members should be on the board, what requirements a member would need to be admitted to the board or what would prevent a member from being on the board, nor does it state the period of holding of office or the number of meetings to be held. This is obviously a serious concern as the Association cannot function and achieve its goals unless an appropriate board is set up and regulations in terms of its establishment are outlined and agreed upon. An important fact in setting up a board is its representative nature. It would be expected that the Board "should consist of people with financial and business expertise, as well as a knowledge of the tax profession, in order to play a meaningful role" (Dijkman, 2003:4).

(b) Staff of the board and designation of inspectors

According to the EAA Act section 6(2) "the board may designate persons appointed in terms of subsection (1) and any other persons who he may deem fit, to perform the

functions of inspectors under this Act subject to its control”. Therefore in terms of the EAA Act the board will establish an inspectorate function in order to assist with monitoring compliance. It can be assumed from the objects of the board that this inspectorate function will aim to oversee and regulate the conduct and activities of estate agents. The skills work plan (2005a:3) further sets out the structure of the EAAB. According to this document the EAAB consists of a: “chief executive officer, human resources department, accounts department, legal department, claims department, IT department, records department, administrative department, information department and auxiliary services”. The skills work plan further provides a breakdown of the occupational categories of the Board and provides for a total staff compliment of forty-eight people. If the objectives as listed in the SARS proposal were to be carried through to the final legislation this would require a much larger structure than that of the EAAB. A technical, training, research, legislative and advisory department amongst others would additionally be required, resulting in far higher membership fees than those paid by estate agents, based on the structure of its Board.

Although the main purpose of the SARS proposal is to set out a model that would attempt to regulate the tax industry in South Africa, no mention is made in the model as to how, once a person becomes a member of the Association, he or she will be monitored. It does not stipulate that a division will be set up within the Association that will review work carried out by tax practitioners from time to time or address and investigate complaints, if received. The proposal contains no methods or procedures as to how the Association will achieve regulation and is very vague on this issue. It does not even list this as a key objective, being the regulation of conduct of members and how it will monitor whether the appropriate standard of conduct is being upheld. Towards the end of the proposal it refers to a code of professional conduct being implemented by the Association, but does not provide any detail on the requirements of the code or how adherence would be monitored. This point again demonstrates a gap within the SARS proposal.

(c) Strategic objectives

The EAA Act lists the objects of its board, these being to:

- (a) maintain and promote the standard of conduct of estate agents; and
- (b) regulate the activities of estate agents.

The above two objects are concise and to the point, therefore setting a standard of conduct for estate agents and regulating the activities of the agents. According to SAICA (2005:1) it achieves these objectives and regulation through the following means:

- Preventing unsuitable persons from entering the industry;
- Administering a qualifying examination for new applicants;
- Investigating complaints concerning improper estate agency conduct and activity;
- Imposing disciplinary sanction on estate agents found to have violated the licensing Act or Code of Conduct; and
- Reimbursing consumers who have suffered financial loss through the theft by estate agents of trust monies, from its Fidelity Fund.

The skills work plan further enhances on these two objectives by creating more detailed strategic objectives. The strategic objectives as listed in this document (2005a:5) are:

1. to effectively administer and improve service excellence;
2. to improve the image of the EAAB and the stakeholders through better communication channels;
3. to serve as real estate information resource for all South Africans;
4. to provide training and development for EAAB staff;
5. to implement the vision and mission of the organisation through training and developing of staff;
6. to ensure that licensed estate agents are competent and morally fit to act as real estate agents and salespersons;
7. to ensure that licensed real estate agents comply with the real estate practice standards imposed by the regulatory authority;

8. to identify and address issues affecting real estate consumers and practitioners;
9. to effectively and efficiently administer the programmes and operations of the regulatory authority;
10. to enhance standards, that is, to maintain procedures, evaluate applicants for honesty, integrity, trustworthiness, competency and legal qualifications;
11. to increase the broad acceptance of the principles of mandatory continuing education through the approval of relevant courses perceived to provide value; and
12. to redress past imbalances pertaining to the procurement of goods and services.

The two objectives in terms of the EAA Act and certain strategic objectives as listed above are representative of the type of objectives that could be expected to appear in a document concerning the regulation of the tax industry. Strategic objective 3 may not be entirely applicable to the Association, as it will not constitute the only tax information source in South Africa. Many existing professional bodies and SARS already have large databanks of information with regard to tax issues and regulations. In addition, strategic objective 6 is not clear as to how estate agent competency is evaluated. It is not clear whether the EAAB would provide training to the estate agents in order to ensure competency. This objective could be linked to a similar objective currently contained in the SARS proposal. However, as discussed in chapter 3, to provide training to members of the Association would be costly and possibly involve duplication of effort, as many existing bodies already provide tax training.

The remaining strategic objectives of the EAAB could be applicable to the Association if amended slightly. In order to achieve regulation a standard for the conduct of tax practitioners must be set and the activities of the tax practitioners must be monitored and regulated. The SARS proposal, however, does not simply concentrate on achieving these two objectives, but lists fifteen key objectives of the Association, in total (refer to the previous chapter where the different objectives of the Association were discussed in

detail). The strategic objectives of the EAAB appear to be more concise than those listed in the SARS proposal and directly address the two key objectives as set out in the EAA Act. The SARS proposal merely lists the objectives but does not state how the Association will attempt to achieve the objectives. By including objectives such as providing research into taxation, passing comment on actual or impending legislation, providing courses, seminars and presentations and undertaking and advising on all matters which may be in the interest of the Association, makes the objectives very onerous. These objectives also tend to reduce the focus on the regulation of the tax profession and promote many other aims which are not directly linked to regulation.

In addition it could be assumed that the cost of belonging to the EAAB, having only two key objectives to fulfil, versus the costs of belonging to the Association, having fifteen objectives to fulfil, would be significantly lower. By only having two key objectives the EAAB still achieves the aims it was initially set up for, one being to provide a service to members and secondly a protection of the public utilising services of their members. Earlier in 2005 it was indicated, in a discussion forum held by SAICA with its members, that the main object for the introduction of regulation of the tax industry by Trevor Manuel in his budget speech of 2002, was for public protection. If this is the main intention behind the regulation, then instead of creating a complex system involving high costs, a more simple structure with concise objectives could be developed and operated which is similar to that of the EAAB.

(d) Core values

The EAAB has also established a set of core values which could be assumed to form the basis of its code of conduct. In terms of the skills work plan (2005a:3 and 4) the core business values of the EAAB are based on the following:

- efficiency and effectiveness;
- professionalism;
- ethics/discipline;
- quality services;

- better communication and liaison with the Department of Trade and Industry;
- honesty;
- creativity;
- service excellence;
- corporate culture of caring;
- enabling legislation invariably containing checks and balances to ensure that the regulator carries out its responsibilities as intended by government;
- sound and transparent administration and control of financial affairs;
- establishing education and research facilities so as to constitute a necessary corollary to technology and demographics; and
- increasing public awareness of regulator services.

These core values set out the values on which the EAAB is based and which it aims to uphold. It relates to how the Board conducts itself and is a form of code of conduct for the Board. SARS has not set out any such value system for the Association in its proposal. Perhaps this would be investigated and established once the Association is in operation? The core values of the EAAB are very significant and applicable also to what would be expected of a tax regulatory authority. Perhaps the Association could seek some guidance from these.

(e) Committee of inquiry

According the section 8B of the EAA Act:

- (1) The board may from time to time appoint such number of committees of inquiry as it deems fit, each consisting of at least three members ...
- (2) A committee of inquiry may exercise or perform any power or function which is granted or entrusted to it in terms of the Act.

The EAA Act therefore makes provision for a committee of inquiry to be set up for the purposes of investigating any conduct by members which may be unacceptable. The proposal of SARS makes mention of a disciplinary committee that will be established. It



does not, however, state how this disciplinary committee will function, under which circumstances it will be required to operate or what level of punishment a disciplinary committee would be entitled to impose as a result of improper conduct. It merely makes mention of twenty instances of punishable offences. It does not include details on the type of punishment to impose to fit the crime. The EAA Act, however, contains section 30 which provides detail on the improper conduct of estate agents and what punishments will be implemented.

(f) Improper conduct by estate agents

Most of the forms of improper conduct referred to in terms of section 30 of the EAA Act are specific to the Estate Agents' industry. Only two instances may be applicable to the tax industry:

- (1) Any estate agent shall be guilty of improper conduct if he –
 - (e) contravenes any provision of the code of conduct referred to in section 8(b) or fails to comply with any such provision; and
 - (h) commits an offence involving an element of dishonesty.

Subsection (e) of section 30 refers to the code of conduct of the EAAB. The EAAB has an established code of conduct which regulates the conduct of estate agents. It contains the following sections (EAABb, 2005:1-8):

- 2 general duty to protect the public interest;
- 3 mandates;
- 4 duty to disclose;
- 5 duty not to make misrepresentations or false statements or to use harmful marketing techniques;
- 6 duties in respect of offers and contracts;
- 7 prohibition against undue influence;
- 8 remuneration;
- 9 trust money and interest;

- 10 confidentiality; and
- 11 vicarious responsibility.

Each section contains detailed information and guidance as to what is expected of the estate agent. Most requirements are specific to the estate agency industry. However, due to the fact that the SARS proposal has provided no detail on the actual code of conduct, simply listing the possible sections it could contain, the information as contained in the estate agent's code of conduct could be used as a basis when the Association is formed. Other codes of conduct such as the code enforced by SAICA, for example, could be utilised as a basis.

The EAA Act further states that if there is a charge of misconduct, the committee of inquiry may investigate it in the prescribed manner. In terms of section 30 (3) of the EAA Act :

- when any estate agent is found guilty of conduct deserving sanction by the board or committee of inquiry, the board or committee of inquiry may-
- (a) withdraw the fidelity fund certificate of such estate agent...;
 - (b) impose on such estate agent a fine not exceeding R25 000 or such higher amount as may be prescribed...; or
 - (c) reprimand such estate agent.

The EAA Act lists specific punishments to be imposed as a result of an offence. This, however, is not specified in the proposal of SARS relating to tax practitioner regulation. The proposal lists a number of punishable offences all having varying degrees of severity, which would surely require punishment of varying degrees of severity? The only punishment referred to in the SARS proposal is cancellation of membership if a member commits a punishable offence. Surely not all of the offences listed in the proposal would warrant cancellation of membership? The proposal therefore does not contain sufficient information as to how improper conduct would be dealt with.

Funding of the EAAB

With regard to funding, the board sets prescribed levies which are paid by estate agents. This aspect of funding is lacking in the proposal of SARS. Future members cannot ascertain from the proposal what costs would be borne by themselves or what the registration fee would be. In addition there may be duplication of activities in certain areas, as many members already belong to other professional bodies, paying high subscriptions. Therefore there is a concern about issues of cost.

Membership of the EAAB

An entrance examination is required to be written by a prospective member of the EAAB and any individual is eligible to write this examination, there are no restrictions. Once the examination is passed the estate agent then can apply for a Fidelity Fund Certificate. "Only on issue of the Fidelity Fund Certificates, may such estate agent commence operations" (EAAB, 2005c:2). There is also a tiered approach if an individual chooses to study to become an estate agent. The third and highest tier is that of a principal estate agent. In order to be admitted as this level of membership, a level 5 or 6 qualification as listed on the national qualifications framework needs to have been attained prior to the writing of the entrance exam. The second tier is that of a non-principal estate agent. In order to be admitted on this level and to be allowed to carry out the functions associated with this level, a level 4 qualification on the national qualification framework needs to be attained. The first level is that of a candidate estate agent where only a level 1 or 2 qualification on the national qualifications framework need be attained. The attaining of qualifications at the various levels on the national qualifications framework is not a necessity and according to the EAAB (2005c:1) full status can be acquired by:

- passing an Estate Agency Affairs Board examination; or
- having served a year's candidature under the supervision and control of a qualified estate agent; or
- having been exempted from the prescribed training.

This profession is less complex than that of the tax profession and the regulation of the tax profession cannot be directly aligned to this criteria. Tax professionals are required in some instances to provide advice on which taxpayers rely or to compute complex tax calculations which could have serious financial and other consequences for the taxpayer if calculated incorrectly. Therefore it is necessary to develop more stringent entrance requirements for the regulation of the tax industry. The SARS proposal has addressed this to a certain extent by putting forward a two-tiered membership approach. This, however, might not be the most appropriate. This point was again the focus of discussion in the forum held between SAICA and its members early in 2005 where many members felt that SAICA members should be exempt from the admission requirements stipulated in the SARS proposal. It was felt that membership to the Association should be automatically provided if a person belonged to either SAICA or the legal profession, for example. In addition a reduction of membership fees should be considered.

Conclusion

As can be seen in the preceding paragraphs the EAA Act is concise and contains legislation appropriate to achieving its two key objectives. The EAAB itself is “not content to be complacent and continuously seeks to improve its effectiveness and efficiency and, in so doing, to remain a worthy regulator of the industry and protector of consumers” (EAAB, 2005:2-3). Much of the legislation contained in the Act is specific to the estate agency industry; however the features comparable with the tax profession have been outlined in the paragraphs above.

In summary, there a few key features contained in the functionality of the EAAB, that SARS could adopt. The EAAB has a clearly established vision and mission, specific guidelines are set indicating who may become a member of the Board, how many members should be on the Board, the period of holding of office, number of meetings, the requirements for admission and instances in which membership will be cancelled. These features are clearly lacking in the SARS proposal. The structure and operations of the

EAAB are simplified and clearly laid out in the EAA Act. In comparison, the SARS proposal listed, inter alia, fifteen objectives and a much larger structure would be required to operate the Association effectively. In addition, the EAAB has an established inspectorate division and committee of inquiry which monitors compliance. Again, this is a gap in the SARS proposal, as no mention is made of how a member of the Association will be monitored. The EAAB has an established set of core values which form its basis. SARS, however, has referred to no similar value system in the proposal concerning the Association. In addition, the EAAB lists specific forms of punishment and prescribes levies in terms of funding, which aspects are clearly lacking in the proposal of SARS. The only area in which the EAAB principles cannot be adopted or utilised by SARS in the formation of the Association is with regard to membership qualifications and experience requirements. The estate agency profession is less complex than that of the tax system and the entrance requirements are therefore much simpler.

When comparing these features to those documented in the SARS proposal it appears that the SARS proposal has become too complicated and onerous in many areas. The objectives are lengthy and focus is lost with regard to the main aim of the proposed Association. If SARS had aligned the proposal more closely with that of the EAAB, the key concerns of current tax practitioners would possibly be addressed. In order to develop a model best suited to South Africa it is possibly advisable to explore a model of a tax regulatory system currently operating effectively in another country. The next chapter will therefore review the rules and regulations contained in the Australian Tax Agent's Board.

CHAPTER 5 – EVALUATION OF THE MODEL OF THE AUSTRALIAN TAX AGENTS BOARD AND COMPARISON WITH THE SARS MODEL

Introduction

As concluded in chapter 4, the EAAB is not the most suitable model on which to base tax regulation in South Africa. The entrance requirements of its members in relation to qualifications and experience are too low and would not cater for the complexity of the tax industry in South Africa. In addition the objectives and aim of the Board may be too simple to achieve the desired balance as expressed by Izel du Plessis (2003:9) as being: “a balance between abuse and monopoly, a balance between market forces and legislation, and a balance between the interests of SARS, taxpayers and tax practitioners”. The model of the Australian Tax Agents Board (ATAB) might be more closely aligned to the desired model which South Africa would wish to implement, as expressed in the proposal of SARS. The model of the ATAB is examined in depth in this chapter in order to identify the similarities and differences between it and the SARS proposal and to establish whether the model of the ATAB is more suitable for South African tax regulation, in the light of the conceptual regulatory framework suggested in chapter 3.

Roles and objectives of the Board

In Australia, tax agents are seen to play a very important role in the administration of the tax system. Regulation of these agents in Australia was “aimed at protecting the public by ensuring that persons who charge a fee for providing taxation related services have appropriate knowledge of the Australian income tax law, relevant accounting principles, and are otherwise fit and proper persons to be registered as tax agents” (ATAB, 2005a:1). In order to achieve this regulation the ATAB was constituted in terms of Part VIIA of the Income Tax Assessment Act 1936 (ITAA36). It comprises of a Board in each State, which are independent statutory bodies acting autonomously in the execution of its

duties. Each Board consists of three members. According to the ATAB (2005a:1) “one member is an officer of the Australian Tax Office (ATO) and the other two members traditionally come from the legal and accounting professions”. In comparison with the EAAB consisting of fifteen members and the SARS proposal which does not stipulate the number of members, but merely stipulates that at least one must be a representative from SARS and another a representative from National Treasury, the ATAB has three board members which fairly represent the professions affected by tax regulation. Although the ATAB includes a member who is an officer of the ATO (similar to the SARS representative on the proposed Association Board), it is clearly stated in the ATAB (2005a:1) that “the deliberations of the Board are completely independent and the Commissioner of Taxation has no control over the proceedings of the Board”. This clearly contrasts with a loosely-formulated requirement in the SARS document where the Association is required “to co-operate at all times with SARS and National Treasury” (SARS, 2002b:17).

The ATAB (2005a:1) further sets out the responsibilities of the board as being, “to administer the tax agent registration requirements” and being “responsible for determining the suitability of applicants to be registered as tax agents, dealing with complaints about tax agents and ensuring that proper standards are maintained across the tax agent profession”. Each of these areas of responsibility is discussed in more detail below. It can be established, however, that when comparing the objectives of the EAAB to those of the ATAB, the objectives of the ATAB are more closely aligned to the tax profession and are more onerous than simply maintaining a standard of conduct or regulating the activities of agents. In addition the objectives of the ATAB are more focused on achieving regulation than the objectives as listed in the SARS proposal, where objectives such as passing comment on proposed legislation, providing for research into taxation and providing courses, seminars and training events, for example, are included.

Admission requirements to practise as a tax agent

In terms of SARS (2002b:4 to 5) in Australia “a person must be registered as a tax agent to charge a fee for preparing or lodging income tax returns and objections, or for transacting business on behalf of a taxpayer in income tax matters”. Once a tax agent registers with the ATAB a certificate of registration is granted to the tax agent and he or she is allocated a reference number. This certificate is required to be displayed in the tax agent’s office and the registration number is to be quoted on all tax returns lodged by the tax agents and on all communications to the Board and the ATO. The SARS proposal lacks this detail and does not state what will happen once a tax practitioner is granted membership of the Association. A similar approach to registration as adopted by the ATAB could be utilised in South Africa. The problem, however, with adopting this approach is that everyone will be issued with the same certificate of registration, resulting in no differentiation between members. A concern was expressed by a member of SAICA in the SAICA discussion forum held earlier in 2005, that if the same certificate is issued to all members irrespective of their qualification levels then a chartered accountant will be viewed in the same manner as a practitioner with a diploma. It was feared that the “CA” brand would suffer, as all tax practitioners would be seen to be the same in the eyes of the public. In order to address this issue, differentiation of categories of tax practitioners should be investigated for implementation in South Africa. This aspect is explored in further detail in the next chapter.

In order to be admitted as a tax agent in Australia certain prescribed qualifications in terms of the Income Tax Regulation No. 156 have to be met. A person may be admitted as a tax agent in the following cases: if he or she has a tertiary qualification in accountancy plus experience, if the person is either a barrister or solicitor, if he or she has studied in accountancy at a technical and further education college (TAFE) or, lastly, if the person has had a minimum of eight years relevant employment experience. Each category contains various requirements. If the person falls into the first category according to SARS (2002b: 5 to 6) he or she:

- (a) shall have completed the academic requirements for the award of a degree, diploma or other qualification from an Australian university, college of advanced education or other tertiary institution of an equivalent standard, and have passed examinations in such subjects...to represent a course of study in accountancy of not less than 3 years' duration and in commercial law of not less than 18 months' duration or shall possess such other qualifications as the Board regards as equivalent to those qualifications;
- (b) shall have:
 - (i) been engaged in relevant employment on a full-time basis for not less than a total of 12 months in the preceding 5 years;
 - (ii) otherwise be engaged in relevant employment to an extent that the Board regards as equivalent to that referred to in (i) above; or
 - (iii) been engaged in such other employment and for such time as the Board regards as equivalent to being engaged in relevant employment as referred to in (i) above, and
- (c) shall have, by written examination, successfully completed a course of study in Australian income tax acceptable to the Board.

These requirements need to be fulfilled in order for a person to be admitted as a tax agent. In this instance the person will have the relevant qualification requirement plus experience.

Secondly, if an individual is a barrister or solicitor he or she will be admissible as a tax agent according to SARS (2002b:6) if such person:

- (a) shall have completed the academic requirements for admission as a barrister or solicitor of the High Court or of the Supreme Court of a State or Territory;
- (b) shall have :
 - (i) been engaged in relevant employment on a full-time basis for not less than a total of 12 months in the preceding 5 years;

- (ii) otherwise be engaged in relevant employment to an extent that the Board regards as equivalent to that referred to in (i) above; or
- (iii) been engaged in such other employment and for such time as the Board regards as equivalent to being engaged in relevant employment as referred to in (i) above;
- (c) shall have, by written examination or examinations set by a college of technical and further education (or an examination or examinations of an equivalent or higher standard), successfully completed a course of study in basic accounting principles; and
- (d) shall have, by written examination, successfully completed a course of study in Australian income tax law acceptable to the Board.

A third type of individual who can be admitted as a tax agent is a person who has obtained a qualification in accountancy at a college of technical and further education. SARS (2002b:6) states that admission will be granted if such person:

- (a) shall have completed the academic requirements for the award of a diploma or certificate from a college of technical and further education (TAFE) following a course of study in accountancy of not less than 2 years' duration of full-time study or 4 years' duration of part-time study;
- (b) shall have:
 - (i) been engaged in relevant employment on a full-time basis for not less than a total of 2 years in the preceding 5 years;
 - (ii) otherwise be engaged in relevant employment to an extent that the Board regards as equivalent to that referred to in (i) above; or
 - (iv) been engaged in such other employment and for such time as the Board regards as equivalent to being engaged in relevant employment as referred to in (i) above; and
- (c) shall have, by written examination, successfully completed a course of study in Australian income tax law acceptable to the Board.

The final category in which a member can be admitted as a tax agent is if he or she has a minimum of eight years of relevant employment. SARS (2002b:7) states that such a person:

- (a) shall have:
 - (i) been engaged in relevant employment on a full-time basis for not less than a total of 8 years in the preceding 10 years;
 - (ii) otherwise be engaged in relevant employment to an extent that the Board regards as equivalent to that referred to in (i) above; or
 - (iii) been engaged in such other employment and for such time as the Board regards as equivalent to being engaged in relevant employment as referred to in (i) above; and
- (b) shall:
 - (i) be a member of and entitled to vote at meetings of the Australian Society of Accountants, the Institute of Chartered Accountants in Australia or the National Institute of Accountants; or
 - (ii) have, by written examination or examinations set by a college of technical or further education (or an examination or examinations of an equivalent or higher standard), successfully completed a course of study in basic accountancy principles and have, by written examination, successfully completed a course of study in Australian income tax law acceptable to the Board.

In all four categories it is required that a person has “by written examination, successfully completed a course of study in Australian income tax law acceptable to the Tax Agent’s Board” (SARS 2002b:7). Various degrees of experience and accounting competency are other requirements. With regards to experience requirements according to SARS (2002b:7) the term relevant employment means “employment by a person in the course of which there has been substantial involvement in income tax matters including:

- the preparation or examination of a broad range of income tax returns;

- the preparation or examination of objections to assessments issued in respect of such returns; and
- the provision of advice in relation to income tax returns, assessments or objections.

The above examples are by no means exhaustive and it will be at the discretion of the ATAB whether a candidate wishing to be admitted as a tax agent will have sufficient relevant experience.

Although there are different admission criteria for a tax agent in Australia, this does not mean that once registered, a tax agent with a qualification in accountancy from a TAFE will be viewed any differently to a tax agent who is a barrister or solicitor. The ATAB makes no distinction between highly qualified members and those with a technikon diploma. Similarly the certificate of registration will not display this distinction. Although the SARS discussion document may have based its two-tiered membership approach on that which the ATAB adopts, South Africa might need to adopt a slightly different approach in order to gain the acceptance of the majority of tax practitioners of the impending tax regulation.

The current South African proposal and that of the ATAB tends to group members into one body, with all members being given one identity, for example, tax agent. According to Arendse (2005:6) “the academic standard and professional requirements of Chartered Accountants is higher than any other professional accountancy body in South Africa and it is essential that this accomplishment is not diminished in any way through the regulation process”. In order to recognise this SAICA members could be either given an accredited membership or, alternatively, tiered membership could be adopted. Admission to each tier would be dependant “upon the academic qualification, experience and professional level of the member” (Arendse, 2005:6). Chartered Accountants would therefore be admitted to the highest membership tier. As stated above, this area of concern is discussed in greater detail in the next chapter.

In Australia, if a person charges a fee for the execution of tax services whilst not registered as a tax agent, he or she will be committing an offence. According to SARS (2002b:5) this person will “face a fine, upon conviction, of up to 200 penalty units (\$22,000) ... It is also an offence, under section 251O of the ITAA36, to represent oneself as a tax agent or to advertise that tax returns can be prepared and to attend to income tax matters unless registered as a tax agent. The penalty for breaching section 251O is a maximum fine of 10 penalty units (\$1,100)” (SARS, 2002b:5). This could be an additional point for SARS to consider including in the legislation governing the Association if it wishes to increase public protection and create and uphold a good name for the tax profession.

Fit and proper person

In order for a tax practitioner to be registered as a tax agent in Australia an essential condition “is the notion of being a ‘fit and proper person’ to prepare income tax returns and transact business on behalf of taxpayers in income tax matters” (ATAB 2005c:1). This is an explicit condition contained in the Australian law governing the ATAB and is a decisive factor when admitting an individual as a tax agent. The Board is entitled not to register a person if they do not meet the criteria of being a “fit and proper person” and similarly, once registered, the Board could suspend or cancel the registration of a tax agent if the above requirement is not satisfied. There is, however, not an absolute definition of the expression “fit and proper person”. In the High Court Case of *Hughes and Vale (Pty) Ltd v The State of NSW [No.2]* (1955) 93 CLR 127 at 156 (ATAB, 2005a:1 to 2) the court made reference to the expression “fit and proper person” as being:

familiar enough as traditional words when used with reference to offices and perhaps vocations. But their very purpose is to give the widest scope for judgment and indeed for rejection. “Fit” (or “ideoneus”) with respect to an office is said to involve three things, honesty, knowledge and ability: honesty to execute it truly, without malice, affection or partiality; knowledge to know what he ought

duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it.

The values of “honesty, knowledge and ability” seem to be the key factors in determining whether an individual is a fit and proper person. These values, according to the ATAB (2005a:3), “can be referred to as the general umbrellas of ‘capacity’, ‘qualifications’ and ‘good fame integrity and character’”. In terms of the first umbrella being that of capacity, a person will not be deemed to be “fit and proper” if he or she is not a natural person or has not attained the age of eighteen years. Under the second umbrella a person will not be deemed to be “fit and proper” if he or she has not met the qualification criteria as discussed in the paragraphs above. Thirdly if the person does not express good fame, integrity and character he or she will not be admitted as a tax agent.

In the case of *Re Su and Tax Agents’ Board*, SA (1982) 82 ATC 4284 and 4286 (ATAB, 2005c:12 to 13) some indication was provided as to what “the general notion of ‘good fame, integrity and character’ in the Act entails by referring to the functions of a tax agent:

The function of a tax agent is to prepare and lodge income tax returns for other persons. A person is a fit and proper person to handle the affairs of a client if he is a person of good reputation, has proper knowledge or taxation laws, is able to deal competently with any queries which may be raised by officers of the Taxation Department. He should be a person of such competence and integrity that others may entrust their taxation affairs to his care. He should be a person of such reputation and ability that officers of the Taxation Department may proceed upon the footing that the taxation returns lodged by the agent have been prepared by him honestly and competently.

If the Board finds against any of the above the applicant may be deemed not to be a “fit and proper person” and not admitted as a tax agent. The SARS proposal, (2002b: 8), states two instances of conduct that will affect fame and character:

- (a) the person has been convicted of a serious taxation offence during the previous five years, or
- (b) the person is under sentence or imprisonment for a serious taxation offence.

A “serious taxation offence” has been defined in Division 1, section 251A of Part VIIA of the Income Tax Assessment Act 1936 as being:

- (a) an offence against section 29D or 86A of the Crimes Act 1914, being an offence that relates to a tax liability within the meaning of the Taxation Administration Act 1953; or
- (b) an offence that relates to an offence of a kind referred to in paragraph (a); or
- (c) an offence that is:
 - (i) an offence against a taxation law; or
 - (ii) an offence against sections 6, 7 or 7A of the Crimes Act 1914, or subsection 86(1) of that Act by virtue of (a) of that subsection, being an offence that relates to an offence against a taxation law.

Any applicant or member convicted of a serious taxation offence will not be allowed to practise as a tax agent as it will not constitute “good fame, integrity and character”.

It can be established from the previous paragraphs that the ATAB has a set system in place in determining whether an individual will qualify to be registered as a tax agent and when he or she would be disqualified. Certain requirements are set out in the Act and are administered by the Board when applications are received. These qualification and disqualification criteria are lacking in the SARS proposal. The proposal simply provides qualification requirements and experience criteria that will enable a practitioner to become a registered member. At no stage in the proposal are other qualification criteria mentioned, such as the character of the person. In addition, disqualification criteria are not addressed at all. The only reference of disqualification contained in the proposal

relates to cancellation of membership when the tax practitioner has already been registered. According to SARS (2002b:22):

- (a) the Board shall cancel the membership of any member who subsequent to his or her admission to membership is:
 - (i) removed from an office of trust on account of misconduct; or
 - (ii) convicted of theft, fraud, forgery or uttering a forged document or perjury and sentenced in respect thereof to imprisonment...

More stringent admission requirements, similar to those adopted by the ATAB, need to be addressed by SARS in preparation for the impending creation of the Association. The necessity of this was expressed by the ATAB (2005c:19):

the importance of establishing conditions for membership with a profession is that it provides the opportunity for the profession to manifest their commitment to ensuring public protection. It suggests that those who have been recognised as a member of the profession have met the high standards that it requires to sustain their position of privilege and, in addition, that their continued affiliation is contingent upon them maintaining those standards.

Public protection has been expressed as one key element or purpose for the proposed creation of the Association in South Africa. Therefore, to ensure that this objective is achieved, stringent admission requirements have to be enforced and maintained. This will make the public more confident in its use of tax practitioners registered with this organisation.

General responsibilities and conduct of tax agents

According to the ATAB (2005b:1), once registered as a tax agent the agent has the right to “charge a fee to prepare income tax returns and objections and to transact business on

behalf of taxpayers in income tax matters; it also carries a number of responsibilities". Most importantly, as expressed in the ATAB (2005b:1) a tax practitioner is expected to:

1. Prepare returns honestly and competently, so that they are true and accurate;
2. Keep up to date with changes in taxation laws and practice;
3. Act professionally in dealing with clients, including the Australian Taxation Office; and
4. Maintain your good fame and character. Your reputation for honesty and integrity is one of your major assets as a tax agent.

The ATAB does not have a specific code of conduct within its organisation to which tax agents have to adhere. "Generally, the Board accepts behavior and practice consistent with the various "Codes of Professional Conduct" of the accounting and legal professional associations, as satisfying these requirements" (ATAB, 2005b:1). The tax agent cannot plead ignorance that he or she is not aware of the requirements of the code of conduct applicable to these professions as it is stipulated in the documentation dealing with responsibilities, that if an agent is at any time uncertain of correct practice, that he or she should contact the ATAB for advice. This approach differs somewhat from the SARS proposal which states that the Association will have its own code of professional conduct, on establishment. The creation of this code of conduct will necessitate a large investment of time and money and again could be an area of duplication of effort as both legal and accounting professions in South Africa currently have established codes of conduct.

Complaints

As mentioned above one of the duties of the Board is to deal with complaints received by the public relating to tax agents. Taxpayers have a right to lodge a complaint if they are not satisfied with the performance or conduct of the tax agent. The complaints will be addressed in terms of a "dispute resolution" (ATAB, 2005a:2) in order to ascertain whether a tax agent is "fit to remain registered or whether ... registration should be

suspended or cancelled” (ATAB, 2005a:2). ATAB (2005a:6) states that “the Board can deal with complaints which are directly related to tax agent services such as preparing tax returns and objections, and matters that reflect on an agent’s character, integrity and general fitness to be registered as a tax agent”. It further states that the Board can consider complaints such as:

- negotiating your refund without your authority;
- failing to forward on your refund in a timely manner;
- refusing to release your documents without a lawful reason;
- misconduct, such as falsifying your tax return;
- lodging your return without your authority;
- neglecting your tax affairs;
- continually lodging returns late;
- failing to pass on correspondence;
- continually failing to respond to phone calls or letters; and
- negligent, criminal or fraudulent conduct.

If a tax agent is not registered the Board will not take action on these complaints, but will refer them to the Tax Agent Investigation Unit of the ATO. This office will then conduct the investigation. In addition, any dispute that has arisen over fees cannot be resolved by the Board as this is considered to be a matter between the taxpayer and tax agent and of a more commercial nature. Complaints against a tax agent must be lodged in writing and the tax agent will then have an opportunity to respond to the complaint. After considering the complaint and on conclusion of the investigation the Board may “caution, suspend or cancel the registration of the tax agent” (ATAB, 2005a:7).

The complaints procedure is very detailed in the documentation of the ATAB. It provides both the tax agent and taxpayer with guidance on what kind of conduct would constitute grounds for a complaint, how to lodge a complaint, what the procedure would be on receipt of a complaint and what consequences the tax agent could face on the outcome of the investigation. The SARS proposal does not list the administration of

complaints as one of its objectives. Administration of complaints and the process in which to deal with these is a key aspect of tax practitioner regulation. It creates greater public confidence in the process in that the public will have an avenue in which to address complaints if they are not satisfied with the performance of their tax practitioners. In addition tax practitioners will be aware of the grounds on which complaints may be lodged and the process to be followed thereafter. The SARS proposal makes reference to many punishable offences but provides no detail on how these offences will be discovered or monitored by the Association or dealt with on discovery. With public protection being one of the main aims for the formation of the Association, this area needs to be further addressed by SARS before the finalisation of the regulations or legislation constituting the Association.

Conclusion

The code of conduct and regulations of the ATAB are focused very strongly on protecting the reputation and standing of the profession. It has strict rules of conduct in place to ensure that high standards are maintained and that the public is, above all, protected to ensure the good name of the profession is upheld. If a tax professional becomes a member of the ATAB it will mean that he or she has met the strict standards and the public will view this as such. This Board has worked effectively since its establishment and, with continuous improvement over the years, has managed to continue to uphold its high standards.

The model of the ATAB contains many attributes upon which SARS could base its regulatory system. The ATAB has clearly defined roles and objectives of the Board which are focused on achieving regulation and stringent admission requirements. The notion of a “fit and proper person” is adopted by the ATAB as one of its stringent admission requirements, which helps to identify those persons who qualify for admission as a tax agent and those who are disqualified. These criteria are lacking in the SARS proposal. In addition, the general responsibilities and conduct of tax agents are stipulated. One interesting aspect which SARS could consider is that the ATAB does not

have its own code of conduct, but merely stipulates that members should adhere to the codes of conduct maintained by the accounting and legal professional associations. This reduces operating costs significantly. There are also clear procedures outlined for the administration of complaints, which is another grey area in the SARS proposal. A similarity between the two proposals is that neither provides a distinction between members once registered, therefore a chartered accountant is viewed as equivalent to a lawyer or the holder of a matriculation certificate. This area has raised concerns, as discussed in chapter 3, and will be reviewed again in the final chapter.

After evaluating the SARS proposal and two existing models, namely the EAAB and the ATAB, the next chapter evaluates the three models against the proposed conceptual regulatory framework. This will assist in identifying the most appropriate model which fulfills all the requirements of the framework and on which SARS could base its proposal. In addition, the chapter will put forward various opinions and comments, highlighting possible further research areas or areas of consideration for SARS.

CHAPTER 6 – EVALUATION OF THE THREE REGULATORY MODELS AGAINST THE BASIC REGULATORY FRAMEWORK

Introduction

In the preceding chapters the SARS proposal, dealing with the regulation of tax practitioners in South Africa, was reviewed in detail and two alternative regulatory models, those of the Estate Agents' Board and the Australian Tax Agents' Board, were evaluated and compared with the SARS proposal. Each model was critically evaluated and this revealed various advantages and disadvantages of each of the models. These comparisons also helped to identify flaws or gaps in the SARS proposal. In addition, a conceptual regulatory framework was proposed in chapter 3, against which the various regulatory models could be evaluated.

In this chapter the proposed regulatory framework is used to evaluate the three regulatory models addressed in the research, namely the SARS proposal, the EAAB and the ATAB. Each model is evaluated against the best practice aspects of the regulatory framework and conclusions are reached on their adherence to each of these best practices. In addition, concerns are highlighted, where flaws and gaps are identified. This chapter also identifies areas of possible future research.

Comparison of the various regulatory provisions for tax practitioners

Refer to the spreadsheet on the page that follows.

COMPARISON OF THE VARIOUS REGULATORY PROVISIONS FOR TAX PRACTITIONERS

| BEST PRACTICE ASPECTS (BASED ON THE REGULATION FRAMEWORK) | THE SARS PROPOSED ASSOCIATION OF TAX PRACTITIONERS | THE ESTATE AGENTS' BOARD | AUSTRALIAN TAX AGENTS' BOARD |
|---|--|--|---|
| Degree of State control | <ul style="list-style-type: none"> - Independent of the South African Revenue Services - A self-regulated legal persona - One representative of SARS and National Treasury on the Board | <ul style="list-style-type: none"> - Act of Parliament - Statutory Regulation - Members of the Board appointed by the Minister (of Trade and Industry) - No government representation | <ul style="list-style-type: none"> - Provisions incorporated in the Income Tax Assessment Act - Board in each State : independent statutory bodies acting autonomously - One tax office member on each Board - Commissioner of Taxation has no control over Board proceedings |
| Vision, Mission, Strategic Objectives | <ul style="list-style-type: none"> - Protection of the tax base - Protection of the taxpaying public <p>[No vision or mission articulated]</p> <p><u>Note 2</u></p> | <ul style="list-style-type: none"> - Maintain and promote standards of conduct - Regulate activities of estate agents (to protect the public) <p>[Vision and mission articulated]</p> | <ul style="list-style-type: none"> - Protecting the public by ensuring that persons who charge a fee for providing taxation-related services have appropriate knowledge and are fit and proper persons to be registered as tax agents <p>[No vision or mission articulated]</p> |
| Goals, or detailed strategic objectives: - Establish rules of behaviour - Monitor, supervise, enforce | <ul style="list-style-type: none"> - Promote the common interest of tax practitioners - Maintain and preserve the tax integrity and status of the profession - Advance the theory and practice of taxation in all respects - Provide for research into taxation - Provide members with information on developments - Speak with one voice - Allow members to exchange views - Provide courses, seminars and presentations to other professions and the public - Co-operate at all times with SARS and the National Treasury - Pass comment on actual and impending legislation - Prescribe qualifications and/or experience to be obtained by members - Apply for membership and co-operate with national and international bodies | <ul style="list-style-type: none"> - Preventing unsuitable persons from entering the industry - Administering a qualifying examination for new applicants - Investigating complaints relating to improper conduct and activity of members - Imposing disciplinary sanction for violations of the Licensing Act or code of conduct - Reimbursing consumers who have suffered financial loss through theft by estate agents of trust money (from the Fidelity Fund) <p>Twelve further <u>functions</u> are listed including administration, image building, training and information services, ensuring competence and moral fitness, compliance with standards and redressing past imbalances.</p> | <p>No specific goals are stated, but the Board <u>responsibilities</u> are set out:</p> <ul style="list-style-type: none"> - Administering tax agent registration requirements - Determining suitability of applicants to be registered - Dealing with complaints about tax agents - Ensuring the maintenance of proper standards across the tax agent profession |

Notes relating to the comparative grid

Note 1: State involvement

State involvement in the Estate Agents' Affairs Board (EAAB) is very clear, while the Australian Tax Agents' Board (ATAB) is an independent body. The Association of Tax Practitioners (the Association) is proposed as an independent, self-regulated legal persona. What is not clear is how the Association will be constituted: a separate Act or provisions within the Income Tax Act?

Note 2: Strategic objectives

Both the EAAB and the ATAB have one over-riding objective – protection of the public when they make use of the services of members. The Association has two proposed objectives – protection of the taxpaying public and protection of the tax base.

Note 3: Goals aimed at achieving the objectives

The goals (or strategic objectives) of the EAAB and the ATAB are formulated in accordance with the theoretical Regulation Framework proposed in the research. The goals of the Association include only two which are in accordance with the Regulation Framework: prescribing qualifications for admission of members and dispute settlements. The others are loosely formulated goals and functions (further discussion to follow).

Note 4: Constitution and composition of the Board

The method of constituting the Association has not been proposed in the SARS document, or its composition.

Note 5: Matters relating to improper conduct

The SARS proposal for the Association is not clearly set out and is lacking in certain respects.

Note 6: Membership and admission requirements

The SARS proposal provides for a two-tier structure of membership, based on the complexity of the tax work to be performed, as well as the academic and experiential qualifications for each tier. There is no clarity on certification or licensing. Further concerns are addressed later.

Note 7: Funding

No provision is made in relation to funding of the Association. Further concerns are addressed later.

List of concerns flowing from the comparison and the prior review of the SARS proposal

In addition to the matters referred to in the notes appended to the table, the following concerns arise from the SARS proposal for the Association:

- **The function of section 67A of the Income Tax Act**

If the Association is to operate as a separate body, will the members register with this body and, if so, what function will section 67A of the Act fulfil? Is it intended as an interim measure, or will the entire constitution of the Association and the registration of members be effected through the Income Tax Act?

- **Objectives of the Association**

The dual objectives proposed for the Association by SARS are not in line with the other two Boards and the objective of protecting the tax base may not be appropriate. In the opinion of the writer, this could lead to a conflict of interest for registered members. One over-riding objective should be formulated and the writer is of the opinion that the protection of the public should be the main objective, bringing the SARS proposal into line with that of the EAAB and the ATAB.

This main objective could easily be achieved through ancillary objectives such as setting up and maintaining a code of conduct, a complaints and disciplinary procedure for non-adhering members and severe penalties for individuals who are found to be practising tax who are not members of the Association. The ATAB has clear, defining objectives in order to achieve its main objective. As discussed in the preceding chapter the responsibilities or objectives of the ATAB are “to administer the tax agent registration requirements” and to be “responsible for determining the suitability of applicants to be registered as tax agents, dealing with complaints about tax agents and ensuring that proper standards are maintained across the tax agent profession” ATAB (2005a:1). These are the responsibilities or objectives to which SARS should align the regulation of the tax industry in South Africa. There are four

main focus areas, the first being registration of applicants through various admission requirements, second and third being the handling complaints by reviewing these and initiating disciplinary action where necessary and the final one being to ensure that standards are always maintained through continued professional development or alternative assessment criteria. By simply having these four key objectives public protection is achieved, as all tax professionals will belong to one body and be regulated by the same rules and regulations, meaning therefore that if a professional belongs to the Association he or she has met the high standard of the Association and the public can be confident when using his or her services.

In addition to the conflict of interest that could arise from the second objective, this conflict of interest flows through to the proposed goals of the Association and the objective to “co-operate at all times with SARS and National Treasury”. This would also prompt the question whether the representation of SARS and the National Treasury on the Board is intended to facilitate such co-operation. According to de Klerk (2003:24) practitioners must not be “seen to be an extension of SARS, nor should it be an organisation that should be doing the work of SARS. There is an inherent danger of this happening if SARS is a stakeholder”. Consultation with SARS to ensure “good tax practice as well as assisting in voluntary compliance and the curtailment of errors” (de Klerk, 2003:24), would be beneficial to the Association. Overstepping this boundary would be detrimental. According to Arendse (2005:5) “if the intention behind the regulation is to protect the public interest, then it is inappropriate for the regulation to be carried out by SARS, as this approach would reduce the regulatory Board to no more than another tax-collection arm.” If the Association is seen by the public as an extension of SARS or to be lacking in independence, this could become “a major disincentive to use tax practitioners” (Arendse, 2005:5) regulated by the Association.

The writer agrees with these views and therefore proposes that the committee should consist of people with tax knowledge and additionally having business and financial expertise. It should be constituted from representatives of existing professional

bodies, the number of representatives could be aligned to that of the ATAB or an alternative number if needed. Representation could be according to the “South African based practicing members represented by each body” (de Klerk, 2003:24). The Board must also be completely autonomous and independent of SARS.

- **Other objectives**

Included amongst the detailed strategic objectives, the objectives to advance the theory and practice of taxation in all respects, to provide courses, seminars and presentations to other professions and the public and to pass comment on actual and impending legislation, implies the existence of a large organisational structure and high costs for members, which would have to be passed through by way of fees charged to taxpayers seeking advice. In order to ensure that “just another toothless watchdog” (Arendse, 2005:4) will not be created, SARS has to carefully streamline the proposed objectives of the Association.

- **Applicability to all practitioners**

A point that has been highlighted in a preceding chapter is that the regulation must apply to all tax practitioners and not only to a certain group. “Any person completing a tax return on behalf of another should be regulated, not only those who do so for reward, as rewards may be in various forms which may not easily be detected, for example, weekends away” (Arendse, 2005:3).

- **Membership of other professional bodies**

A concern that has been expressed in relation to membership of the Association is the overlap with members of other professional bodies who would be required to register with the Association. Increased costs, duplication of codes of conduct (and possibly conflicts) and duplication of training, seminars and commentary on legislation give rise to further concerns relating to cost. SAICA and other accounting professions have supported the proposed regulation, but have made it quite clear that “the establishment of a separate regulatory body for tax practitioners would be a duplication of effort where practitioners are already regulated” (Arendse, 2005:3).

Therefore, whilst SAICA has accepted the need for regulation, particularly with reference to those taxpayers currently not belonging to a professional body, it is of the opinion that “any regulation that is introduced should recognise that SAICA members are already regulated, and as far as possible, the existing regulatory structures should be used” (Arendse, 2005:3). SAICA is of the opinion that “it may be appropriate to have ‘accredited members’, which would refer to tax practitioners who are members of an approved professional body, such as SAICA members, and ‘general members’, being those who do not belong to an approved professional body. All members must be required to adhere to the minimum requirements of the regulatory Board” (Arendse, 2005:5). The writer has recommended exemptions for certain professions or affiliated membership.

- **Rules of conduct and penalties**

Rules of conduct and penalties are prescribed by existing professional bodies and the Income Tax Act also provides for a number of offences and penalties, including sections 69, 72, 73, 75 and 75A of the Act. The SARS discussion document did express reservations if reliance were to be placed on the existing codes of conduct upheld by various professional bodies, on the basis that “the existing codes of conduct are normally not tax specific” (SARS, 2002b:2). SAICA countered this by stating that “this problem could be relatively easily overcome as the professional bodies can adapt their codes of conduct to ensure that they meet certain minimum criteria” (Arendse, 2005:4). In addition the Association of Certified Public Accountants (CPA) stated that, if necessary, existing codes of conduct “could be easily amplified” (de Klerk, 2003:21), in order to achieve SARS requirements. The suggestion put forward by SAICA was that the “Regulatory Board establish its own code of professional conduct and disciplinary procedures and other professional bodies be allowed a period of time in which to amend their Codes and procedures to meet the same criteria with regard to tax specific requirements” (Arendse, 2005:4). Once the alignment has taken place these codes of professional conduct should then be recognised by the Association. “The members of those professional bodies should then be regulated by their own professional bodies and the regulatory Board should

then rely on their Codes, and disciplinary processes” (Arendse, 2005:4). This approach is similar to that followed by the ATAB in Australia and would help to minimise the duplication of effort and cost to those members already belonging to existing professional bodies. Professional bodies that have an established code of conduct such as SAICA and CPA have, in addition, disciplinary processes. If the code of professional conduct becomes aligned to the minimum requirements expected by the Association, then a similar process would need to occur with regard to disciplinary procedures. Once this alignment has taken place professional bodies will be responsible for disciplining their own members and this would help to avoid duplication of effort.

The CPA was of the opinion that if instances, which require disciplinary action, are going to mirror the twenty punishable offences as listed in the SARS proposal, that this could be excessive. In their submission to SARS they stated that punishable offences contained in “paragraphs (b) – (t) go way beyond the reasonable norms for the regulation of practitioners in that it is specifically referenced to the advantage of SARS and does not relate to professional conduct in general. It has all the trappings of a club to be placed in the hands of SARS, with a view towards keeping the organized professions in tune to its music” (de Klerk, 2003:22). The CPA further emphasised that if “paragraphs (b) – (t) be enforced, it should be made to apply to members in limited practice, full practice and senior employees of SARS. A Committee of Tax Experts should discuss the details of these offences” (de Klerk, 2003:22). The CPA strongly expresses the point that the list of punishable offences is too lengthy and difficult to monitor, investigate and prove. It also concurs with SAICA in that professional bodies already have disciplinary procedures and that if there was any failure to take appropriate action, “it would stand to be challenged by SARS for dereliction of duty” (de Klerk, 2003:22). The writer is in agreement with the proposal made by both SAICA and the CPA regarding the code of conduct and disciplinary action. In addition, the Association could follow the method adopted by the ATAB where members are required to adhere to the codes of conduct of the legal

and accounting professions and therefore the regulatory authority would not have to set up its own code of conduct.

- **Improper conduct**

A further area lacking in the SARS proposal is the punishment of improper conduct. The proposal lists many punishable offences but does not detail what form of punishment will be imposed once the offence has been committed. The regulations will serve no purpose if no punishments are enforced, as exploitation will continue if appropriate disincentives are not implemented. A suitable punishment therefore needs to be introduced to act as a disincentive. "For example, the Australian model should be followed which imposes a substantial fine on any person completing tax returns who is not a registered tax agent" (Arendse, 2005:5). The Board of the Association will therefore need to decide on the various fines or penalties that will be implemented when an offence is committed. Various degrees of punishment should fit the type of offence committed. One additional point to consider according to Arendse (2005:5) is "to prevent 'moonlighting practitioners' from exploiting other practitioners' regulation status".

- **Categories of membership**

The granting of membership is another area of concern. The SARS proposal referred to different categories of membership using a tiered approach, setting out stringent admission requirements based on qualifications and experience. It can be agreed that there is a definite need for different categories of membership as certain tax practitioners perform tax compliance work only, whereas "other persons are engaged solely in rendering opinions or advice on the fiscal statutes of South Africa" (Dijkman, 2003:5). These two categories will result in the academic and experience requirements being different. Although different levels are necessary, the proposed minimum requirements that need to be satisfied before admission to any one of the levels are stringent.

A particular area of concern is the number of tax hours a practitioner is required to have completed before entrance to a particular level is granted. According to Dijkman (2003:5) “many practitioners, although handling much tax work, do not do so exclusively as they also provide other professional services. This could create a problem in reaching the number of hours proposed by the regulations”. It can also not be taken for granted that a person who works longer hours in the field of tax is more competent than another person working fewer hours. “Providing proof of the number of hours worked is also problematical, as it would appear that few professionals document the number of hours spent on a particular area of work” (Dijkman, 2003:5 to 6). It is also not clear how a person who has been working outside the tax field would gain the necessary experience, as a person cannot act as a tax practitioner unless they have the necessary experience and cannot obtain the necessary experience as they will not be allowed to practise tax. The only solution in this instance would be for a person to join a tax consulting firm and work under the guidance of a partner registered as a tax practitioner and obtain the necessary hours of experience. It is not clear, however, if this is acceptable to SARS.

An additional requirement that has to be met in order to become a full member is that an applicant needs to possess a post-graduate degree in the field of tax. This may affect many older practitioners who have not obtained this form of qualification but, through the years of experience gained, are extremely competent. These practitioners may also find it difficult to prove the number of hours of experience obtained due to insufficient documentation of this over the past number of years. “It is also doubtful whether members of the legal profession will have the required two courses in accounting notwithstanding the fact that they may have a post-graduate qualification in tax” (Dijkman, 2003:6). The types of applicants mentioned above could be refused membership based on their lack of qualifications or hours of experience. “As it stands at present it would appear as if a vast number of tax practitioners would not meet the stringent academic requirements set by SARS to qualify for inclusion into the full practicing group. This notwithstanding the fact that they may have a high level of functional ability and tax knowledge”

(de Klerk, 2003:18). In a submission made to SARS by the CPA it was stated that “there is no need for the stringent academic and experience requirements for full practicing membership. The fact that anyone has a qualification and passed all the relevant academic courses laid down in the proposal as well as having the correct amount of South African tax work experience is not a guarantee that the person has kept up to date with changes in taxation legislation and is therefore qualified for full practicing membership” (de Klerk, 2003:20). Full membership should be allowed with respect to “current set requirements with regards to qualifications, experience and Continued Professional Development (CPD) requirements” (de Klerk, 2003:20) of accredited professional bodies. SARS therefore needs to reconsider the admission requirements for full membership and take into account long-practising members or members of the legal profession who may not have all the necessary university or technikon courses as required.

Another form of membership contained in the SARS proposal is for members who are entitled to limited practice. These members “are confined to the year or period covered by the return that he or she prepared” (Dijkman 2003:7). This may not be practical in all instances. The fact that they “can only represent the taxpayer concerning the year or period covered by the return that he prepared together with the fact that the member cannot represent a taxpayer on appeal, will have the effect of increasing costs to the taxpayer, since additional professionals will have to be contracted in” (de Klerk, 2003:17). In addition, in an instance where the taxpayer changes advisors and receives a query relating to a return submitted by the previous advisor, “the new advisor would appear to be precluded from dealing with any matter relating to the prior return lodged by the previous advisor” (Dijkman, 2003:7). This could place the taxpayer in a difficult and costly situation, as members entitled to full practice may have to be contracted in. De Klerk (2003:18) further states in the submission of the CPA that “members entitled to limited practice will not be allowed to function as public officers (neither as tax practitioners in general) to Close Corporations. They will no longer be able to render a ‘one stop’ tax and accounting service to Close Corporations because of the

splitting of their functions as 'accounting officer' and their functioning as 'public officer'. Serving only low-income earners will impoverish their practices and can lead to bankruptcy in many instances”.

The solution proposed by SARS to deal with the concerns mentioned above is membership “structured along the complexity of taxpayers” (Dijkman, 2003:17). Dijkman (2003:17) provides an example of “taxpayers who are employees or pensioners and do not carry on any other trade, taxpayers who earn remuneration or passive income from investment regardless of whether these taxpayers are provisional taxpayers or not, could be serviced by members entitled to limited practice. This would be regardless of whether such member prepared the tax return or not”. The submission by the CPA expresses a somewhat different opinion, as it is stated in the submission that members entitled to limited practice “should be regarded as an entry level only and a time limit should be set for practitioners to progress to full practice. After a window period only members entitled to full practice should be allowed to operate” (de Klerk, 2003:19). The CPA is also of the opinion that “anyone completing tax returns for reward ... should have passed at least one entry exam at an accredited controlling body ... An entry exam will allow people with the necessary skills but not necessarily the required qualification for full practicing membership to become full practicing members” (de Klerk, 2003:19). The suggestion is that SARS “develop a learnership program that is registered with the Seta for Finance, Accounting, Management Consulting and other Financial Services (FASSET) to enable tax practitioners to train future tax practitioners” (de Klerk, 2003:19).

Further examples of a tiered membership structure have been provided by SAICA in its submission to SARS (Arendse, 2005:6), for example:

Those with no academic qualifications but with the required minimum amount of experience could be admitted to level 1, those who have successfully completed at least one year full-time university / technikon

level course in taxation and two years accounting could be admitted to level 2 and level 3 would require the successful completion of at least two years' full-time university course in taxation, one year of law and four years of accounting and / or extensive practical experience.

The scope of work provided by members will also have to vary depending on the tier of membership. This again would need to be investigated by SARS. SAICA proposes that "the scope of work permitted within each tier of membership must be clearly established, and properly publicised, taking into account the level of skill required for the work allowed" (Arendse, 2005:6). The fact that all Chartered Accountants may not have kept up to date with tax practice or may not have the necessary experience, is controlled by SAICA's code of professional conduct. "SAICA members are required to ensure that they only perform work for which they consider that they are suitably qualified and, as members in the highest tier, they would therefore be permitted to do any tax work, but subject to their professional Code of Conduct" (Arendse, 2005:7). Finally, SAICA proposes that "the membership certificate or similar document should clearly reflect the level of membership and the public must be made aware of the different levels and scope of work allowed" (Arendse, 2005:7).

Another form of membership referred to in the discussion document is an "associate member", the meaning of which is not clear. This needs to be clarified by SARS, because currently it is interpreted as relating to members who form part of existing, recognized professional bodies, such as SAICA and that these members would be granted "associate membership". The discussion document, however, contains no further detail relating to these types of members. For example, would they pay lower fees, would all members forming part of a recognized professional body automatically be eligible to become members of the Association and which body would discipline the member? SAICA's proposal to SARS is that "all SAICA members should be given automatic admission to the regulatory Board ... SAICA will then register these members with the regulatory Board as a bulk registration ...

SAICA members should continue to be regulated by SAICA, with the avenue open to the regulatory Board to report any unacceptable behavior to SAICA and ensure that appropriate action is taken timeously” (Arendse, 2005:6).

The admission requirements are a critical aspect of the success of the organization and due to all the conflicting views mentioned above, an area that can be highlighted for further research.

- **No separate identification of categories of membership**

A problem identified is that all members will be grouped together on admission to the Association and have one professional identity. SAICA is of the opinion that “the academic standard and professional requirements of Chartered Accountants is higher than any other professional accountancy body in South Africa and it is essential that this accomplishment is not diminished in any way through the regulation process” (Arendse 2005:6). SAICA puts forward two solutions to this problem, the first being that SAICA members should be recognised as ‘accredited members’, however no further elaboration on the definition of this category of membership is given. The second solution is that it “may be necessary to have different tiers of membership of the regulatory Board, with admission to each tier dependent upon the academic qualification, experience and professional level of the member. If this approach is followed, SAICA members must be admitted to the highest tier of membership, given their qualifications and compulsory practical training and requirements for CPD” (Arendse, 2005:6). The second alternative, however, requires further investigation, as the admission requirements for each tier need to be clearly determined and applied. The scope of work provided by members will also have to vary depending on the tier of membership. Additionally, as stated above, SAICA proposed that “the membership certificate or similar document should clearly reflect the level of membership and the public must be made aware of the different levels and scope of work allowed” (Arendse, 2005:7). The approach to membership as proposed by SAICA is unique to South Africa and needs to be carefully considered and investigated by SARS. Other professional

bodies may not agree with the fact that SAICA members would automatically be granted the highest tier of membership. This approach does, however, have its advantages as the public will be made aware the status of the member they are dealing with, which level the practitioner occupies in the Association and the qualifications or experience the practitioner has. It could also serve to limit the cost to members who belong to existing recognized professional bodies. The example provided in this research relates to Chartered Accountants only, but legal or other accounting bodies may also believe that they are entitled to the top tier of membership and automatic admission. This is an area in which SARS will have to exercise care to make the right decision, taking into account all of the proposals above, that will be to the benefit of all parties involved.

- **Costs**

Many of the problems raised by various commentators and the writer, relating to the SARS proposal, are such that they would make the cost of membership very high. This would have to be passed on to the taxpaying public in the form of fees. This may have the effect that prohibitive costs would dissuade taxpayers from consulting practitioners and the objectives of the Association will be frustrated.

- **Funding the Association**

A final omission in the proposal of SARS relates to funding. The intention of SARS is that the Association will become self-funding after one year of operation, but no method is suggested as to how the Association will achieve this. No proposed fee structure or method of calculating fees is set out in the proposal. It is therefore difficult to establish what costs will be borne by the tax practitioners on the formation of the Association. This needs to be clarified to ensure that costs are not excessively high and are determined in a transparent method.

Conclusion

The concerns and problem areas identified in the above paragraphs need to be investigated by SARS before finalization of the Association. The discussion also highlights areas where further research could be conducted. In addition to these areas of concern, certain advantages of the EAAB and ATAB model were identified in the course of their review in chapters 4 and 5, respectively, and in the comparison with the conceptual regulatory framework in this chapter. These advantages could be used as a basis for SARS to realign its proposal in order to achieve the desired effect of regulation, being that of public protection. SAICA, the CPA and other institutions submitted recommendations to SARS as to how the proposal could be improved to ensure that the ultimate objective was achieved, as well as ways in which changes could be made to ensure that the regulation was not to the detriment of tax professionals currently practising in South Africa.

The writer of this research is of the opinion that the SARS proposal is too prescriptive and, at the same time, too broad. A simplified regulation procedure such as the ATAB model would appear to be preferable. The SARS proposal is a hybrid of the other regulation models. What the final model should be, depends on the intention of the legislature.

In the case of the estate agents, it was necessary to create a new professional qualification, a professional monopoly for registered estate agents and a professional body to regulate and promote all aspects of the property market. This previously unregulated market sector, in which any person could act as an agent selling property and acting for sellers and purchasers of fixed property, created the opportunity for abuse and the potential for instability in an important sector of the economy. The solution to this problem required an Act of Parliament which codified all regulations for the creation of the profession of an estate agent – membership, admission requirements, qualifications, disciplinary rules, offences, penalties, an ethical code, training and continuous

professional development, promotion of the industry and creating public awareness, fees and an infrastructure to administer this effectively and efficiently.

This is very similar to the establishment of the Chartered Accounting profession, which has its constituting legislation, a Public Accountants' and Auditors' Board, the South African Institute of Chartered Accountants designed to serve the interests of its members and two tiers of membership – those in public practice and those who may only use the designation of “Chartered Accountant SA”.

The model of the Australian Tax Agents Board is far simpler. It recognizes that tax practitioners are usually members of an already regulated profession, subject to its own admission requirements and disciplinary rules. Regulation of tax agents is effected through the taxation Act, which includes all the necessary regulations. The Board is a very simple structure designed only to deal with complaints, membership qualifications and discipline. Its low cost, simplicity and practicality make it an appropriate model for the South African situation.

The principal of regulation should be embraced by tax advisors, as this will protect their professional integrity and help to manage the relationship between advisors, SARS and the National Treasury. An appropriately structured Association of Tax Practitioners should also contribute towards improving tax compliance and lowering the economic cost of administering the whole tax system by reducing services, tax queries and legal disputes arising from poor advice. Such an Association would therefore be of benefit to all stakeholders.

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