

AGENDA PAPER

Item Number: 14
Date of Meeting: 23 September 2022
Subject: Update on the IESBA Project on Tax Planning & Related Services

Action Required For Discussion For Noting For Information

Purpose

To provide the Board with an update on IESBA's Project on Tax Planning & Related Services, which will impact the Code and APES 220 Taxation Services in due course.

From the 1st of January 2022, APESB CEO Channa Wijesinghe has been a member of this IESBA Taskforce (in his capacity as an IESBA member) and has been involved in the development of these IESBA proposals.

Background

In September 2021, the International Ethical Standards Board for Accountants (IESBA) approved a [project proposal](#) on tax planning and related services. The project aims to develop a principles-based framework based on the fundamental principles and the conceptual framework in the IESBA Code to guide professional accountants' ethical conduct when providing tax planning and related services to clients or their employer.

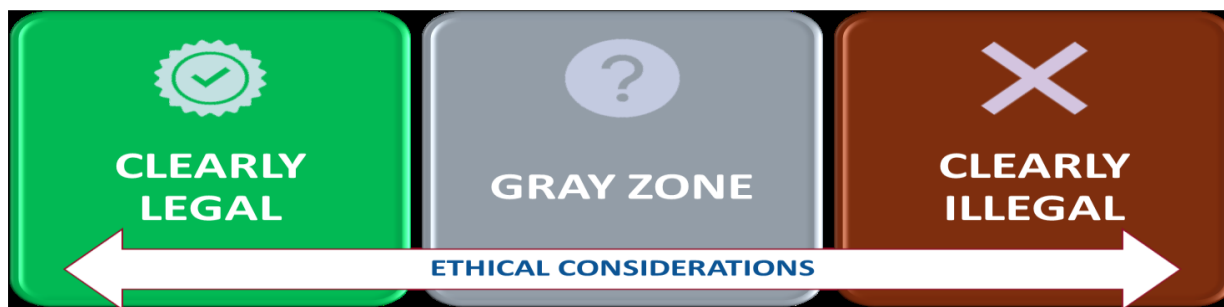
A significant part of the impetus for this project is recent tax scandals such as the Panama Pandora and Paradise papers. These scandals have focused the public, government and regulatory bodies of multiple jurisdictions' attention on the professional practices and behaviour of professional enablers such as lawyers and accountants.

At the IESBA March 2022, the IESBA reviewed a [report](#) from the Public Interest Oversight Board (PIOB) on the public interest considerations of IESBA's current projects. The PIOB supports the IESBA's tax project noting the current global emphasis on taxation, tax avoidance and social responsibility regarding tax practices.

Scope of the Project

The IESBA Taskforce noted that tax planning services could fall anywhere within a broad ethical spectrum from what is considered clearly legal to what is considered clearly illegal. Therefore, ethical considerations apply to professional accountants providing tax planning services all along this spectrum. However, the perception of professional accountants' ethical behaviour in carrying out tax planning services that, while not illegal, are perceived as

unacceptable tends to arise within the boundaries of what the IESBA has termed the “gray zone.”



Source: IESBA Tax Planning & Related Services – Briefing Note.

The project's focus will be on the 'gray zone' (which falls between clearly legal tax services and those that are clearly illegal) and issues of uncertainty or improper behaviour.

The Tax Planning Taskforce is aware that the issues concerning Tax Planning and Related Services are unique given the sensitive nature of tax planning in terms of its financial impact on clients and employing organisations, the broader role of taxes in meeting jurisdictions' policy goals, and the complexities of the subject matter.

Global Stakeholder engagement

The IESBA Tax Planning Taskforce has undertaken diverse stakeholder engagement to inform the standard-setting process, including holding three global roundtables (Americas, Europe & Asia Pacific) in April 2022. Over ninety delegates from around the world attended these IESBA global roundtables. The taskforce has considered this global feedback in developing an ethical framework for Tax Planning and Related Services.

Key aspects of the proposed ethical framework for Tax Planning and Related Services

Proposed new sections 280 and 380 of the Code

The taskforce proposes that the ethical tax planning framework be incorporated into two new sections in Parts 2 ([280 for professional accountants in business](#)) and 3 ([380 for professional accountants in public practice](#)) of the Code.

Definition of Tax Planning and Related Services

The taskforce has developed the following preliminary definition of Tax Planning:

Tax planning comprises a broad range of [services/activities] designed to assist [a client/an employing organization] in structuring its affairs in a tax-efficient manner, including taking a position on a current or future tax return

There are also other types of services or activities performed by Professional Accountants that are related to the provision of Tax Planning services, such as assisting in resolving a dispute with the tax authority on a Tax Planning position that the Professional Accountant or another

party recommended or preparing a tax return that reflects the position in the Tax Planning arrangement. These related services or activities are within the scope of this tax planning framework.

Responsibilities of Management and Those Charged with Governance

The Taskforce believes that management and Those Charged with Governance (TCWG) of clients and employing organisations also have specific responsibilities concerning tax planning. For example, management and TCWG are responsible for ensuring that the relevant entity's tax affairs are conducted in accordance with relevant tax laws and for maintaining appropriate books and records to enable the entity to comply with its tax compliance obligations.

Accordingly, the proposed ethical tax planning framework appropriately recognises the critical role played by management and TCWG with respect to Tax Planning activities.

Establishing a credible basis for Tax Planning Advice

Based on the global roundtables, it was clear that Professional Accountants must establish a credible basis for providing Tax Planning Advice. There was a general acceptance that what is a credible basis will also vary from jurisdiction to jurisdiction.

Potential actions that a professional accountant might take to establish a credible basis include:

- Reviewing the relevant facts and circumstances, including the economic purpose and substance of the arrangement.
- Reviewing legislative proceedings that discuss the intent of the relevant tax legislation.
- Reviewing relevant literature such as court decisions, law or industry journals, and tax authority rulings or guidance.
- Considering whether the basis for the proposed arrangement is a common practice that the relevant tax authorities have not challenged.
- Considering how likely the relevant tax authorities would accept the proposed arrangement if all the relevant facts and circumstances were disclosed.
- Consulting with experts within or outside the firm or organisation.
- Consulting with the relevant tax authorities and obtaining advance rulings where possible.

The gray zone and dealing with uncertainty

Based on the global stakeholder consultations undertaken, the taskforce acknowledges that it is challenging to identify the appropriate terminology to refer to the "gray zone" of uncertainty.

Accordingly, the taskforce has proposed guidance to acknowledge that a Professional Accountant might encounter circumstances giving rise to uncertainty as to whether a proposed tax planning arrangement will comply with the relevant tax laws and regulations.

As such, where there is uncertainty, it will be more challenging to establish a credible basis for the Tax Planning arrangement, and threats to compliance with the fundamental principles might be created.

Navigating the Grey zone

Potential actions a professional accountant can take to navigate the grey zone are;

- Structuring the tax planning arrangement so that it has a clear economic purpose and substance or is based on common practice that is unchallenged.
- Where possible, obtain an advance ruling from the tax authorities.
- Alternatively, obtain an opinion from an independent legal counsel regarding the interpretation of the relevant tax laws and regulations.
- If there are wider reputational and commercial risks, advising the client or employer not to pursue the proposed tax planning arrangement

The stand-back test

The Tax Planning Taskforce has developed a stand-back test for the IESBA's consideration. The essence of the standard-back test is that in determining whether to proceed with the advice or recommendation on the tax planning arrangement, the Professional accountant considers the reputational, commercial and wider economic risks and consequences arising from how stakeholders view the tax planning arrangement.

Reputational and commercial risks pertain to personal or business implications of having a prolonged dispute with the tax authorities or may involve adverse publicity, fines and penalties. The wider economic risks related to the arrangement's relative impact on the jurisdiction's tax base or, in some cases, multiple jurisdictions.

The Tax Planning Taskforce believes that when the professional accountant gets to the stage of determining whether to proceed with the tax planning advice, it is critically important that this stand-back test is performed due to heightened public attention on the negative consequences caused by tax avoidance due to the recent tax scandals.

This test will also assist the (OECD's) Base Erosion and Profit Shifting (BEPS) initiative to address tax avoidance to ensure that the profits are taxed where the economic activities generating the profits are created. It is also a response to a suggestion from the Public Interest Oversight Board (PIOB) to the IESBA to incorporate an aspirational element in the tax planning framework that would elevate the ethical bar for all Professional Accountants.

This test is a critical public interest element of the framework as it will make the professional accountant consider the potential for any adverse consequences for the client or employing organisation, as well as the relevant jurisdiction, in terms of its tax base and in the light of how stakeholders might view the Tax Planning arrangement.

If Tax Planning is carried out in accordance with the spirit and intent of this tax planning framework, it could also contribute to the long-term sustainability goals of organisations.

Documentation

The Taskforce has also encouraged the professional accountant to document the work undertaken during the tax planning process, including:

- The goals, economic purpose and substance of the tax planning arrangement.
- The nature of any uncertainties.
- The accountant's analysis of the situation, the courses of action considered, the judgments made, and the decisions taken to develop the proposed tax planning arrangement.

It is in the interest of a professional accountant to prepare documentation supporting the Professional Accountant's position if the tax planning arrangement is subsequently challenged later.

Way forward

The expected timeline for the project would be an Exposure Draft approved by IESBA in December 2022 (or March 2023), with a final pronouncement due by the end of 2023.

Once IESBA issues an ED, APESB will engage with Australian stakeholders to obtain feedback on the proposals. It is expected that this will occur in the first half of 2023. At that time, Technical Staff will also review the likely impact on APES 220 *Taxation Services*.

Technical Staff will continue to monitor the progress of the IESBA project and will update the Board on future developments.

Recommendation

The Board note the update on the IESBA's Project on Tax Planning and Related Services.

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Date: 4 September 2022