



UNIVERSITY OF WITWATERSRAND, JOHANNESBURG

**A COMPARATIVE ANALYSIS AND SUBSEQUENT RECOMMENDATIONS FOR
IMPROVEMENT OF THE DRAFT ADVANCE PRICING AGREEMENT LEGISLATION IN
SOUTH AFRICA**

MONIQUE FERNANDES CARVALHO

**A RESEARCH REPORT SUBMITTED TO THE FACULTY OF COMMERCE, LAW AND
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Abstract

When dealing with multinational enterprises (MNEs) which are connected parties and located within in different jurisdictions, they must transact with each other and set prices at which they transfer goods or services¹ between each other on an arm's length basis (Ernst & Young (EY)(2021); United Nations (UN)(2021: 29)).

According to the Organisation for Economic Co-operation and Development (OECD), the arm's length principle (ALP) assists MNEs to identify the price at which a transaction would take place, had its members in fact been subject to market forces. In other words, the transfer price set for those transactions between unconnected persons should be used as a benchmark against which to appraise those transactions taking place between connected persons; any identified discrepancies may thereafter lead to a potential future adjustment which gives rise to transfer pricing disputes between taxpayers and the tax authorities. (South African Revenue Service (SARS) (1999: 8).)

In order to minimise these transfer pricing disputes, the OECD emphasised the need for a more proactive, clear, effective discussion to take place between taxpayers and the tax authorities. The OECD has identified and communicated a proactive, upfront dispute resolution mechanism, known as advance pricing agreements (APAs). APAs are a tool that attempts to prevent disputes from arising through the proactive, upfront engagement between the taxpayers and tax authorities. (Organisation for Economic Co-operation and Development (OECD)(2016: 7 – 8); OECD (2022 a: 213).)

APAs are not yet governed under South African (SA) legislation; however, although the South African Revenue Service (SARS) has submitted draft legislation on APAs for public comment, nevertheless no further steps have yet been taken to date (SARS (2021)).

One of the biggest challenges of APAs which far removes their practicality is the period within which they take place until completion. Statistically, there is a limitation in the amount of data which is available when dealing with APAs as a topic in isolation. The author selected a number of OECD member countries from which she was able to retrieve a limited but relevant amount of data from reliable sources, which clarifies the average time period it takes to complete an APA from start to end. The author selected both the United States of America (USA) and United Kingdom (UK) for reasons which are set out below in this research report.

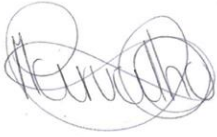
This research report provides a comparative analysis of the draft APA legislation submitted by SARS in SA, in comparison with the APA legislation promulgated and followed in the USA and UK. Subsequently, suggested improvements to the draft APA legislation in SA by reference to the APA legislation followed both in the USA and UK are further provided.

Key words: transfer pricing, arm's length principle, multinational enterprises, double taxation, double taxation agreement, mutual agreement procedure, advance pricing agreements, Organisation for Economic Co-operation and Development, base erosion and profit shifting, South African Revenue Service.

¹ Service also includes the licensing of intellectual property and the provision of financial assistance.

Declaration

I declare that this research report is my own unaided work. It is submitted in partial fulfilment for the degree of Master of Commerce (specialising in Taxation) at the University of Witwatersrand, Johannesburg. It has not been submitted for any other degree or examination in any other university.



Monique Fernandes Carvalho

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Dedication

Firstly, to God for giving me the strength, ability and most importantly health to complete this research report;

Secondly, to my beloved fiancé, Gregory Shaun Branquinho, who endured many late nights in support of completing this research report and who has continued to be my biggest and most constant supporter for the past six and half years;

Thirdly, to my beloved father, Antonio Manuel Da Mota Carvalho and mother, Anabela Rebelo Carvalho, who have continued to encourage and support me throughout the last ten years of my study career; and

Lastly, to my supervisors, Professor Alwyn De Koker and Mr Steven Breslin for your valuable time, guidance and support.

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Glossary of terms and abbreviations

Abbreviation	Detailed Description
ATR	Advance tax ruling
AE/AEs	Associated enterprise/Associated enterprises
ALP	Arm's length principle
APA	Advance pricing agreement
APMA Program	Advance Pricing and Mutual Agreement Program
BEPS	Base erosion and profit shifting
DTA	Double taxation agreement
HMRC	His Majesty's Revenue and Customs
IRS	Internal Revenue Service
MAP	Mutual agreement procedure
MLI	Multilateral instrument
MNE	Multinational enterprise
OECD	Organisation for Economic Co-operation and Development
OECD guidelines	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrators
PDF	Portable Document Format, developed by Adobe
PN7	Practice Note 7
RE	Regarding
SARS	South African Revenue Service
SA	South Africa/South African
SP	Statement of Practice
TAIT	Treaty Assistance and Interpretation Team
TIOPA	Taxation (International and Other provisions) Act
TPM	Transfer pricing methodology
UK	United Kingdom
USA/U.S.	United States of America
USCA	United States Competent Authority

Chapter 1: Introduction

Background

According to Arnold and McIntyre (2002), the term “transfer price” is defined as follows:

“A transfer price is a price set by a taxpayer when selling to, buying from, or sharing resources with a related person. ...A transfer price is usually contrasted with a market price which is the price set in the market place for transfers of good and services between unrelated persons.” (Arnold & McIntyre, 2002, as cited in EY (2021)).

In other words, a transfer price is the price at which an intra-group transaction, also known as a “controlled” transaction takes place between connected parties within a multinational enterprise (MNE) group. The transfer price is compared with the market price at which a transaction take place between unrelated entities/unconnected parties which operate independently on an arm’s length basis. (EY (2021); UN (2021: 29).)

The price at which these intra-group transactions take place has a defiant effect on the entities’ income and/or expenses resulting from such transactions, and consequently impacts on the amount of profit recorded by each group entity for tax purposes (UN (2021: 29)).

It is clear from the above information that the essence lies in establishing the appropriate arm’s length price to ensure that the amount of profit recorded by each group entity reflects a true and accurate amount for tax purposes (UN (2021: 29)). If the pricing set by MNEs does not accord with international norms or with the arm’s length principle (ALP) under domestic law, the tax authority considers such pricing to be “mispricing, incorrect pricing, unjustified pricing or non-arm’s length pricing, and issues of tax avoidance and evasion may potentially arise” (UN (2021: 30)).

The OECD adopted the ALP with the idea of providing sufficient guidelines on how pricing should be set for those transactions which occur between connected persons (Valentiam Group (2020)). Transactions taking place between connected persons should adopt similar characteristics to those transactions which take place between unconnected/independent persons (i.e., each party receives a fair market value price for the transaction) (SARS (1999: 8)).

Paragraph 1 of Article 9 of the OECD Model Tax Convention deals with the ALP and provides that the ALP assists MNEs to identify the price at which a transaction would be, had its members in fact been subject to market forces. Subsequently, the purpose for which the ALP was recommended by the OECD was to ensure that the transfer price set for those transactions between unconnected persons should be used as a benchmark against which to appraise those transactions taking place between connected persons; any identified discrepancies may thereafter lead to a potential future adjustment resulting from double taxation. (SARS (1999: 8).)

Taxpayers unsatisfied with the tax treatment of a transaction which attracts double taxation, should first follow the dispute process applicable in the tax jurisdiction where the double taxation has occurred, followed by an application for use of the Mutual Agreement Procedure (MAP) or mandatory binding arbitration (only available in those jurisdictions whereby this remedy has been implemented) (EIs (2017: 2 – 3)). Although the MAP and mandatory binding arbitration is used as a mechanism to resolve disputes relating to transfer pricing adjustments which give rise to double taxation, as well as document non-compliance, the challenge is that such mechanisms are applied on a reactive basis rather than on a proactive basis. This means that for as long as these mechanisms are the only options available, transfer pricing disputes on double taxation, as well as document non-compliance, are an inevitable occurrence in the foreseeable future. It is therefore required that alternative methods which have a proactive, upfront engagement between the taxpayers and tax authorities when dealing with transfer pricing issues should be formulated and implemented. (OECD (2016: 7 – 8).)

The 2022 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrators (OECD guidelines) highlighted the adoption for the advance pricing agreements (APAs) which provide a proactive, upfront engagement between the taxpayers and tax authorities for purposes of reducing the possibility of double taxation as well as document non-compliance in relation to transfer pricing disputes (OECD (2022 a: 213)).

Advance pricing agreements

According to PWC, an APA may be regarded as a formal agreement whereby a taxpayer together with one or more tax authorities identifies and sets a transfer price for those transactions taking place by and between the taxpayer and its related parties (PWC (n.d.)).

APAs originated as far back as the nineties. The first-ever APA was concluded between the Apple Computer Corporation and the Internal Revenue Service (IRS). The concept of APAs has since been adopted by MNEs for purposes of avoiding transfer pricing exposure and secure a measure of confidence in their transfer pricing policies. (Valentiam Group (2021).)

Since the inception of APAs by the IRS, there has been a growing trend in the number of jurisdictions which have adopted and implemented the programme into their domestic legislation, through recommendations by the OECD (Valentiam Group (2021)).

OECD's position on APAs

In 1999, the OECD published an update to the 1995 OECD guidelines in the form of a new Annex. The new Annex provided an introduction to APAs, discussed issues relating to multilateral APAs, as well as set out guidelines on how to conduct an APA under the MAP. (OECD (n.d. a).)

According to the new Annex, APAs are defined as a form of administrative approach which assists in the prevention of transfer pricing disputes from occurring through application of the ALP to transact in advance of those transactions taking place (OECD (n.d. a)).

It is clear from the above definition that the purpose for which an APA is recommended for implementation by the OECD is that it promotes consistency in practice among those countries which choose to adopt the programme, as well as being a proactive step taken in creating an engagement between the taxpayers and tax authorities in an attempt to eliminate any future, unwanted transfer pricing disputes (OECD (n.d. a)).

APA approaches formed part of the 1995 OECD guidelines with the intention to “monitor carefully expanded use of APAs” (OECD (n.d. a)), “to make the MAP APA process more transparent, more effective and produce more consistent results” (OECD (n.d. a)), as well as to provide the recommendation that if and when possible APAs “should be concluded on a bilateral or multilateral basis between competent authorities through the mutual agreement procedure of the relevant treaty.” (OECD (n.d. a)).

There are several elements which are required to be present in order for an APA programme to be successful. Furthermore, in order for an APA programme to prosper, it requires highly skilled personnel who have the ability to perform their duties diligently and skilfully, since APA application can be a timely, costly and a frustrating process. (Rampersad & McLennan (2022).)

SA’s position on APAs

Section 31 of the Income Tax Act, No. 58 of 1962 (ITA) (Republic of South Africa, 1962) came into effect on 19 July 1995. The purpose for which this section was promulgated into SA law was to counter transfer pricing practices which might give rise to unfavourable tax implications for the SA fiscus. (SARS (1999: 6).) As from years of assessment commencing on or after 1 April 2012, section 31 of the ITA was amended which places the onus of proof on the taxpayer as opposed to the Commissioner’s discretion. This means that the taxpayer is obliged to prove to the tax authorities that its transfer pricing is conducted at arm’s length; failure to adhere to this principle may result in relatively significant transfer pricing adjustments and penalties under section 31 of the ITA and the Tax Administration Act, No. 28 of 2011 (TAA) respectively. (SARS (1999).)

Additionally, section 25 and 29 of the TAA, as amended, may be read together with section 31 of the ITA; and these sections principally deal with transfer pricing’s country-by-country reporting requirement as prescribed by SARS (SARS (1999)).

On 6 August 1999, SARS published Practice Note 7 (PN7). PN7 is a comprehensive document which provides guidance on the way in which section 31 of the ITA should be interpreted. SARS states in PN7 that in the case whereby there is an absence of specific guidelines in PN7, section 31 of the ITA provisions or any tax treaties concluded by SA, recommendations by the OECD, in the OECD guidelines, must then to be followed. Although SA is not an OECD member country, such OECD guidelines are acknowledged as an “important, influential document that reflects unanimous agreements amongst the member countries” (SARS (1999: 6)) and is therefore followed by many non-member OECD countries including SA. Furthermore, SA has demonstrated a commitment to the OECD recommendations by SARS signing the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, also known as the Multilateral Instrument (MLI). (SARS (1999: 6); Snyckers (2017).) The MLI is a multilateral treaty which supports jurisdictions to act quickly in amending the way in which their tax

treaties operate to make provision for the implementation of specific measures which are designed to address multinational tax avoidance and to be more effective when resolving tax disputes (Zakat, Tax and Customs Authority (2020)).

SARS, by signing the MLI in June 2017, has proved its commitment towards implementing specific measures to conduct cross-border dispute resolutions between the taxpayers and tax authorities more effectively (Snyckers (2017)).

Irrespective of SARS's commitment to the OECD by signing of the MLI and adopting the MAP; SARS has continued to exclude transfer pricing matters from the advanced tax ruling system, and therefore there is no legislated APA programme in place, only draft legislation within the SA fiscal system which may assist, if promulgated, as a proactive mechanism to combat transfer pricing disputes between the taxpayers and tax authorities.

In summary, it must be noted that the implementation of APAs is essential since it acts as a proactive mechanism to combat transfer pricing disputes between the taxpayers and tax authorities in SA. However, the subsequent chapters will discuss and explore throughout this research report whether the proposed draft legislation by SARS is sufficient in comparison with that which is followed in other jurisdictions. Subsequently, recommendations for improvements to the draft legislation in SA will be further discussed below with reference to the APA legislation followed in other jurisdictions.

Research question

In light of the above theory, the need for implementation of legislation which will govern APAs in SA is noted. However, the question arises: is the current drafted APA legislation in SA adequate in comparison with the related legislation that is applied elsewhere?

In order to address the aforementioned research question, the following sub-questions will be addressed:

Firstly, what constitutes transfer pricing?

Secondly, what is the nexus between transfer pricing and APAs?

Thirdly, what type of tax legislation is applicable to APAs in SA and under which legislation is this topic governed?

Fourthly, what type of tax legislation has been introduced in the USA which specifically deals with APAs?

Fifthly, what type of tax legislation has been introduced in UK which specifically deals with APAs?

Finally, a comparison of the tax legislation applicable to APAs in SA against the related legislation in the USA and UK will be used as a basis on which to make recommendations for the improvement of the draft APA legislation in SA.

One of the biggest challenges of APAs which strongly limits their practicality is the period it takes until completion. Statistically, there is a limit to the amount of data which is available when dealing with APAs as a topic in isolation. However, it must be noted that the OECD has made it a formality that as from 2024, all OECD member countries are obliged to submit statistical data regarding APAs. Accordingly, the author has selected a number of OECD member countries which have published this level of information, even though this is relatively limited, which clarifies the average time period it takes to complete an APA from start to end (see the following tables):

*n/a: not available

***Different types of APAs**

Unilateral:	<i>"an APA that involves only the taxpayer and the tax authority of the country where the taxpayer is located."</i> (Deloitte, 2012:3)
Bilateral:	<i>"an APA that involves the taxpayer, associated enterprise (AE) of the taxpayer in the foreign country, tax authority of the country where the taxpayer is located, and the foreign tax authority."</i> (Deloitte, 2012:3)
Multilateral:	<i>"an APA that involves the taxpayer, two or more AEs of the taxpayer in different foreign countries, tax authority of the country where the taxpayer is located, and the tax authorities of AEs."</i> (Deloitte, 2012:3)

Australia				
Year	2018	2019	2020	2021
Completed APAs	31	27	13	n/a
Time Period (months)				
Unilateral	23.27	28.92	32.92	n/a
Bilateral	31.67	36.85	50.26	n/a
Multilateral	61.6	n/a	n/a	n/a

Canada				
Year	2018	2019	2020	2021
Completed APAs	25	12	15	9
Time Period (months)				
Unilateral	17.8	19.7	22.9	0.2
Multilateral / Bilateral	41.9	56.6	34.4	48

UK				
Year	2018	2019	2020	2021
Completed APAs	30	26	24	24
Time Period (months)	33.6	47.9	55.5	54

USA				
Year	2018	2019	2020	2021
Completed APAs	169	188	202	202
Time Period (months)	40.2	38.8	32.7	35.1

It is evident from the above statistics that in respect of the USA, during the 2018 – 2021 years of assessment there is a trend indicating:

- An increase in the number of APAs completed; and

- A decrease in the number of months taken to complete the APAs (taxnotes (2021); KPMG, (2022));

In respect of the UK, during the 2018 – 2021 years of assessment there is a trend indicating:

- A consistent number of APAs completed; and
- A continuous increase in the number of months taken to complete the APAs (GOV.UK, (2022)); and

In respect of Australia and Canada, during the 2018 – 2021 years of assessment there is a trend indicating:

- A decrease in the number of APAs completed; and
- An inconsistent increase in the number of months taken to complete the APAs (Australian Tax Office (2022); Canada Revenue Agency (2022)).

Based on the abovementioned statistics, the author has made an informed decision to consider both the USA's and UK's legislation, for reasons which are mentioned below (see **Scope and limitations** below).

Research objective

This study aims to investigate the extent to which the draft APA legislation in SA is sufficient and/or falls short in comparison with related legislation in the USA and UK. In areas where SA draft legislation falls short, recommendations will be made for consideration by SARS.

Research methodology

A comparative research method was conducted and applied in fulfilment of this research report. The research applied in this research report is a unique investigation undertaken in order to acquire new knowledge; however, it is focused on a specific practical objective.

Descriptive research information is included in this research report which demonstrates relationships that assist in explaining and describing the current regulatory framework. The objective of explanatory research is to provide details where there is a limited amount of existing information.

A specific research question was identified and addressed through the collection, processing and applying of the research. A comparative analysis of other countries – the USA and UK – was conducted and supported by the descriptive research since there are no published rulings nor are there any interpretation notes in SA which focus specifically on the topic of APAs.

A qualitative approach was applied in this research report. A detailed review of applicable literature, including legislation, journal articles, discussion papers and other published material was also performed.

Scope and limitations

This study selected the USA and UK as a point of reference for APAs. Apart from both these countries having been regarded as developed countries and members of the OECD, the reason for this selection stems from the broad APA network that both these countries currently have in place, as well as statistical certainty in that both jurisdictions mitigate and continue to mitigate the time periods within which it takes to complete an APA. When considering the aforementioned and by interpretation of statistics it can be assumed that the process as set in the legislation, both in the USA and UK, is a progressive and reliable source for purposes of comparison in this research report.

Areas not covered in this research report are a thorough discussion of the various MAPs, as well as mandatory binding arbitrations which are available to taxpayers. This study rather focuses specifically on APAs in respect of transfer pricing, followed by a comparative analysis and recommendations for improvements to the SA draft legislation.

Proposed chapter outline

Chapter 1: Introduction

Chapter 1 provides a broad but detailed introduction to important aspects of transfer pricing followed through to potential disputes which may arise, and which may be avoided through the implementation of an APA. Currently, as APAs have not been formally implemented in SA legislation, their potential implementation forms the basis of this research report. The introduction includes research questions, objectives and methodologies, followed by a proposed chapter outline.

Chapter 2: A discussion on the arm's length principle and advance pricing agreements through an international lens

Chapter 2 initially provides a detailed discussion regarding the ALP, how the ALP can give rise to transfer pricing disputes and how transfer pricing disputes may be avoided through the implementation of a proactive APA.

This chapter also provide a detailed discussion of APAs in the context of transfer pricing, what the APA programme aims to achieve, a summary of the process involved in giving effect to the APA programme, and its advantages and disadvantages.

The information provided in this chapter will primarily be based on information provided by the OECD.

Chapter 3: USA legislated advance pricing agreement programme

Chapter 3 provides a detailed discussion on the current legislated APA programme followed in the USA, a developed country.

The purpose of this chapter is to gather information, including but not limited, to an initial discussion on the APA programme implemented and executed in the USA, the legislated APA programme in the form of a stepped approach, the participating parties' obligations and interests in this APA programme, and its advantages and disadvantages.

The aforementioned information will assist the reader to clearly understand the APA programme followed in USA in order to formulate a comparison with its South African equivalent.

Chapter 4: UK legislated advance pricing agreement programme

Chapter 4 provides a detailed discussion on the current legislated APA programme followed in UK, also a developed country.

The chapter follows the same approach as in Chapter 3 with regard to gathering information on the APA programme in the UK.

Chapter 5: SA draft legislated advance pricing agreement programme

Chapter 5 provides a detailed discussion on the current draft APA legislation published by SARS in SA, a developing country, for deliberation and comments.

The purpose of this chapter is to identify and discuss distinct differences and shortfalls, as well as the similarities in the draft APA legislation in SA in comparison with what has been promulgated and executed in both the USA and UK, as well as the relative advantages and disadvantages.

Chapter 6: Conclusion and recommendations

Chapter 6 summarises the findings of each chapter and reaches a conclusion based on the information that was gathered as part of this research document. Furthermore, a list of recommendations is presented on improvements to the SA draft APA legislation, drawing on the differences and shortfalls of related legislation promulgated and applied in both the USA and UK.

Chapter 2: A discussion on the arm's length principle and advance pricing agreement through an international lens

Background

The rapid advancements in global technology, transportation and communication over the past decades have resulted in MNEs expanding their supply chains to various jurisdictions around the world (UN (2021: 29)).

With the globalization of the economy and the increase in MNEs, the volume of international trade within MNEs has increased over the years and consequently attention is thus drawn to ways in which intra-group transactions are being priced (De Robertis (2018)).

“Intra-group transactions” are defined both locally and internationally as the transfer of good and service, capital and intangible property abroad, within an MNE group. Intra-group transactions make up more than 30% of all international transactions and currently show a steady growth in the global trade market. (UN (2021: 29).)

When establishing the price at which an intra-group transaction must take place, most countries refer to the OECD guidelines in which the ALP is defined (De Robertis (2018)).

Introduction to the Organisation for Economic Co-operation and Development

In summary, the OECD is an international organisation established in 1961 which encourages the idea of countries working together to identify problems and find solutions to

“common challenges, develop global standards, share experiences and identify best practices to promote better policies for better lives” (OECD, (n.d. b: 4)).

The OECD provides its information and advice through knowledge and evidence. It inspires and influences in a multilateral setting, as well as sets standards and provides policy support through an evidence-based process. (OECD (n.d. b: 12 – 14).)

The aim of the OECD is to promote policies which are formulated with the following purposes: (a) to work towards achieving the peak of a sustainable economic growth, employment and standard of living in all Member countries, and when doing this to maintain financial stability and to contribute to the development/improvement of the world economy; (b) to participate in the economic expansion and development in both Member and non-member countries; and (c) to participate in the growth of world trade on a multilateral, non-discriminatory basis in accordance with international obligations (OECD (n.d. c)).

The aforementioned policies encourage countries to learn from one another, and in doing so, be enabled to compare best practices so that one solution may be adapted and applied elsewhere (OECD (n.d. b: 18)).

Arm's length principle

In terms of the OECD guidelines, the ALP provides that transactions between MNEs belonging to the same group should be priced the same as those transactions between unrelated parties. Insofar as the above principle is complied with, the profits earned by each entity in the MNE group will reflect a relative value created by their activity. (De Robertis (2018).)

The ALP originated in the early 20th century. It was formally introduced into the domestic law of both the USA and Canada in 1924, followed by Sweden in 1928 and subsequently Italy in 1936. The ALP was included in the League of Nations Draft Convention for the Allocation of Business Income between States in 1933, followed by its implementation in the OECD Tax Model Convention in 1963; and sixteen years later in 1979, it was implemented worldwide for the first time when the OECD published its OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrators. (De Robertis (2018).)

The OECD guidelines provide that the ALP is an international transfer pricing standard that was agreed to and adopted by OECD member and non-OECD member countries – including South Africa – for tax purposes by MNE groups and tax authorities (OECD (2022 a: 29)).

Transactions which take place between connected/related parties are referred to as “controlled” transactions, whereby transactions which take place between unconnected/independent parties is referred to as “uncontrolled” transactions (OECD (2022 a: 29 – 30)).

Certain economic forces, also known as “market forces”, regulate the pricing of transactions between unconnected/independent parties. These unconnected/independent parties will most likely operate in a manner which is most beneficial to their self-interest; in other words, on an arm's length basis through negotiation of the terms and conditions which are most favourable to themselves. In simple terms, an unconnected/independent seller would want to sell at the highest price possible, while an unconnected/independent buyer would want to buy at the lowest price, and so the price agreed to between the unconnected/independent buyer and seller would be determined in an equilibrium of these two opposed forces. (OECD (2022 a: 29 – 30); SARS (1999: 6).)

In the absence of regulation, the pricing of controlled transactions would be determined by forces that differ from those that govern the pricing of uncontrolled transactions. Any discrepancies in the pricing of transactions which take place between unconnected/independent parties in comparison to those transactions taking place between connected/related parties will ultimately have an effect on the overall group profit and taxation. In other words, when transfer pricing does not reflect the market forces and the ALP, which is most likely the case in the pricing between connected/related parties, tax liabilities of MNEs and the tax revenues of the host country can be distorted. (OECD (2022 a: 29 – 30).)

A distortion in the transfer price may result in an adjustment to this price in order to ensure that the ALP is satisfied. OECD member and non-OECD member countries have agreed to such necessary adjustments for tax purposes, and the same is achieved by establishing commercial and financial relations that they would expect to find between

unconnected/independent parties in similar transactions under similar circumstances. (OECD (2022 a: 29 – 30).)

For the reasons set out above, regulations are required to govern the manner in which transactions take place between unconnected/independent parties. The ALP is a concept which applies in order to identify the arm's length price. (OECD (2022 a: 31).) Per PN7 it provides that the ALP is the "first and overriding principle" and that all transactions between connected/related parties are to be given effect on an arm's length basis, this "simply means that the transaction should have the substantive financial characteristics of a transaction between independent parties, where each party will strive to get the utmost possible benefit from the transaction" (SARS (1999: 8)). Per paragraph 1 of Article 9 of the OECD Model Tax Convention on Income and on Capital (OECD Model) it further provides the ALP to be as follows:

"[Where] conditions are made or imposed between two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly." (OECD (2022 a: 31)).

In more simple terms, an adjustment to the profits will be performed by reference to conditions which would have been considered between unconnected/unrelated parties in similar transactions under similar conditions. Following this, the ALP adopted an approach whereby it treats members of a MNE group as operating as separate and independent entities rather than a single unified business. Therefore, an analysis of controlled transactions, with reference to connected/related parties and unconnected transactions, is referred to as the "comparability analysis", which is the heart of the application of the ALP. (OECD (2022 a: 31).)

The importance of implementation of the comparative analysis is that it stresses the need for an approach which is balanced in terms of reliability on the one hand, and the burden it creates for the taxpayers and tax authorities on the other (OECD (2022 a: 31 – 32)).

Paragraph 1 of Article 9 of the OECD Model sets out the foundation for the comparability analysis and introduces the need for: (a) a comparison to be made between the terms and conditions made or imposed between connected/related parties and those made between unconnected/independent parties. The identification of such discrepancies will help determine the need for re-evaluation of the accounts for purposes of calculating the tax liabilities of connected/related parties; and (b) a determination of the actual profits that would have accrued at arm's length, for purposes of determining the quantum of any re-evaluated accounts. (OECD (2022 a: 31 – 32).)

There are various reasons for which both OECD members and other non-OECD members have adopted the ALP; however, the main reason is that the ALP provides a wide parity of tax treatment for both connected and unconnected MNE groups, placing them on a more equal footing for tax purposes and circumventing the creation of tax advantages or disadvantages which would alter the relative competitive positions of either type of entity. Therefore, the ALP promotes growth of international trade and investment. (OECD (2022 a: 32).)

There are certain practical difficulties when applying the ALP, such as in the case whereby connected/related parties engage in a transaction that unconnected/independent parties would not undertake. Such transactions do not evidence a means of tax avoidance but may be an ordinary transaction between members of a MNE group which are faced with different commercial circumstances than that which would appear between unconnected/independent parties. This form of transaction creates difficulties when applied against the ALP due to there being relatively little to no evidence of the conditions that would have been considered or established by unconnected/independent parties transacting on a similar basis. However, the fact that there is no evidenced unconnected/independent transactions which might have taken place between unconnected/independent parties, does not in itself justify the conclusion that the transaction does not reflect an arm's length price. (OECD (2022 a: 32 – 33).)

Nevertheless, the ALP can create an administrative burden for both the taxpayer/s and the tax authority/ies in cases where connected parties have transacted at what they regard is an arm's length basis evidenced by supporting documentation. It is however questionable whether such "supporting documentation" is regarded as adequate to evidence that the transaction reflects an arm's length price to the tax authority/ies. Insofar as an amount appears not to be on an arm's length basis, any identified discrepancy may lead to a potential future adjustment resulting from double taxation, as well as document non-compliance in relation to transfer pricing disputes. (OECD (2022 a: 33).)

Therefore, for purposes of avoiding such discrepancies, the OECD guidelines recommend the adoption of the APAs which essentially provide a proactive, upfront engagement between the taxpayers and tax authorities for purposes of reducing the possibility of dealing with double taxation as well as non-compliance of documentation in relation to transfer pricing disputes (OECD (2022 a: 33)).

Advance pricing agreement

Detailed guidelines for the administration of APAs were initially adopted in 1995, followed by an update which was published by the OECD in October 1999. The updated guidelines for the administration of APAs under the MAP is in the form of the new Annex. (OECD (n.d. a).)

The new Annex provides that an APA is an administrative approach which seeks to prevent transfer pricing disputes from occurring by determining criteria for applying the ALP to transactions ahead of time of those transactions taking place (OECD (n.d. a)). In other words, it is an agreement which is entered into by and between the taxpayer, one or more associated enterprises and one or more tax authorities, which sets out particular criteria (e.g. "method, comparables and suitable adjustments thereto, critical assumptions as to future events" (OECD (2022 a: 213))) for determining the transfer price of those transactions which take place over a fixed period of time (OECD (2022 a: 213)).

Since APAs are intended to give the taxpayers and tax authorities advance tax certainty, it replaces the traditional administrative, judicial and treaty mechanisms available for resolving transfer pricing disputes, by preventing those disputes from occurring. Therefore, these APAs are most useful in cases whereby the traditional mechanisms fail or are difficult to apply, or in cases where there is a likelihood that a transfer pricing dispute may arise. (OECD (2022 a: 213); OECD (2022 b: 14).)

Upon completing an APA, the tax authority provides confirmation to the taxpayer that no transfer pricing adjustment will be made to the transactions mentioned therein, for a given period of time, provided that the taxpayer follows the terms set out in the agreement (OECD (2022 b: 14)).

An APA also sets out terms in the agreement authorising the revision or cancellation of an arrangement for future years. A revision or cancellation of an APA may be necessary in cases where there is a significant change in business operations or when uncontrolled economic circumstances have an effect on the methodology in a manner which independent enterprises would consider consequential for purposes of their transfer pricing. (OECD (2022 b: 14).)

Whilst it is clear from the above information that there is no general definition for APAs, the new Annex in the OECD guidelines mentions different types of APAs: unilateral, bilateral and multilateral APAs (OECD (1999: 2 – 3)). Each of these APAs is discussed below:

- Firstly, a unilateral APA is an agreement between the taxpayer and a single jurisdiction. These forms of APAs are exclusively domestic law instruments of jurisdictions and provide tax certainty in respect to transactions which take place within in a single jurisdiction only. (OECD (2022 b: 14).);
- Secondly, a bilateral APA is an agreement between two jurisdictions and is generally executed domestically through an agreement which takes place between the taxpayer/s and each tax authority. However, depending on the jurisdiction, it may permit the taxpayer/s to be party to the bilateral APA. Either method mentioned above shall give tax certainty in relation to the transaction/s covered in both jurisdictions. (OECD (2022 b: 14).); and
- Lastly, a multilateral APA is an agreement between more than two jurisdictions and offers a remarkable amount of tax certainty for the taxpayers and tax authorities in comparison to bilateral APAs in situations involving more than two jurisdictions. However, given the co-ordination required and the inexperience most jurisdictions have in relation to multilateral APAs, these may create various challenges, which are discussed in the new Annex. (OECD (2022 b: 14); OECD (1999).)

The Annex further provides an outline of the aims/objectives of the APA programme. It is noted that the traditional audit or examination techniques used to resolve transfer pricing disputes have proved to be burdensome and costly to both the taxpayers and tax authorities in respect to time and resources. These traditional techniques examine the transfer price sometime after they have been set, thus creating actual difficulty in obtaining reliable information to accurately identify whether an arm's length price was used at the time of setting. These difficulties have led to the development of the APA programme as a preventative measure for purposes of avoiding such problems. As a result of the above-mentioned information, the new Annex concludes that the APA programme was therefore developed with the objective of facilitating realistic and collaborative negotiations between taxpayers and tax authorities to resolve transfer pricing issues expeditiously and prospectively; to use the taxpayers' and tax authorities' resources more constructively; and to create a measure of certainty for the taxpayers. (OECD (1999: 4).)

Following through from this, the core of the new Annex examines in detail the entire APA programme, starting from pre-filing meetings, to the filing of a proposal, to the consideration and evaluation by the tax authority, to the discussion and conclusion, to the implementation of the APA and finally monitoring and renewal of such an agreement (OECD (n.d. a)).

Since the Annex focuses on giving guidance to tax authorities, it is an opportunity for the taxpayers to understand how best it can contribute to the APA programme. Subsequently, and in addition to the new Annex, specific recommendations for the implementation of APAs are set out under Action 14 of the base erosion and profit shifting (BEPS) action plan discussed below. (OECD (2022 a: 213).)

A broad discussion on the base erosion and profit shifting action plan

The ever-evolving principle of globalisation has, according to the OECD, increased the integration of economies, industries and markets (OECD (2013: 7)). The interdependence of these economies, industries and markets is created through “cross-border trade, the transfer of technological processes, and flow of investment capital, information, skills, resources, and labour” (Salam Press (2019)).

The BEPS action plan makes specific reference to cases whereby MNEs make use of complex tax structures which are used to minimise or eliminate their tax liability, through the exploitation of gaps and discrepancies in the tax rules to artificially shift profits to lower or no-tax locations, where the business has a minimum to no economic activity, or to corrode tax bases through tax-deductible payments which include but are not limited to interest and royalties (OECD (n.d. d)).

These complex tax structures are generally structured in a lawful manner, which as a result undermine the fairness and integrity of the tax system because international organisations which exercise their operations across borders can use BEPS to gain competitive advantage over those organisations that operate at a domestic level (OECD, (n.d. d)).

It is therefore evident that through the creation of these complex tax structures, MNEs are able to legally avoid tax through the exploitation of gaps and discrepancies in the tax rules of contracting jurisdictions and will as a result obtain a taxable benefit in respect thereof (Bergin (2012)).

Following from the above paragraphs, it is thus clear that from a global perspective, MNEs have adopted a tax avoidance attitude which needs to be highlighted and addressed.

In July 2012, leaders of the G20 put forward a request which subsequently materialised in the creation and launching of the OECD/G20 project which addressed the main issues relating to BEPS (OECD (2017: 5)).

The three-pillar objective of the OECD/G20 project was to (1) strengthen the reasons of corporate income tax rules at an international level; (2) readjust taxation with the substance of economic activities; and (3) to improve transparency (OECD (2017: 5)).

The OECD conducted a study into BEPS, and subsequently submitted a report in 2013, *Addressing BEPS*, which was the foundation for the 15-point action plan endorsed by both the OECD Council and G20 leaders at their July 2013 Summit (OECD (2017: 5)).

Within two years of the 15-point action plan endorsement, the *BEPS Package* of 15 measures was delivered in October 2015. This BEPS Package was developed by 44 countries, including all OECD and G20 members who equally participated, as well as discussions with more than 80 other jurisdictions which took place over and above the input received from original stakeholders. (OECD (2017: 5).)

During September 2015, a request was put forward by the G20 Finance Ministers to the OECD requesting that an Inclusive Framework on BEPS be built with the “involvement of interested non-G20 countries and jurisdictions which commit to implement the BEPS project, including developing economies...” (OECD (2017: 6)).

In February 2016, a proposed Inclusive Framework on BEPS was endorsed by the G20 Finance Minister. To date, over 100 countries and jurisdictions have joined the Inclusive Framework on BEPS – including SA, which committed itself to the implementation of the BEPS Package. (OECD (2017: 6); PWC (2022).)

The effects of BEPS from a transfer pricing perspective were highlighted and measures were put in place under Actions 8-10, 13 and 14.

In summary, Actions 8-10 provided that tax authorities will more stringently evaluate whether the transfer pricing results are in accordance with value creation. In other words, to determine whether the operational profits are in line with the economic activities which generated them. (Transfer Pricing Asia (2019).) In this regard, the BEPS Actions 8-10 provide clarity and strengthen existing standards, as well as provide guidance on the way in which to apply the ALP ordinarily, and in the case whereby a suitable price is to be determined for hard-to-value-intangibles within the ALP (OECD (n.d. e)).

Subsequently, Action 13 provides that transfer pricing documentation and compliance requirements are being applied or tightened in various jurisdictions globally through implementation of a country-by-country reporting requirement. The country-by-country reporting requirement provides tax authorities a sufficient amount of information required for them to conduct transfer pricing valuations and inspections. (Transfer Pricing Asia (2019); DTC (n.d.: 3).)

Lastly and most importantly for purposes of this research report, Action 14 aims to make dispute resolutions mechanisms more effective through application of the APA process. In other words, since APAs ensure the timely, effective and efficient resolution of tax-related disputes through proactive, upfront engagement between the taxpayers and tax authorities, Action 14 provides for specific recommendations for the adoption of APAs since it provides certainty in both treaty partner jurisdictions, and will in effect lessen the likelihood of double taxation and prevent transfer pricing disputes. (Transfer Pricing Asia (2019); OECD (2022 a: 33 & 213).)

Since the OECD advocates for the implementation of APAs for reasons which are mentioned above, the OECD guidelines further provide a list of the advantages which may be considered when jurisdictions adopt the APA programme. The advantages are discussed below as follows:

- APAs eliminate uncertainty and enhance the predictability of the tax treatment of international transaction. In other words, there will be certainty in the tax treatment of the transfer pricing issues covered by the APA for a particular period of time, and the APA can make provision for the renegotiation and extension of the period of time to which it applies. (OECD (2022 a: 218).)
- APAs provide an opportunity for the taxpayers and tax authorities to be able to meet and negotiate in a non-conflicting environment; by doing this, parties are able to come to legally correct and practical results, and when doing this they will most likely be able to create close relations with treaty partners on transfer pricing issues (OECD (2022 a: 218)).
- APAs ward off costly and time-consuming examinations and litigation of transfer pricing issues between the taxpayers and tax authorities (OECD (2022 a: 218 – 219)).
- There may be reduction or elimination of juridical or economic double or non-taxation when entering into a bilateral and multilateral APA since all the relevant jurisdictions participate. However, this is not the case in respect to unilateral APAs. A unilateral APA does not provide certainty that there will be a reduction of double taxation because the tax authority affected by the transaction covered by the APA may regard the method adopted when identifying the transfer price not to be consistent with the ALP. (OECD (2022 a: 219).)
- The disclosure of information and co-operation between parties when entering into an APA assists the tax authorities to be able to gain an understanding of complex international transactions undertaken by MNEs. The development of the skills of tax authorities in respect to particular industries or specific types of transactions gives them the ability to better service other taxpayers in interchangeable circumstances. (OECD (2022 a: 219).)

Whilst the OECD guidelines provide a list of the advantages, it too provides a list of the disadvantages which must be considered and remedied to its full extent, where possible and when jurisdictions consider the implementation of the APA programme. The disadvantages are as follows:

- Unilateral APAs can cause serious issues for both the taxpayer and tax authority. From the tax authority's point of view, issues may arise because it may not agree with the APA conclusion. A tax authority's not agreeing to the APA conclusion eliminates the increased level of certainty for the taxpayer involved and a depletion in economic or juridical double taxation for the MNE group. Therefore, in the case of a taxpayer agreeing to an arrangement which will have the effect of over-allocating income to the jurisdiction within which the APA was concluded for purposes of avoiding lengthy and costly transfer

pricing enquiries or unrestricted penalties, the administrative burden will shift from the jurisdiction in which the APA was concluded to the other tax jurisdiction. A taxpayer should never feel obliged to enter into an APA for reasons mentioned above. (OECD (2022 a: 219 – 220).)

- Unilateral APAs create a corresponding adjustment issue. In other words, when the taxpayer and tax authority enters into a unilateral APA, it is critical that the flexibility exercised by the taxpayer and associated party to accommodate their pricing to the range of permissible pricing in the APA preserves the ALP, since the foreign tax authority is likely not to allow for a corresponding adjustment arising from the APA that is not in line with the ALP. (OECD (2022 a: 220).)
- Certain APAs rely on unreliable predictions on changing market conditions without sufficient critical assumptions. In order to avoid the possibility of double taxation arising, it is relevant for the APA programme to remain flexible, because an invariable APA may not reflect an arm's length condition. (OECD (2022 a: 220).)
- The APA programme can put pressure on transfer pricing audit resources since a tax authority will have to “divert resources earmarked for other purposes (e.g. examination, advising, litigation, etc.) to the APA programme” (OECD (2022 a: 220)).
- Where a tax authority has undertaken to enter into numerous bilateral APAs involving only a selection of associated enterprises within a MNE group, there is the likelihood that each APA is concluded in a similar manner to the previously concluded APAs without having due regard to the conditions operating in other markets. Special care should be taken when considering the results of previously completed APAs as being representative across all markets. (OECD (2022 a: 220).)
- The APA programme will attract more compliant taxpayers and fewer non-compliant taxpayers. Compliant taxpayers include taxpayers which are audited on a constant basis with their pricing methodology then examined due to previous difficulties experienced with tax authorities on transfer pricing issues. For purposes of avoiding the recurrence of the abovementioned transfer pricing issues, these taxpayers are interested in applying for an APA. The danger is that audit resources and expertise are diverted to compliant taxpayers, due to the shortfalls previously experienced by them and away from the investigation of those less compliant taxpayers where resources can be better deployed in diminishing the risk of losing tax revenue. (OECD (2022 a: 221 – 222).)
- The APA programme seeks more information than would be required in a transfer pricing examination. Due to the disclosure of such detailed information when entering into an APA, tax authorities are able to perform a more detailed study of the transaction at issue than they would in the context of a transfer pricing examination – which is the traditional method which takes place when an APA is not entered into. In considering the aforementioned, the OECD guidelines provides that tax authorities should avoid making the APA programme burdensome and more demanding of taxpayers than is strictly required by the scope of the APA programme. (OECD (2022 a: 221 – 222).)

- There can be misuse of information disclosed to the tax authorities when the taxpayers attempt to enter into an APA. In other words, problems may arise if the tax authorities misuse information obtained for an APA in their examination practices. (OECD (2022 a: 222).)
- Tax authorities have an obligation to ensure that they comply with domestic law, rules and regulations against the disclosure of confidential information they receive when entering into an APA. The confidentiality obligation aforementioned limits public disclosure of confidential data between treaty partners. (OECD (2022 a: 222).)
- APAs are used generally for larger transactions as they can be costly and time-consuming, and therefore smaller taxpayers may not be in the financial position to afford using this process (OECD (2022 a: 222)).

Following from the information provided in this Chapter 2 of the research report, the reader is informed of the OECD's suggested approach to be followed by jurisdictions when implementing the ALP and APA into their domestic legislation.

Chapter 3: USA legislated advance pricing agreement programme

Background

In early 2012, the APA programme merged with that portion of the office of the U.S. Competent Authority (USCA) that resolves transfer pricing cases under the MAP of the USA's bilateral income tax conventions to form the Advance Pricing and Mutual Agreement Program (APMA Program) (Internal Revenue Service (IRS)(n.d. a)).

In late 2020, the Treaty Assistance and Interpretation Team (TAIT) joined the APMA Program. TAIT endeavours to resolve competent authority issues arising under all other articles of the USA's tax treaties, including those issues relating to estate and gift taxes (IRS (n.d. a)).

The APMA Program's mission is to resolve actual or potential transfer pricing disputes and other competent authority matters in a timely, principled, and cooperative manner (IRS (n.d. a)).

In accordance with its mission, the APMA Program undertakes to govern all matters within its jurisdiction in a manner which is in line with USA's treaty obligations, and secures the appropriate tax bases of the USA and its treaty partners; prevents fiscal evasion; advocates consistency and reasonableness in its conclusions; and provides the taxpayers access to competent authority assistance and to the APA process in accordance with considerations of principled, effective and efficient tax administration (IRS (n.d. c: 13 – 14)).

The APMA Program's APA process provides for a voluntary process whereby the IRS and the taxpayers are able to resolve transfer pricing issues or issues where transfer pricing is applicable in a principled and cooperative manner on a forthcoming basis; interest and penalties may also be resolved to the extent which the APMA Program has authority in terms of the Internal Revenue Code of 1986 (26 USC) (the Code), as amended or under the USA tax treaty. This APA process improves the competence of the tax authority by inspiring taxpayers to come forward and present all facts necessary for the proper evaluation of their proposed covered issues and to work towards a resolution of these issues in a spirit of openness and cooperation. (IRS (n.d. c: 14).)

Giving effect to the APA process reduces the burden of compliance by giving the taxpayers greater certainty regarding the issues it deals with, as well as promoting the resolution of these issues through allowing discussion and resolutions to be made in advance before the consequences of such resolutions are completely known to either the taxpayers or the IRS. Therefore, the APA process is intended to address ongoing issues, issues which have already arisen, or those which are expected still to arise. (IRS (n.d. c: 14).)

Introduction to the USA advance pricing agreement programme

The Rev. Proc. 2015 – 41 (revenue procedure) provides guidance on the process of requesting and obtaining an APA as well as the administration of the executed APA from the APMA Program, a constituent office of the USA's competent authority, within the office of the Deputy Commissioner International, Large Business & International Division (IRS (n.d. c: 2)).

The revenue procedure updates and suspends Rev. Proc. 2006 – 9, 2006 – 1 CB 278, as modified by Rev. Proc. 2008 – 31, 2008 – 1 CB 1133, which is also suspended. This revenue procedure is released together with the Rev. Proc. 2015 – 40, IRB 2015 – 35, which provides all the procedures and guidelines on the process for requesting assistance from the USA’s competent authority under the provisions of the USA’s tax treaties. (IRS (n.d. c: 2).)

The revenue procedure provides that (a) a taxpayer’s APA request may include one or more covered issues which is/are (b) applied to certain proposed taxable years and (c) may involve one or more foreign competent authorities. When there are foreign competent authorities involved, a bilateral or multilateral APA request is to be submitted. In evaluating the APA request, the APMA division may also need to consider additional interrelated matters, additional tax years or additional treaty countries, collectively known as an interrelated matter. (IRS (n.d. c: 15).)

The APMA division, after considering the interrelated matter, may need to communicate to the taxpayers any concerns and the possibility of having to expand the scope of the APA as early as possible in the APA process (IRS (n.d. c: 16)).

After the taxpayers expand on the scope, the APMA division is then required to consider the taxpayers’ particular facts and circumstances and the scope of the covered issues as provided for in the APA request before being able to make decisions on whether or not the interrelated matter must also be considered (IRS (n.d. c: 16)).

Following from the above information, roll backs may be applicable. The primary purpose of an APA is to resolve coverable issues for prospective years; however, an APA can also be “rolled back”, meaning it will cover one or more previous taxable years. Therefore, an APA term will then comprise both roll back years and prospective years. (IRS (n.d. c: 17 – 18).)

Lastly, and in order to reduce the uncertainty and administrative costs to the taxpayers and government, bilateral and multilateral APAs are generally preferable to unilateral APAs. Considering this statement, if a taxpayer requests to enter into a unilateral APA, the taxpayer is required to provide an explanation for its use in a pre-filing memorandum stating why it believes that a unilateral APA is appropriate to cover that issue. The APMA division, after taking into account the taxpayer’s views expressed in the pre-filing memorandum, will be required to make a decision on whether or not it will accept a unilateral request. If the APMA division decides to reject the unilateral request, it must provide reasons to the taxpayer for this rejection. (IRS (n.d. c: 19).)

The general requirements for initiating and continuing an APA

In order to initiate an APA process, the taxpayer must initially (a) meet the pre-filing requirements; (b) submit a completed APA request and (c) pay the correct user fees (cumulatively referred to as “The pre-filing protocol” discussed below) (IRS (n.d. c: 21)).

The step form approach when entering into the advance pricing agreement programme

Step 1: The pre-filing protocol

Step 1.1: Pre-filing conference or informal consultations

Pre-filing conference

An initial pre-filing conference assists to give taxpayers preliminary views and guidance on potential APAs and APA-related issues. Its intended purpose is to lead to a more productive and efficient APA process for the APMA Program and the taxpayers who intend to file a future APA request. Therefore, depending on the situation, taxpayers are invited and, in some cases obliged, to meet with the APMA division in a pre-filing conference prior to the filing of an APA request. For the same reason, the APMA division will invite and occasionally require taxpayers to submit a pre-filing memorandum prior to filing an APA request. (IRS (n.d. b: 1).)

The pre-filing requirements are as follows:

- **Requesting pre-filing conferences:** Taxpayers who intend to request to hold a pre-filing conference with the APMA division must submit a request as part of their mandatory pre-filing memorandum (discussed below) or its optional pre-filing memorandum (discussed below) (IRS (n.d. c: 23)).

Page one of the request must provide the following information:

- (a) State if the taxpayer is considering entering into a unilateral, bilateral or multilateral APA request;
 - (b) The foreign country/countries implicated by the APA request;
 - (c) Names of team leaders, economists and managers who contributed during prior and ongoing APA requests;
 - (d) Years involved;
 - (e) Transaction amount/s;
 - (f) Taxpayers city and state; and
 - (g) Meeting length requested (IRS (n.d. b: 2 – 3)).
- **Mandatory pre-filing memoranda:** Taxpayers are required to file a mandatory pre-filing memorandum prior to filing an APA request if any one of the conditions apply (IRS (n.d. b: 1)):

- (a) The taxpayer intends filing a unilateral APA request to cover an issue that could be dealt with under a bilateral or multilateral APA: to minimize taxpayer and governmental uncertainty and administrative costs, bilateral and multilateral are preferable to unilateral APAs; therefore, the taxpayer must provide comments which will explain in a pre-filing memorandum why it believes that a unilateral APA is appropriate to cover the issue. The APMA division will consider the taxpayer's comments and thereafter make a decision on whether or not it will accept or reject the taxpayer's unilateral APA request. (IRS (n.d. c: 24).)
- (b) The taxpayer must seek permission to file an abbreviated APA request (IRS, (n.d.) b: 24). Prior permission is required in order for a taxpayer to complete an APA request under this section. An abbreviated APA request is appropriate in situations whereby a request is made for the expansion of a competent authority request; for APA renewals; and for APA requests eligible for small case users and any other exceptional circumstances. In evaluating the taxpayer's request to file an abbreviated APA request, the APMA division will consider that in most cases, it can process an APA request when the APA request itself contains all the documents reasonably required to evaluate such a request, irrespective of whether such documents have been submitted before to the IRS. Before requesting permission to file an abbreviated APA request, the taxpayer should consider whether the documents that it proposes to omit from the APA request could alternatively be provided as exhibits to that request. (IRS (n.d. c: 32).)

Following on from the above information, there is a different process which is to be followed when there is (1) an abbreviated APA request not eligible for small case APA user fee or when there is (2) an abbreviated APA request eligible for small case APA user fee:

- (1) *An abbreviated APA request not eligible for small case APA user fee:*

To request permission to file an abbreviated APA request not eligible for small case APA user fee, the taxpayer must file a pre-filing memorandum. After the APMA division reviews the pre-filing memorandum and (if applicable) holds a pre-filing conference, it will thereafter inform the taxpayer either that it will accept an abbreviated APA request, or that it requires that a complete APA request be filed. (IRS (n.d. c: 32 – 33).)

- (2) *An abbreviated APA request eligible for a small case APA user fee:*

To request permission to file an abbreviated APA request that is eligible for a small case APA user fee, the taxpayer may contact the APMA division informally to discuss the content of the proposed request. After informal discussions have taken place and consideration of written material submitted by the taxpayer to the APMA division, the APMA division will inform the taxpayer that it will either accept the abbreviated APA request or that it will require that a completed APA request be filed. (IRS (n.d. c: 32 – 33).)

- (c) The covered issues proposed by the taxpayer will, or could reasonably be expected to, involve any of the following:
- (1) The licensing of or transfer of intangibles in connection with, or the development of intangibles under, an intangible development arrangement; or
 - (2) A global trading arrangement; or
 - (3) A business restructuring, or the use of intangibles whose ownership changed as a result of a business restructuring; or
 - (4) Unincorporated branches, pass-through entities, hybrid entities, or entities disregarded for USA tax purposes (IRS (n.d. c: 24)).

When taxpayers file a mandatory pre-filing memorandum, they are required to indicate if they require to have a pre-filing conference. Taxpayers who intend not to have a pre-filing conference may nonetheless be obliged to participate in one as a precondition to filing an APA request, if the APMA division foresees that a pre-filing conference is in the best interest of effective and efficient tax administration. (IRS (n.d. b: 1).)

Following from the above information, taxpayers may request an optional pre-filing conference prior to filing an APA request or request an optional pre-filing conference prior to filing a mandatory pre-filing memorandum. Those taxpayers that attend an optional pre-filing conference prior to filing a mandatory pre-filing memorandum may be required to participate in another pre-filing conference at a later stage. (IRS (n.d. b: 1).)

- **Optional pre-filing memoranda:** Taxpayers may voluntarily submit pre-filing memoranda in cases other than those mentioned above. Although not obliged, the APMA Program recommends that a pre-filing memorandum be submitted for APA requests since such memorandum may present novel or complex substantive or procedural issues, as well as it may raise concerns regarding interrelated matters. An optional pre-filing memorandum can be submitted on an unidentified basis; however, the APMA division do recommend that a name be disclosed so as to provide a more informed understanding of the procedural and substantive issues that may arise during the APA process. (IRS (n.d. c: 24 – 25).)
- **Contents of a mandatory or optional pre-filing memoranda:**
 - (a) **Mandatory pre-filing memoranda:** must be length and content appropriate to the size and complexity of the covered issues proposed by taxpayers. Furthermore, the mandatory pre-filing memorandum must be presented in memorandum format but may be accompanied by diagrams, slides, spreadsheets and similar supporting materials. (IRS (n.d. c: 25).)

- (b) *Optional pre-filing memoranda*: must be length and content appropriate to the substantive or procedural issues that the taxpayer intends to raise with the APMA division. Furthermore, the optional pre-filing memorandum may be presented in any particular format chosen by taxpayers accompanied by diagrams, slides, spreadsheets and similar supporting materials. (IRS (n.d. c: 25).)

Both a *mandatory pre-filing memoranda* and *optional pre-filing memoranda* must encompass the following:

- (a) State the taxpayer's name and Employer Identification Number (EIN), unless that taxpayer makes an authorized request for an anonymous pre-filing conference (IRS (n.d. b: 1));
- (b) Whether the taxpayer seeks a pre-filing conference and if yes, the issues the taxpayer intends discussing;
- (c) Propose at minimum three available dates for a pre-filing conference to take place that would typically be at least two weeks after the date that the pre-filing memorandum is submitted;
- (d) Include covered issue diagrams if the pre-filing memorandum is mandatory (IRS (n.d. c: 25));
- (e) If mandatory and the taxpayers requests a unilateral APA rather than a bilateral or multilateral APA, the taxpayer must explain why it believes that a unilateral APA is appropriate to cover that issue (IRS (n.d. b: 2));
- (f) A taxpayer who is subjected to a mandatory pre-filing memorandum must seek permission to file an abbreviated APA request. The request for permission must provide:
 - (1) Information, documentation or other materials that the taxpayer proposes to omit from its APA request;
 - (2) The taxpayer's reasoning for omitting such information, documentation or other materials. The taxpayers reasoning shall demonstrate that the provision of such information, documentation or other material is not necessary when the APMA division considers the APA request. Following on from this, and if applicable, the taxpayer must further include in such reasoning that the applicable law, facts and circumstances, economic conditions, proposed covered issue(s) and method(s) and other factors relevant to the proposed APA years are substantially the same as those relevant to the current APA or the competent authority resolution as the case may be;

- (3) In the case of a suggested renewal of an APA, the taxpayer is required to summarise in a table the results and adjustments under the current APA, in absolute and percentage terms in comparison with the arm's length points or ranges specified in the APA, and also to summarize any proposed changes in terms of the current APA;
 - (4) The names and contact details for the taxpayer's point of contact; unless the pre-filing memorandum is submitted on an unidentified basis, it is required to complete a Form 2848 authorising the point of contact to represent the taxpayer in connection with the APA request or to complete a Form 8821, which permits the point of contact to inspect or receive confidential tax information about the taxpayer in connection with the APA request; and
 - (5) Identify all open back years of the taxpayer and which of such years, if any, are under examination by the IRS. (IRS (n.d. c: 26).)
- **Place for submission of the pre-filing memoranda:** Two printed copies and one electronic copy of the pre-filing memorandum must be submitted to the APMA division at the address provided in **Annexure A** below. The electronic copy of the pre-filing memorandum must follow rules for media and format of electronic submissions described below and under the main heading "**Step 1.2: Preparation and submission of the advance pricing agreement request**", followed by sub-heading "The content and form of complete APA requests", point 2, paragraph (b). (IRS (n.d. c: 27).)

The actions taken with respect to pre-filing conferences and memoranda:

- The APMA division will advise the taxpayer on whether or not it will accept or decline the taxpayers request to hold a pre-filing conference. The APMA division may request a pre-filing conference to take place and to follow the mandatory pre-filing memorandum irrespective of whether or not the taxpayer requested such conference. If the APMA division decides to hold the pre-filing conference, the conference is required to deal with the procedural and substantive issues pertaining to the APA request. The taxpayer must be prepared to discuss the relevant facts and circumstances surrounding the issue/s, method/s, terms and conditions it proposes to cover in the APA as well as it must justify the reason why it has requested to file an abbreviated APA request. If the APMA division decide against holding a pre-filing conference, it will advise the taxpayer to proceed with filing its APA request; and
- A pre-filing conference can be held on an anonymous basis, unless the taxpayer submitted a mandatory pre-filing memorandum providing its identification information therein; however, it is noted that a recommendation was put forward and which provides that a pre-filing conference should be submitted on a named basis, in order to facilitate a more informed discussion of procedural and substantive issues that may arise during the APA process. (IRS (n.d. c: 27 – 28).)

All statements or representations made by the APMA division in a pre-filing conference are made on an informal basis and are not binding on the IRS (IRS (n.d. c: 28)).

Informal consultations

The APMA Program is also available for informal consultations with the taxpayer within or outside of the APA process (IRS (n.d. c: 20 – 21)).

The informal consultation will address potential covered issues and the APA process in general. Taxpayers are required to provide sufficient information to make an informal consultation meaningful and are encouraged to consider the contents of the pre-filing conference for ideas about information that may be useful to present to the APMA division. (IRS (n.d. b: 3); IRS (n.d. c: 20 – 21).)

Any statements or representations made by the APMA division, either orally or in writing, during such informal consultation are not binding on the IRS. These informal consultations can take place in person, written or over a telephone call; and any such informal consultations where the taxpayer remains anonymous to the APMA division may include participation of a taxpayer's officers or employees on an anonymous basis. (IRS (n.d. c: 20 – 21).)

Step 1.2: Preparation and submission of the APA request

Time for filing an APA request

An APA is intended to apply to prospective years. The APMA division requires an APA request to be filed early enough so that the proposed APA term would cover at least five prospective years, unless the taxpayer provides a compelling reason to include fewer years. (IRS (n.d. c: 28 & 35).)

An APA term can compromise prospective years and roll back years (if any):

- A prospective year is a taxable year in an APA term (or requested APA term) for which a taxpayer has filed a complete APA request, or a APA request that is considered complete as of a date that is no later than the applicable return date

("If the taxpayer timely files its U.S. return for a taxable year, the applicable return date for that year is the later of (i) the actual filing date, and (ii) the U.S. return's due date prescribed by statute without regard to extensions. If the taxpayer does not timely file its U.S. return for a taxable year, the applicable return date for that year is the U.S. return's due date prescribed by statute without regard to extensions" (IRS (n.d. c: 28))

for that taxable year (IRS (n.d. c: 28)).

- An APA year, or proposed APA year, ending before the first prospective year will be the roll back year (IRS (n.d. c: 28)).

Dependant on the taxable years that the taxpayer proposes to be covered by the APA terms, and depending on the date which the APA request is regarded as complete, the first prospective year of the APA may or may not be the same as what is proposed by the taxpayer (IRS (n.d. c: 28 – 29)).

In other words, a taxpayer may file an APA request proposing that a particular taxable year be the first prospective year of the APA; however, if the APMA division determines that the APA request is not complete as of the applicable return date for that taxable year, then the taxable year that the taxpayer proposed to be the first prospective year will be considered to be a proposed roll back year (IRS (n.d. c: 29)).

An additional deadline, known as the special filing deadline rule, was applied by the APMA Program for both bilateral and multilateral APA requests. The purpose for which this deadline rule was implemented was to manage the timing of discussions with regards to bilateral and multilateral APAs with foreign competent authorities. The special filing deadline rule provides that a taxpayer shall file a complete bilateral or multilateral APA request no later than 60 days after a corresponding bilateral or multilateral APA request proposing to cover significantly the same coverable issue/s and APA years that have been filed with a foreign competent authority. Following on from this, the filing of a corresponding request with a foreign competent authority shall appear as the filing of a substantive request with the foreign competent authority rather than the mere filing of a notice of intent to file a substantive request. If the taxpayer fails to file the bilateral or multilateral APA within the prescribed period as provided for in the special filing deadline rule, then the first APA year will no longer be regarded as a prospective year, but rather a roll back year; or if the taxpayer misses the deadline by more than one year, then the first two or more APA years will then be considered roll back years. (IRS (n.d. c: 29 – 30).)

Following from the above information, general APA requests may be regarded as complete on a date earlier than the actual date that the APA request was filed. Therefore, the IRS is obliged to inform the taxpayer of the date on which it regards the APA request to be complete – i.e., the APA request is backdated to the date when the user fee was paid, to when an original request was filed, but the request had certain deficiencies which needed to be dealt with, etc. (IRS (n.d. c: 30).)

A “Dollar File” request is an exception to the above rule, and is automatically considered complete and filed on the date as and when the user fee is paid by the required date and the APA request is filed within 120 days of the required date, or an extended period of 30 days, provided that the taxpayer has submitted an application for extension prior to expiry of the initial 120-day period (IRS (n.d. c: 31)).

The content and form of complete APA requests

The APMA division will consider an APA request as complete if it is, firstly, accompanied by payment of the correct user fees; secondly, contains all the information required and mentioned in **Annexure B** below – the APA request requirements; and lastly, it proposes covered methods that provide a reasonable basis on which to consider resolution of the proposed covered issues.

The section below expands on the points mentioned above.

▪ ***The user fees for advance pricing agreement requests:***

All user fees are to be paid through the Pay.gov website and are due and owing no later than the date it files the APA request (IRS (n.d. c: 33 – 34)).

An APA request will not be regarded as complete by the APMA division until such time as the correct user fees are paid. Therefore, a taxpayer may seek clarity on the user fee amounts applicable to an APA request, by making direct contact with the APMA division either informally or through submission of a pre-filing memorandum. (IRS (n.d. c: 33 – 34 & 78).)

Following on from the above information, the APMA will inform the taxpayer if it has paid less than the correct user fee amount; if yes, the taxpayer will thereafter have the option to pay the outstanding difference or withdraw the APA request and receive a refund on the amount paid. However, in exceptional circumstances, the APMA will authorise the remedy of the insufficient user fee to relate back to the date that the insufficient user fee was paid for purposes of determining when a complete APA request is considered to be filed. (IRS (n.d. c: 34).)

A separate user fee is applicable for each APA request submitted by each controlled group. For this purpose, a multilateral request is considered to be a set of bilateral requests for each country involved. (IRS (n.d. c: 79).)

The general user fees amounts are as follows:

- (a) \$60,000 for each APA request, except as otherwise specified below;
- (b) \$35,000 for each request for renewal of an APA that does propose a significant expansion of the APA's scope or a significant change in the covered method/s, and provided that the relevant facts remain significantly the same, unless such renewal is eligible for the small case APA user fee;
- (c) \$30,000 for each APA request eligible for the small case APA user fee (IRS (n.d. c: 79)) – A taxpayer is eligible to pay a small case APA user fee only if all of the following apply:
 - (1) The controlled group has sales revenue, within the meaning of Treas. Reg. §1.482-5(d)(1), of less than \$500 million in the previous three financial years of assessment;
 - (2) The total value of the proposed covered issue/s is not expected to exceed \$50 million in any given year of the proposed APA years;
 - (3) The total value of any transfer of rights in, or use of, intangibles is not expected to exceed \$10 million in any given year of the proposed APA years; and

- (4) None of the proposed covered issue/s involves intangible property arising from, or relating to, an intangible development arrangement (IRS (n.d. c: 79 – 80)); and
- (d) \$12,500 for each amendment to a current unilateral, bilateral or multilateral APA – an amendment includes coverage over additional issues, material changes to a proposed covered method and any other material additions or changes to the terms and conditions of the APA. The APMA division will not impose this amendment fee unless the APMA division or a foreign competent authority initiates a request to amend the proposed covered issue/s or method/s. (IRS (n.d. c: 79).)

Any multilateral APA requests for the same controlled group within a 6-day period will amount to a maximum total fee charge of \$60,000, plus \$30,000 for each foreign competent authority involved (if any) beyond the first two (IRS (n.d. c: 79)).

▪ ***The advance pricing agreement request requirements as indicated in Annexure B below:***

The appendix attached to the revenue procedure, repeated in **Annexure B** attached to this research report, sets out the instructions for preparing and filing an APA request. Said differently, it provides the content which should be presented, as well as the information and instructions on other administrative matters relevant to filing such request. (IRS (n.d. c: 63).)

Irrespective of whether or not the APA request is abbreviated or complete, it should provide additional information/documentation that the taxpayer believes is important to ease the APMA division's evaluation of the request. The level of detail required in the APA request is dependant upon a number of factors, including the facts and circumstances of the request, as well as consideration must be given to all discussions which took place with the APMA division in any pre-filing memorandum or pre-filing conference. (IRS (n.d. c: 63).)

(a) *The required content of the advance pricing agreement request:*

An APA request is required to include a request letter containing the exhibits presented in the order as listed in **Annexure B** below (IRS (n.d. c: 64)).

The original signed and dated request letter received from the taxpayer or the taxpayer's authorised representative must be included in one of the three required printed copies of the APA request (IRS (n.d. c: 64)).

The request letter together with the exhibits must contain or respond to the required statements, descriptions, explanations and other requested information. If in the event a taxpayer deems a required item not applicable to its APA request, then this must be shown as "N/A" or "Not Applicable". Alternatively, if the taxpayer maintains that it is unable to provide the required item or seek exceptions to the filing requirement, it must provide a statement

for its reasons for not being able to provide the particular item or the basis for the exception it seeks. The APMA may allow for the application of certain exceptions to the filing requirements set out in the appendix attached to the revenue procedure and discussed below, on a case-by-case basis. (IRS (n.d. c: 64).)

Request letter: to be presented according to the instructions and structure set out in **Annexure B** (attached); further, the taxpayer is to provide an index which will indicate the page on which each part or subpart begins (IRS (n.d. c: 64)).

In summary, the request letter must contain the following parts and subparts:

Part 1 – Executive summary: The executive summary must provide the following subparts, being the “Identifying information” and “Summary of APA request”;

Part 2 – Administrative information: The administrative information must provide the following subparts, being the “Authorization”, “IRS Office”, “Filed Years”, “Request for SAP review” and “Optional e-mail memorandum of understanding”;

Part 3 – Proposed covered issue/s: The proposed covered issue/s must provide the following subparts, being the “Pre-filing information” and “Roll back”;

Part 4 – Proposed covered method/s: The proposed covered method/s must provide the following subparts, being the “Selection and application of the proposed covered method(s)”, “Search and screening process”, “Application of proposed covered method(s)”, “Demonstration of proposed covered method(s)” and “Segmentation of financial results”; and

Part 5 – Proposed APA terms and conditions: The proposed APA terms and conditions must provide the following subpart, being the “Review of proposed APA” (IRS (n.d. c: 65 – 70)).

Additionally, the APA request must include exhibits after the request letter, separated, ordered and inclusive of the information as indicated in **Annexure B** below (IRS (n.d. c: 70 – 71)).

In summary, the exhibits to be included are the following:

Exhibit 1: “Content of exhibits”;

Exhibit 2: “Authorization form”;

Exhibit 3: “Protective claim”;

Exhibit 4: “Waiver or ex-parte communication”;

Exhibit 5: “Consent to disclosure”;

Exhibit 6: “Consents regarding period of limitations”;

Exhibit 7: “Penalties of perjury declaration”;

(**Exhibit 7:** The “Penalties of perjury declaration” is written so as to accommodate such a declaration accompanying both an APA request and a supplemental submission (IRS (n.d. c: 71)))

Exhibit 8: “User fee receipt”;

Exhibit 9: “Documents submitted to foreign competent authorities”;

Exhibit 10: “Pre-filing submissions”;

Exhibit 11: “Covered issue diagrams”;

Exhibit 12: “APAs”;

Exhibit 13: “Selection process”;

Exhibit 14: “Information on elected comparables”;

Exhibit 15: “Proposed draft APA”;

Exhibit 16: “Application of APA template”;

Exhibit 17: “Federal income tax filings”;

Exhibit 18: “Financial statements”;

Exhibit 19: “Section 6662 documentation”;

Exhibit 20: “Regulatory filings”;

Exhibit 21: “APA annual reports”; and

Exhibit 22: “Intercompany agreements” (IRS (n.d. c: 71 – 76)).

Any additional exhibits may be included if and where necessary (IRS (n.d. c: 70)).

Whilst the exhibits must be included as part of the completed APA request, certain exhibits are required to be produced both in printed and electronic version; whilst other exhibits need to be produced only in electronic form (IRS (n.d. c: 70 – 71)).

(b) *Manner and media of APA request filings:*

Copies of the APA request are to be filed as follows:

- (1) One original bundle printed and submitted: must contain signed originals of the request letter and “penalties of perjury” declaration and, if applicable, of the authorization form, consent to disclosure and e-mail authorization, together with copies of all other required printed information (IRS (n.d. c: 76 – 77)).
- (2) In a separate envelope, clearly labelled, must be two original signed consents to extend the period of limitation for assessment of tax (IRS (n.d. c: 77)).
- (3) Two photocopies of the original bundle and three electronic copies of the original bundle together with the required electronic-only attachments, on CD or flash drive or of a similar acceptable electronic storage medium (IRS (n.d. c: 77)).
- (4) All originals and copies of the APA request must be filed with the APMA division at the address provided in **Annexure A** below (IRS (n.d. c: 77)).
- (5) Upon request, the taxpayer may be required to provide additional electronic copies and/or bound photocopies of the contents of the original printed submission (IRS (n.d. c: 77)).

Following from the above information, this report will further provide clarity of the contents and format of both a printed version and electronic version of an APA.

- (1) *A printed version of the APA request must contain:* The request letter and Exhibits 1 – 15 – must be separated and ordered in the manner provided in **Annexure B** below. If an exhibit is not applicable to the APA request, a statement to this effect must be provided in that relevant section. (IRS (n.d. c: 77).)

The original signed consents to extend the period of limitations for assessment of tax must be individually stapled as needed, with all consents bound together with a binder clip (IRS (n.d. c: 77)).

- (2) *The electronic version of the APA request must contain:* The request letter and Exhibits 1 – 22 and any other additional exhibits, if necessary (IRS (n.d. c: 77)).

An electronic request letters must be submitted both in Microsoft Word and in Adobe Portable Document format (PDF) (IRS (n.d. c: 78)).

All exhibits attached to the APA request are to be readily available in Microsoft Word or Microsoft Excel, if applicable, instead of, or in addition to the PDF format. However, an exception applies to Exhibit 15 which provides that it must be provided in the Microsoft Word format. (IRS (n.d. c: 78).)

All electronic documents listed above, and which are to be provided in a Microsoft Excel format, must contain formulas and internal cell references (IRS (n.d. c: 78)).

Individual exhibits should contain separate electronic file names in a manner that corresponds to the exhibit numbers and descriptive captions as presented in **Annexure B** below (IRS (n.d. c: 77 – 78)).

If in the case an exhibit is attached and is not applicable to the APA request, a statement to this effect must be included in the electronic file (IRS (n.d. c: 78)).

The taxpayer has the option to provide a bookmarked PDF file which includes the entire content of the APA request, or may be obliged by the APMA to provide such file in a bookmarked PDF version, especially in those cases whereby the APA request is far more complex than others (IRS (n.d. c: 78)).

Lastly, all electronic documents provided together with an APA request and throughout the APA process must be searchable, unless the file is not available in searchable format (i.e., a photocopy of an intercompany agreement) (IRS (n.d. c: 78)).

Step 1.3: Requested and supplemental items of the APA request

All information, documentation and materials required to be included in the APA request may not exhaust the items an APMA division requires to evaluate the APA request; and therefore, the taxpayer may be required to provide subsequent information and/or documentation upon request (IRS (n.d. c: 35 – 36)).

Ordinarily, the taxpayer will be required to disclose information that it would maintain in its normal course of business, or information readily available or can be produced without placing the taxpayer under undue pressure (IRS (n.d. c: 36)).

Further, the taxpayer must be prepared to disclose all requested and supplementary items to both (or all) competent authorities, irrespective if this request for information was raised by a single competent authority only (IRS (n.d. c: 36)).

Step 1.4: Corrected and updated information of the APA request

Any material errors or omissions in the APA request or supplementary submissions is to be promptly corrected or remedied and subsequently notified to the APMA division (IRS (n.d. c: 36)).

Financial data produced in connection with the APA request during the APA process, and which relates to the proposed covered method/s to the proposed covered issue/s, must be updated annually or on a schedule that is mutually acceptable to the taxpayer and to the APMA division. Additionally, the APA request must be supplemented with an illustration of the application of the proposed method/s to the actual financial results of the applicable members of the proposed covered groups for each particular taxable year completed whilst the APA request is pending. (IRS (n.d. c: 37).)

Such supplemented submissions to the APA request must be provided for within 180 days of the close of the taxpayer's taxable year, or by a date that is acceptable by both the taxpayer and the APMA division; however, an extension may be granted if the taxpayer requires data from foreign partners who have different taxable years than the taxpayer or if the taxpayer provides written notifications to the APMA division before the date the supplemental submission would otherwise be due (IRS (n.d. c: 37)).

Step 1.5: Withdrawal of the APA request

The taxpayer has the right to request a withdrawal of an APA request at any time before it executes the APA. Should the taxpayer request the withdrawal, the APMA division usually will not refund user fees if the taxpayer withdraws the APA request after the APMA division begun its due diligence. (IRS (n.d. c: 37).)

Step 1.6: Final stages of the APA request

Decision letter and contact information

A letter will be provided by the APMA division to the taxpayer, which will provide the following information:

- Confirmation of receipt of the APA request;
- The name and contact information of the APMA division leader who was assigned this request; and
- A statement that the request has been completed, and that the APA process will proceed; or that the request is provisionally accepted until such time as deficiencies

in the request have been addressed; or that the request is provisionally rejected, with a description of the reason and circumstances, if any, under which the request might be accepted (IRS (n.d. c: 38)).

Denial or discontinuation of the APA process

The APMA division may decline to enter or continue to enter into an APA process, either right from the beginning or by terminating or suspending the APA process after it has accepted the APA request; such a decision by the APMA division shall not be subject to administrative review (IRS (n.d. c: 38 – 39)).

Following from the above information, there are various reason why the APMA division may decline to enter or continue to enter into an APA process, including but not limited to, the failure to include material required by the revenue procedure in the APA request or the materials requested by the APMA division during the APA process (IRS (n.d. c: 38)).

Further, the APMA division can take a further decision to terminate the APA process for a requested unilateral APA or a subsequent bilateral or multilateral APA. These terminations can be justified if the parties cannot agree on the APA terms in the former, and on the basis that a competent authority resolution is not reached in the latter case. Following on from this, both the taxpayer and the APMA division may agree to execute a unilateral APA if a competent authority resolution is not reached in a bilateral or multilateral APA. (IRS (n.d. c: 38).)

Lastly, if the APMA division declines to continue an APA process after it has begun, the APMA division will make a decision on whether or not to refund the taxpayer's user fees; the decision will be based on numerous considerations, such as the due diligence and analysis the APMA division has taken before further assistance is denied (IRS (n.d. c: 39)).

Step 2: The initial stages of the advance pricing agreement process

The APMA division will reach out to the taxpayer once it has determined that the APA request is complete and that the APA process should continue (IRS (n.d. c: 39)).

The initial stages of the APA process are initiated by holding an opening conference. However, an opening conference may not be relevant in the case whereby the APMA division is experienced and familiar with the proposed issue/s and methods covered and other aspects of the APA request. (IRS (n.d. c: 39).)

If the APMA division suggests that an opening conference is necessary it will make contact with the taxpayer to set a date for the conference to take place. Prior to the opening conference taking place, the APMA division may provide and expect responses to certain questions relating to the content set out in the APA request. A delayed submission of responses by the taxpayer may result in a postponement and reschedule of the opening conference – therefore, it is necessary for the taxpayer to make it a priority to respond to the APMA division questions promptly. (IRS (n.d. c: 39).)

The opening conference is necessary to facilitate the APMA divisions understanding of the facts and circumstances underlying the taxpayers proposed issue/s and method/s covered, and terms and conditions. The reason for which the taxpayer has selected the proposed method/s covered is also a topic for discussion at the opening conference. (IRS (n.d. c: 39 – 40).)

Following from the above information, the APMA division will then be in the position to explore matters potentially interrelated with the proposed issues covered and discuss the prospect of including additional coverable issues, treaty countries, or years into the APA (IRS (n.d. c: 40)).

The taxpayer must therefore be susceptible to discuss the APA request and be in the position to answer all questions about the facts and suggested proposals (IRS (n.d. c: 40)).

The opening conference may subsequently cover procedural matter, including whether a case plan will facilitate the APMA division's evaluation of the taxpayer's APA request, and if so, at what stage in the APA process will it be beneficial for the APMA division to adopt a case plan (IRS (n.d. c: 40)).

A case plan is adopted with the purpose of facilitating efficient processing of the taxpayers APA request. Irrespective of whether a case plan is implemented, the APMA division will endeavour to move through the APA process efficiently, given the scope and complexity of the proposed APA and undertake to perform the necessary due diligence and analysis in respect thereto. (IRS (n.d. c: 40).)

When preparing for a case plan, the APMA division and taxpayer will raise milestones which are dependent on the covered issue/s, the quality of the APA request, the previous responses received by the taxpayer and the further due diligence and analysis are required. The estimated time periods to reach these milestones are reflected in the case plan and subject to revision. The time required to reach these milestones can be delayed by various factors including but not limited to the following:

- The quality of information disclosed by the taxpayer, and time taken to disclose it;
- The need to consider interrelated matters;
- The development of unexpected issues;
- In the case of bilateral and multilateral APAs, when the foreign competent authority/ies are prepared to discuss the case; and
- The ease with which an agreement can be reached with the taxpayer for unilateral APA requests or with foreign competent authority/ies for bilateral and multilateral APA requests. (IRS (n.d. c: 40 – 41).)

Step 3: The evaluation and presentation stage of the advance pricing agreement process

Step 3.1: For bilateral and multilateral APA requests

During the evaluation stage, the APMA division will consider requests from taxpayers, and may invite and/or subsequently be requested to make presentations jointly to the APMA division and the foreign competent authority. This dual or tripartite presentation could facilitate efficient case processing. The APMA division will consult as required with the foreign competent authority as to its interest in joint presentations and will notify the taxpayer accordingly. (IRS (n.d. c: 41).)

The APMA division may further request teleconferences or in-person meetings with the taxpayer during the APA process to discuss questions and concerns the APMA division may have about the taxpayer's APA request, or to discuss the APMA division's temporary views on the request or aspects of the request. The APMA division or the APMA division together with the foreign competent authority may also offer for the taxpayer to provide written responses to memoranda discussing such issues. (IRS (n.d. c: 41 – 42).)

The APMA division may reach a point in the APA process where it will formally make a presentation of its views on the APA request to the foreign competent authority. At this point, disclosures by the APMA division to taxpayers will be made in a paper or memorandum having a length, content, and format appropriate to the scope and duration of the APA process and to the size and complexity of the proposed issue/s and method/s covered and other relevant facts and circumstances surrounding the case. (IRS (n.d. c: 42).)

In certain cases, prior to the APMA division making direct contact with the foreign competent authority, the APMA division may present the paper or memorandum to the taxpayer for its comments before formally presenting this to the foreign competent authority for viewing, or in other cases, the APMA division may issue the paper or memorandum concurrently to the taxpayer and the foreign competent authority. The taxpayer would then be offered an opportunity to provide its comments to both the APMA division and the foreign competent authority for their discussion and consideration towards reaching a competent authority resolution. The decision as to what approach is to be followed is at the decision of the APMA divisions. (IRS (n.d. c: 42).)

The APMA division, together with the foreign competent authority, will reach a competent authority resolution that will underlie the APA that will be executed between the taxpayer and the IRS. The MAP article in the treaties requires that the competent authorities refer certain cases to mandatory arbitration in the case that a discussion between the competent authorities does not lead to a mutual agreement within the prescribed period of time. Those taxpayers entering into a bilateral or multilateral APA should consult the MAP article in the USA's double taxation agreement (DTA) to determine whether it is an arbitration treaty, and the extent to which mandatory arbitration applies to cases initiated by bilateral or multilateral APA requests under the treaty. (IRS (n.d. c: 42 – 43).)

Step 3.2: For unilateral APA requests

Similar steps are applicable to the unilateral agreements as they are for the bilateral and multilateral agreements mentioned above (IRS (n.d. c: 43)).

The main difference is that, in the case of a unilateral APA request, the APMA division and the taxpayer will continue to finalise an APA after the APMA division has completed its due diligence and evaluation of the APA request, and the APMA division and taxpayer have agreed to the covered issue/s, covered method/s and terms and conditions (IRS (n.d. c: 43)).

Step 4: The execution of the advance pricing agreement

A unilateral, bilateral or multilateral APA will become operative on the date when it has been signed by both the IRS and the taxpayer (each entity included within the definition of a taxpayer under section 1.04:

“Unless the context indicates otherwise, the member of the covered group that is either a U.S. person, as defined in section 7701(a)(30) of the Code, or a non-U.S. person that is expected to file one or more U.S. returns during the proposed APA years that will reflect the treatment of covered issues. However, if such a member of the covered group is a member of a consolidated group other than the common parent (as defined in Treas. Reg. §1.1502-1), then the common parent, rather than that member of the consolidated group, is considered to be the ‘taxpayer’. Further, if there is more than one entity that satisfies the preceding definition of ‘taxpayer’, then the term ‘taxpayer’ refers collectively to all such entities)” (IRS (n.d. c: 43 – 44)),

and the APA will then have the effect as provided therein. (IRS (n.d. c: 43 – 44).)

The APA agreement must be signed by the following persons:

- When an APA's covered group includes a member of a consolidated group other than the common parent, the common parent must sign the APA as provided for in Treas. Reg. §1.1502-77;
- An authorised signatory of an APA acting on behalf of a company must have personal knowledge of the APA's covered issue/s, covered method/s and terms and conditions, perform duties not limited to receiving letter rulings or determination letters from the IRS or entering into APAs, and must have permission to sign the corporate income tax return pursuant to a section 6062 of the Code;
- An APA entered by a non-corporate taxpayer must be signed by an individual who has personal knowledge of the APA's covered issue/s, covered method/s and terms and conditions and who has permission to sign that taxpayer's income tax return pursuant to a section 6061 or 6063 of the Code, as applicable; and

- In terms of an APA entered by a partnership, the APMA division may request that some or all partners are to sign the APA (IRS (n.d. c: 44)).

Post advance pricing agreement

Reporting of income, APA primary adjustment, conforming adjustment, and repatriation of funds

- **Reporting of income and APA primary adjustment:** The taxpayer is required to report income, deductions, credits, allowances or any other item or element affecting taxable income during the APA period. In addition to these disclosures, the taxpayer must subsequently reflect the application of the covered method/s to the covered issue/s. (IRS (n.d. c: 49).)

In certain circumstances, the reported information for an APA year may require an adjustment to such amounts reflecting in the taxpayer's books and records for that APA year, and/or to the amounts reflected on a USA return – this is known as an APA primary adjustment (IRS (n.d. c: 49)).

An APA primary adjustment is to be reported as follows:

- (a) On a timeously filed USA return for the APA year;
- (b) On an amended USA return for the APA year, which is to be filed in 120 days of the APA's effective date; or
- (c) Any alternative means that is specified in the APA (IRS (n.d. c: 49)).

Points (b) and (c) mentioned above are only permitted if the original USA return for the APA year is timeously filed no later than 60 days after the APA's effective date.

In respect of any APA year for which the taxpayer files an adjustment in terms of points (b) and (c), the calculation of any required estimated tax instalments for the taxable year will not account for the APA primary adjustment and any related adjustment/s (IRS (n.d. c: 49)).

Further, for such an APA year, the taxpayer will not be subject to the failure to pay penalties or failure to make timely deposits of taxed penalty as provided for in the Code, by reason of the APA primary adjustment and any related adjustments (IRS (n.d. c: 49 – 50)).

- **Conforming adjustment and repatriation of funds:** This conforming adjustment applies to APA primary adjustments that arise from applying a covered method that addresses the allocation of income, deduction, credits, allowances or any other item or element affecting taxable income between members of a controlled group (IRS (n.d. c: 50)).

Therefore, following from the above information, this section will not find application to APA primary adjustments attributable to a USA permanent establishment of a foreign corporation (IRS (n.d. c: 50)).

Following from an APA primary adjustment, a further adjustment, known as the conforming adjustment is required to conform the accounts of the affected members of the controlled group (conforming adjustment) (IRS (n.d. c: 50)).

A conforming adjustment can be realized by the payment of funds between the affected members, and this payment is referred to as a repatriation of funds when the affected members are in different countries (IRS (n.d. c: 50)).

The application of Rev. Proc. 99 – 32 will administer the repatriation of funds to correspond with the accounts following the APA primary adjustment; unless the competent authority repatriation discussed below applies to that APA's primary adjustment (IRS (n.d. c: 50)).

For bilateral and multilateral APAs, the APMA division will make reference to the rules and principles set out in the Rev. Proc. 2015 – 40 which govern the competent authority repatriation, provided that the competent authority repatriation is agreed to as part of the competent authority resolution underlying the APA. This Rev. Proc. 2015 – 40 subsequently provides the terms and conditions which are applicable for the repatriation of funds to confirm the accounts following from an APA primary adjustment. (IRS (n.d. c: 50 – 51).)

The APMA division will not include competent authority repatriation as part of the competent authority resolution unless the following two conditions are satisfied:

- (a) That the person making or receiving repatriation payments is/would be disqualified from making or receiving such repatriated payments under principles set out in Rev. Proc. 99 – 32 or successor guidance; and
- (b) The taxpayer had specifically requested competent authority repatriation in its APA request, or in any subsequent written submission filed by the taxpayer with the APMA prior to a provisional competent authority resolution having been reached (IRS (n.d. c: 51)).

A unilateral, bilateral or multilateral APA will set out the terms and conditions relating to conforming adjustments, as well as the repatriation of any funds (IRS (n.d. c: 51)).

Documentary proof is to be provided in an annual report setting out the manner in which the conforming adjustment for any APA primary adjustment is made, including the amounts, timing and manner of all payments and deemed payments, as well as the facts for which the APA years to which the APA primary adjustment relates must be disclosed in the APA report (IRS (n.d. c: 51)).

Annual Reports

An annual report must be filed for each APA year proving the taxpayer's compliance with the APA terms and conditions, including the amount of any APA primary adjustment for a given APA year. The report must further provide items requested in the APA, as well as disclose any pending requests to renew, modify or cancel the APA. Lastly, this report must identify and correct any materially false, incorrect or incomplete information submitted during the APA process. (IRS (n.d. c: 51 – 52).)

Annual reports must be filed by the taxpayer to the APMA division on or before the later of (a) the fifteenth day of the twelfth month following the close of the APA year; or (b) 90 days after the effective date of the APA. For bilateral and multilateral APAs, the APMA division requires the taxpayer to file the annual report simultaneously with the applicable foreign competent authority/ies. The taxpayer may request an extension to the above dates and time periods, if and when necessary. (IRS (n.d. c: 52).)

The original signed annual report must be filed together with an original signed "penalties of perjury" declaration. The original signed annual report must be submitted together with a printed and electronic copy of this annual report. All three copies of the annual report must be submitted to the APMA division at the address provided in **Annexure A** below. Any additionally requested documents may need to be made available to the APMA division at a later stage. (IRS (n.d. c: 52).)

If the taxpayer is requested to clarify or provide further information in respect of the annual report, this request is not an examination or commencement of an examination of the taxpayer. The taxpayer is therefore required to respond to this request within 45 days of becoming aware of any outstanding or incorrect information. (IRS (n.d. c: 52 – 53).)

The annual report must contain the following declaration (IRS (n.d. c: 53)):

Under penalties of perjury, I declare that I have examined this annual report including accompanying documents, and, to the best of my knowledge and belief, this annual report contains all the relevant facts relating to the annual reporting requirements pursuant to the APA, and such facts are true, correct, and complete.

[If applicable: An adjustment to conform taxable income and other relevant items to reflect the results reported herein has been reported to IRS Examination.]

[If applicable: An amended income tax return to conform taxable income and other relevant items to reflect the results reported herein [has been] [will be] filed with the appropriate Internal Revenue Service Center.]

The taxpayer must sign the declaration as advised in **Annexure B** below (IRS (n.d. c: 53 & 72)).

Failure to file the annual report, timeously, completely, and accurately is a ground upon which the APMA division may rely on to cancel or revoke the APA (IRS (n.d. c: 53)).

Examination

During an examination, the IRS will not consider the revaluation of the covered method/s, but will instead limit the examination of a taxpayer's income tax return in any given APA year to the following topics:

- to identify compliance with the terms and conditions set out in the APA;
- to identify the correctness of the APA annual report's material representations; and
- the accuracy of the supporting data and computations used to apply the covered method/s (IRS (n.d. c: 54)).

Record retention

The taxpayer is required to retain books and records that sufficiently detail and verify that it has completed with the APA terms and conditions (IRS (n.d. c: 54)).

After examination of the covered issue/s the APMA division may request that additional information be made available within 30 days, subject to an extension upon submission of a valid request (IRS (n.d. c: 54 – 55)).

If the taxpayer discloses material that is not considered reasonable by the IRS, the taxpayer may be subject to a penalty in this regard (IRS (n.d. c: 55)).

Revising the APA

A revision of the APA may be enforceable by agreement of all parties. The revision will be effective upon the date of the execution of the revision. The APMA division may approve a revision of the APA in lieu of cancelling or revoking it. (IRS (n.d. c: 55).)

Prior to the APMA division agreeing to a revision of the APA request, it too will seek the consent of the applicable foreign competent authority with respect to the revision. If the USA and foreign competent authority agree to the revision or any other revisions, then the APMA division will agree with the taxpayer to revise the APA. Alternatively, if the USA does not agree to the revision of the APA, then it will remain in force without revision. However, in various cases after which the USA revokes its consent to a suggested amendment, the APMA division and the taxpayer may agree for USA domestic purposes to (a) revise the APA with respect to one or more APA years; or (b) cancel the APA as of a specific date. (IRS (n.d. c: 55).)

Revoking or cancelling the APA

An APA may be revoked by the APMA division due to fraud, malfeasance, a disregard of the material facts set out in the request or subsequent submission (including an annual report) or a lack of compliance with the APA terms and conditions (IRS (n.d. c: 55 – 56)).

Alternatively, an APA may be cancelled due to various other reasons including:

- The taxpayer's misrepresentation or mistake with respect to the material facts, the failure to state the material facts, failure to file a timeous annual report, or a lack of compliance in the terms and conditions; or
- Unless the parties agree to a variation/revision of the APA, the APMA division will cancel the APA in the event that there is a failure of a critical assumption or a material change in the governing case law, statute, regulation, or applicable treaty (IRS (n.d. c: 56)).

The APMA division may waive the cancellation if the taxpayer presents in good faith and reasonable cause, and consents to the making of suggested adjustments to correct for the misrepresentation, mistakes regarding a material fact, or failure to state a material fact or non-compliance (IRS (n.d. c: 56)).

A revoked APA is dated back to the first day of the first APA year; whereby, a cancelled APA is effective as of the beginning of the taxable year in which the critical assumptions failed; or the beginning of the taxable year in which the misrepresentation, mistake regarding a material fact, or failure to state a material fact or non-compliance occurred. However, a cancellation resulting from a change in case law, statute, regulation, USA tax treaty or coordinating agreement will be of effect at the beginning of the year that contains the effective date of the abovementioned change. (IRS (n.d. c: 56 – 57).)

Following from the effective dates of cancellation mentioned above, the APA has no further force and effect with the IRS and the taxpayer for USA income tax purposes. The APMA division will manage any actions relating to the cancellation of the bilateral or multilateral APA with the foreign competent authority/ies. (IRS (n.d. c: 57).)

Changes in case law, statute, regulation or treaty

With regard to any amendments affected to case law, statute, regulation or treaties mentioned in the APA, the new case law, statute, regulation or treaty provisions supersedes any inconsistent terms and conditions of the APA (IRS (n.d. c: 57)).

Renewing the APA

A request for the renewal of an APA can be effective by either filing a complete or abbreviated APA request with the permission of the APMA division (IRS (n.d. c: 58)).

An abbreviated APA request will be suitable if the taxpayer submits a renewal of an APA request and can thus prove that the applicable law, facts and circumstances, economic conditions, proposed covered issue/s and method/s, and other relevant factors are in substance the same as the original APA request (IRS (n.d. c: 58)).

Lastly, a request by the taxpayer to renew a current APA must take place at least nine months before expiry of the final APA year (IRS (n.d. c: 58)).

Disclosures

- **Confidentiality:** Any background information relating to an APA, and the taxpayer's APA request and any supplementary materials submitted in conjunction with the APA request are confidential (IRS (n.d. c: 58)).
- **Not "Written Determinations":** Any background information relating to an APA, an APA request, and any supplementary materials submitted in conjunction with the APA request are not "written determinations" and are not open to public inspection (IRS (n.d. c: 58)).
- **Statutory Report:** The Secretary must prepare an annual report for public disclosure and which shall provide information concerning APAs in a form that does not identify taxpayers, their trade secrets, or proprietary or confidential business or financial information (IRS (n.d. c: 58 – 59)).
- **Exchange of information:** Certain information, such as APAs, annual reports, and factual information contained in APA requests are subject to exchange of information under U.S. tax treaties or U.S. income tax information exchange agreements in accordance with the terms of such treaties and agreements; whereas, in other cases the exchange of information would be optional, and therefore information may be exchanged to the extent consistent with principled, effective, and efficient tax administration and the practices of the relevant foreign competent authorities (IRS (n.d. c: 58 – 59)).

Advantages and disadvantages of the advance pricing agreement programme

After considering a holistic view of the approach followed when entering into the APMA Program in the USA, the apparent advantages and disadvantages are briefly discussed below.

The prior approval of transfer pricing methodology is the primary advantage of entering into an APA, thus creating both tax certainty and flexibility of the transfer pricing methodology (TPM). Furthermore, entering into a bilateral or multilateral APA helps reduce the annual compliance costs, and although taxpayers are still required to submit annual reports, they are less extensive than those submitted when no APA is entered into. (Valentiam Group (2021).)

However, in terms of disadvantages, entering into an APA is time consuming (the average APA takes two years from application), costly, and administratively onerous. Another drawback is that USA APAs make critical assumptions about the business and level of transactions; therefore, variation to transaction values or profit margins might differ substantially from the assumptions in the APA, which renders the APA void, or requires it to be revised. (Valentiam Group (2021).)

Therefore, considering both the advantages and disadvantages, APAs are most useful and beneficial for complex, risky matters, reducing future audits and double taxation which give rise to both primary and secondary adjustments (Valentiam Group (2021)).

Following from the information provided in this Chapter 3 of the research report, the reader is provided with an in-depth analysis into the USA's APMA programme, and the context set out here will become relevant when a comparison is made with the draft legislation in SA.

Chapter 4: UK legislated advance pricing agreement programme

Background

Since 1999, Her/His Majesty's Revenue and Customs (HMRC) has run the APA programme. The APA programme was implemented with the purpose of assisting businesses to adopt the most appropriate methodology to identify the arm's length outcome for complex transfer pricing issues, and to avoid any disputes from arising that may result in the MAP being necessary. (GOV.UK (2019).)

Introduction to the UK advance pricing agreement programme

The UK's APA programme is legislated and appears in Section 218 – 230 of the Taxation (International and Other provisions) Act 2010 (TIOPA, 2010). General guidance on how the HMRC interprets the APA legislation and drives the UK APA programme was originally set out in the Statement of Practice (SP) published in 1999, and which was later replaced by the SP published in 2010 (SP02/10). (GOV.UK (2019).)

According to the HMRC, an APA is a written agreement entered into by and between a taxpayer and the Commissioner of the HMRC which identifies the method for resolving transfer pricing issues in advance of a return being made (see **Annexure C** of this research report which contains *SP02/10 - Advance Pricing Agreements Annex 2 – Sample Agreement*). For as long as the provisions of the agreement are complied with, it will provide assurance to the taxpayer that the treatment for those transfer pricing issues will be accepted by the HMRC for the period covered by the agreement. Similar assurance will be provided in respect to the tax administration of bilateral APAs dealing with the entity at the other end of the transaction. (GOV.UK (2019).)

The provisions set out in a UK APA is in place for a maximum period of 5 years; however, a taxpayer may apply for a shorter period, but by doing this it reduces the period for which the assurance is achieved. Following on from this, the HMRC has shown flexibility in applying the agreed APA methodology to years before the initial APA period, and this is referred to as the "roll back period". Various taxpayers have applied the "roll back period" as an approach to resolve tax queries raised for audits which are pending, and which relate to prior years. It appears that APA negotiations have proved to be more successful in reaching common ground in comparison to the antagonistic atmosphere arising during an audit. (GOV.UK (2019).)

The UK APA programme is available to any one of the following persons/taxpayers: a UK business, including a partnership, which is subject to the transfer pricing provisions set out in Part 4 of the TIOPA 2010; a non-resident trading in the UK through a permanent establishment; and a UK resident trading through a permanent establishment outside the UK (GOV.UK (2019)).

From inception to date, the UK APA programme is free of charge to all UK taxpayers. However, in order to reduce the workload on the HMRC, it restricted accessibility to the programme to only those cases where the transfer pricing may be regarded as "complex"; but exceptions to the rule is provided under the SP02/10. According to the SP02/10, the HMRC is prepared to

admit those APA applicants into the programme where the transfer pricing is not too complex, but where the taxpayers' risk assessment would be "high risk" without use of an APA or where the transfer pricing methodology is tailored to the taxpayers' own circumstances. (GOV.UK (2019).)

Regardless of the limitations mentioned above and the resulting reduction in the number of applications accepted by the HMRC, written confirmation has previously been given by the HMRC of its intention to complete APAs within 18 – 21 months. However, this has not yet been achieved to date and is thus clarified through an analysis of statistics from previous years, inclusive of those mentioned in the diagram on page 5 in Chapter 1 of this research report. (GOV.UK (2019); GOV.UK (2022).)

As previously mentioned in this research report, there are different types of APAs available, more specifically unilateral, bilateral and multilateral APAs.

Before the revised SP02/10 came into force in December 2010, only unilateral APAs were available in the UK; however, since the publication of the SP02/10, unilateral, bilateral and multilateral APA were then made available in the UK (Hay & Norton (2011: 312)).

Historically, the UK had strongly favoured bilateral APAs as, in its view, only bilateral APAs eliminate double taxation. The rationale for this statement is that at the time when the APA programme commenced in the UK in 1999, there was a gap in its domestic legislation, resulting in its only being able to make APAs under the MAP provisions with other treaty partners. (Hay & Norton (2011: 313).)

This view changed more recently and the HMRC is now increasingly open to entering into unilateral APAs. However, the HMRC expects that APA applications must be bilateral rather than unilateral except where:

- The other party to the transactions is resident in a jurisdiction which the HMRC has no DTA or where the HMRC is aware that the other partner/s to the transaction do/es not have an APA programme in place; or
- The HMRC believes that there is little to be gained from a bilateral APA. For example, where the transaction is such that its visibility in the other country is limited or where a ruling already exists in that country; or
- Where the transfer pricing arrangement involving a UK taxpayer is an integral part of the transfer pricing arrangement and which also involves several other jurisdictions. For example, where the UK is at the central or regional structure, meaning it would be difficult to separate the UK transaction or treat any other jurisdiction as the tested party. (GOV.UK (2019); Hay & Norton (2011: 313).)

Sub-section 218(2) of the TIOPA 2010 further provides a list of transfer pricing issues which can be subject to an APA. An APA is useful to resolve the following broad situations giving rise to the transfer pricing issue:

- Whereby separate business enterprises require a determination of the arm's length price under the rules in Part 4 of the TIOPA 2010; or
- Where there is a requirement for the attribution of income or profits between parts of a business enterprise which operate in more than one country where questions arise as to the taxable income to be recognised in any such part; or
- Across the UK oil-related ring-fence. (GOV.UK (2019).)

However, it must be noted that this list is not exhaustive, and an APA is useful in any situation which has the potential to give rise to a future transfer pricing issue of the taxpayer or be limited to one or more specific issues (GOV.UK (2019)).

Following from the above information, a step form approach when entering into a APA programme is discussed below.

The step form approach when entering into the advance pricing agreement programme

Step 1: The initial contact

As a starting point, it is relevant to note that the taxpayer initiates the commencement of the APA programme. However, prior to the taxpayer exercising its right to submit an APA application to the HMRC, the HMRC will have requested the taxpayer to arrange an informal meeting to take place between the parties. The initial purpose for this informal meeting is to allow the HMRC the opportunity to understand the basis for such APA application, and following from this to ensure that both resources and time are not wasted on an unstable application. Upon confirmation that the application is not one that may be regarded as unstable, the HMRC is then given an opportunity to inform the taxpayer of its shortfalls in the application, to provide an outline of the practical anticipated timetable for agreeing to an APA based on previous experiences and to discuss any other practical "process" issues which may arise. (GOV.UK (2023).)

Following from the above information, in order for the taxpayer to be able to secure an informal meeting with the HMRC, it must email APA.mailbox@hmrc.gov.uk with its expressions of interest in an APA and for making the APA. The expression of interest must include the following information:

- The nature of the transfer pricing issues which the taxpayers intend to be covered by the APA;
- A description of the transfer pricing methodology to be followed;
- Details of the transactions to be covered in the APA;
- Details of the tax residence status of all parties involved in the APA; and
- A disclosure of the nature of any current transfer pricing enquiries, competent authority claims and any other relevant issues that the taxpayers may be aware of in the context

of the suggested APA, including the potential Diverted Profits Tax which may be applicable to the covered transactions. (GOV.UK (2023).)

Furthermore, the taxpayer is required to provide the HMRC together with the list of expressions of interest, a detailed description of the business. The identity of the business is necessary since the HMRC cannot make any commitments over acceptance into the APA programme until such time as the identity of the business is known. (GOV.UK (2023).)

The HMRC has stated that an informal meeting to discuss the above-mentioned information, as well as to have due regard to the expression of interests and any other informative documentation and information disclosed by the taxpayer to the HMRC, helps to make discussions faster and more productive than formal written correspondence between the parties. The informal meeting may be either in person or over phone, whichever one is more effective and efficient. (GOV.UK (2023).)

Upon completing the informal meeting between the taxpayer and HMRC, the HMRC is more often than not able to indicate whether it will be prepared to consider an application for an APA based on the verbal and written information and documentation provided by the taxpayer. In the event that the HMRC decides that an APA application should not be accepted into the APA programme, the HMRC will provide reasons for its decision and will allow the taxpayer the opportunity to make additional representations; however, there is no right of admission into the APA programme. (GOV.UK (2023).)

Step 2: The formal submission of the advance pricing agreement

In cases where the HMRC has indicated that it is willing to consider an application for an APA based on the verbal and written information received and perused in the informal meeting, the taxpayer is then required to submit a formal APA application to the HMRC within 6 months or longer period explicitly agreed to by and between the parties at the informal meeting. However, the HMRC reserves the right not to accept any other delays in submitting the written application to the HMRC. (GOV.UK (2023).)

The SP02/10 – Advance Pricing Agreement Annex 1 (SP02/10 – Annex 1) sets out complete details of all the information that should be included in the formal APA application to be submitted to the HMRC (GOV.UK (2023)).

Section 1 of the SP02/10 – Annex 1 provides that an APA application should satisfy the requirements of section 223 of the TIOPA 2010, which states the following:

- The applicant, being the taxpayer, must acquaint itself with the effects of the applicable legislation and effects of any double tax agreements in relation to the transfer pricing issues which are under scrutiny;
- The areas where clarification of the effects is sought; and
- A proposal which clarifies the taxpayer's understanding of the effects of the legislation (GOV.UK (2023)).

Furthermore, all proposals submitted by the taxpayer needs to be supported by the following information:

- The taxpayer's identification and recent accounts for the previous 3 years (GOV.UK (2023)).
- A description of the transfer pricing issue and the period including any roll back years which will be covered in the APA. If applicable, the taxpayer must provide an explanation of why only a selection of transactions and not all transaction between the parties have been included in the APA request. (GOV.UK (2023).)
- An investigation into the functions, assets and risks of the parties and a much broader context of the transactions is to be performed and disclosed – in other words, “the economically relevant characteristics including global value chain, group characteristics and history” (GOV.UK (2023)).
- An investigation into prospective internal comparables available for any of the covered transactions (GOV.UK (2023)).
- A description of the proposed methodology to be used to determine the transfer pricing issues in accordance with the ALP. Furthermore, an investigation must be made which will demonstrate how the application of that methodology satisfies the terms of the UK's legislation, including the effect of any DTA, and confirmation that such methodology is consistent with the OECD Transfer Pricing Guidelines. (GOV.UK (2023).)
- Disclosure of the actual and projected financial data of all parties in relation to the issue detailing the actual and expected turnover, costs and profits from the transactions covered in the APA for the covered period (GOV.UK (2023)).
- Disclosure of the actual and projected financial data for the global value chain of the business relevant for purposes of the APA application – these projections and forecasts must be supported by the projections and forecasts prepared for commercial use by businesses (GOV.UK (2023)).
- A detailed description regarding the international organisational structure, its ownership, business operations of the group to which the business in question belongs, the place/s where operations are conducted and the flow between the parties of those transactions covered in the intended APA (GOV.UK (2023)).
- A description of the records which will be maintained each year to support the proposed transfer pricing methodology (GOV.UK (2023)).
- A description of the currently pending tax enquiries or competent authority claims which are necessary to mention, since it is directly or indirectly relevant to the issues covered by the proposed APA together with the current rulings issued by a foreign tax authority to one of the proposed parties (GOV.UK (2023)).

- The identification and listing of presumptions made in developing the proposed transfer pricing methods which are of crucial importance to the reliability of the application under the arm's length standards (GOV.UK (2023)).
- An investigation into the Diverted Profits Tax position in respect to those transactions covered in the APA and any other transactions directly connected to them. The form and manner within which the investigation should take place is determined by the nature of the covered transactions and the clarity in the position. (GOV.UK (2023).)
- A consideration of all current and expired rulings by the foreign tax authority which covers intercompany transactions or the business activities of members of the group that are indistinguishable to the proposed covered issue/s in the APA or relate to one of the proposed parties (GOV.UK (2023)).
- Finally, any other information that the taxpayer believes is necessary to be disclosed to the HMRC for evaluation (GOV.UK (2023)).

It is clear from the above listed information that the HMRC requires the taxpayer to make a full disclosure when submitting a formal APA application. However, despite the stringent requirements the HMRC may, in practice, be amenable to a change in certain requirements where the circumstances in a particular case mean that a different approach will make for a better process. Following on from this, in the case whereby a bilateral or multilateral APA application is submitted to the HMRC, the HMRC is susceptible to agreeing to work from the same format as is mandated by other administration procedures – the agreement for use of the same format as is mandated by other administration procedures is usually a discussion which takes place at Step 1 of the APA programme, being the initial contact by and between the taxpayer and the HMRC. The application should preferably be submitted before the start of the first chargeable period proposed to be covered by the APA, although the HMRC can exercise its discretion over this by taking into account surrounding circumstances such as in the case where a bilateral APA is being sought and the other tax authority is prepared to extend the taxpayer more time to lodge its application. (GOV.UK (2023).)

In the case of a bilateral or multilateral APA, the taxpayer is obliged to ensure that the information disclosed in an application to one tax authority is made available at the same time to the other tax authority/ies involved (GOV.UK (2023)).

APA information is subject to the same rules of confidentiality applicable in respect to information relating to a taxpayer. Information exchanged between treaty partners for purposes of reaching agreement on bilateral APAs is protected from any form of disclosure by the exchange of information article in the relevant DTA. Therefore, there will be non-disclosure of any information regarding a bilateral or multilateral APA reached with a jurisdiction that is not a member state of the EU, since the HMRC must comply with its obligations under the EU Directive on Administrative Cooperation in the field of taxation (2015/2376/EU). However, considering this limitation, the HMRC may continue to disclose relevant details regarding the formal application. (GOV.UK (2023).)

Step 3: The evaluation of the advance pricing agreement

When the HMRC receives an application, it will evaluate the context it sets out, and if necessary, may request further information and/or documentation. The examination of the application is a collaborative process whereby the transfer pricing issues are conversed openly and access to supporting information and/or documentation is made available. A lack of collaborative engagement on the taxpayer's behalf may result in the HMRC declining to give further consideration to the application. (GOV.UK (2023).)

In the case whereby a bilateral or multilateral APA is being sought, the HMRC will expect that the taxpayer will equally continue to make all relevant information available to the other tax authority/ies at the same time, and in turn will keep the treaty partner/s well versed with the process of its examination of the APA request. The HMRC will also seek to discuss with the treaty partner any key issues arising at its earliest convenience and will keep the taxpayer informed about the progress of the bilateral or multilateral process. Whilst the finalisation of a bilateral or multilateral APA with a treaty partner/s is a government-to-government process, the HMRC is amenable to contribute to and encourage joint meetings involving both the taxpayer and other tax authority/ies to assist in the exploration and evaluation of key factual issues. (GOV.UK (2023).)

Step 4: Concluding an advance pricing agreement

The APA agreement is a binding agreement entered into by and between the HMRC and the taxpayer. The HMRC aims to complete these kinds of agreements within 18 to 21 months from the date of the formal submission. (GOV.UK (2023).) This agreement undertakes to set out the manner in which the transfer pricing issues are treated for a specific period of time, as well as containing the following terms and conditions:

- That the business illustrates a commitment to adhere to the agreed method for dealing with the transfer pricing issue during the tenure of the APA. This illustration will be in the form of a regular compliance form (also known as an "Annual Report") as required under Section 228 TIOPA 2010; and
- That an identification of critical assumptions is relevant, since it has an impact on the reliability of the method followed and which, if subject to change, may render the APA invalid. The APA will ordinarily include an assumption that the relevant transfer pricing law and OECD guidelines remain materially the same. (GOV.UK (2023).)

A draft ordinary APA is included in **Annexure C** below. Normally the person/s responsible for signing the APA on behalf of the business would be the same person/s responsible for signing tax returns on behalf of the company, and these person/s should be authorised within the multilateral group to commit the group to the terms and conditions of the APA (GOV.UK (2023)).

The HMRC's aim to complete the APA within an 18 to 21 month period is dependent upon the complexity of each particular case. However, the period within in which it takes to complete bilateral and multilateral applications is dependent upon the working practice of the administrators in the other country/ies as well as the co-operation from the taxpayer. (GOV.UK (2023).)

If the HMRC determines that there is little to no co-operation or a loss of interest by the taxpayer in agreeing on an APA, the HMRC is authorised then to terminate the APA process as a result of such actions having been exercised by such taxpayer. Put differently, the HMRC has an expectation that the taxpayer will facilitate an efficient process by timeously providing all the required information and documentation for consideration in order to ensure that the application can be considered properly for the purpose of reaching an agreement. (GOV.UK (2023).)

Post advance pricing agreement

As noted, an APA can be in place for a maximum period of 5 years, during which time there are certain obligation on the taxpayer and powers which vest in the HMRC which are discussed below (GOV.UK (2023)).

The submission, monitoring and reviewing of annual reports

There is an obligation on the taxpayer to ensure that it submits annual reports to the HMRC, and by doing this it provides clarity that the terms and conditions of the APA have been complied with (GOV.UK (2023)).

Nullifying and revoking APAs and penalties

The HMRC may revoke an APA in accordance with its terms, provided the taxpayer does not comply with the terms and conditions set out therein or where the identified critical assumptions cease to be valid. Prior to the HMRC considering to nullify, revoke or cancel a APA, it must consult with all interested parties involved, which includes the taxpayer and the competent authority of the treaty partner. (GOV.UK (2023).)

Where there is an intentional or negligent disclosure of false or misleading information by the taxpayer to the HMRC when submitting an APA application or the relevant annual reports, this may result in the HMRC imposing a penalty and/or nullifying the APA (GOV.UK (2023)).

Revising and renewing APAs

A taxpayer may request the amendment and renewal of APAs.

- *Amendment of the APA:* an APA can be amended in accordance with section 225 of the TIOPA 2010, after the necessary consultations have taken place by and between the taxpayer and the HMRC; including the competent authority/ies of the other country/ies involved in the case of a bilateral or multilateral APA (GOV.UK (2023)).

- *Renewal of the APA:* where there have been no changes in the facts and circumstances of an APA, the taxpayer may request a renewal of the APA for a fixed period. This request should ideally not be later than 6 months before the expiry of its current term. (GOV.UK (2023).)

However, if the taxpayer fails to provide the necessary notice in the time period provided above, the HMRC will not rule “an out of time request made” (GOV.UK (2023)) before the end of the first chargeable period affected by the renewal; or in the case of bilateral cases, later, if the other tax authority is prepared to allow further time (GOV.UK, 2023)).

Prior to the HMRC authorising the renewal of the APA, it will consider applying adjustments to the interest, the APA methodology, as well as monitoring requirements if or where necessary (GOV.UK (2023)).

The taxpayer must not always anticipate that a renewal will necessarily be worthwhile, as it is dependent on various factors, including the view and approach of the relevant treaty partners (GOV.UK (2023)).

Advantages and disadvantages of the advance pricing agreement programme

After considering a holistic view of the approach followed when entering into the APA programme in the UK, the apparent advantages and disadvantages are briefly discussed below.

A clear advantage is derived by the taxpayer when entering into the APA programme, since it provides certainty to the taxpayer that the HMRC will accept the treatment of the taxpayer’s transfer pricing issues for the term of the agreement. Further, there is ongoing communication between the taxpayer and the HMRC, which assists to resolve any discrepancies in more informal and reciprocal fashion. (GOV.UK (2023).)

However, the disadvantages to be highlighted regarding the UK APA programme are that while there is appetite from taxpayers to apply for APAs, either the conditions are too restrictive to enter into the programme, or elements such as the length of the process and administrative burden are causing taxpayers to have second thoughts (Grant Thornton (2022)).

Following from the information provided in this Chapter 4 of the research report, the reader is provided with an in-depth analysis of the UK’s APA programme, and the context set out will become relevant when a comparison is made with the draft legislation in SA.

Chapter 5: SA draft legislated advance pricing agreement programme

Background

In 2020, SARS issued a discussion paper on APAs, followed by a release in 2021 of a proposed model, including a draft legislation framework for establishing an APA programme in SA (SAIT (2022: 25)). The APA programme is, according to SARS, to be implemented with the purpose of promoting tax certainty in respect of potentially affected transactions that will prevent or minimise double taxation and associated dispute resolution procedures (SARS (2021: 5)).

Introduction to the SA draft legislated advance pricing agreement programme

Following from the recommendations of the OECD in its BEPS report, a number of countries have recognized and adopted several types of APA programmes (SAIT (2022: 24)).

Although SA is a member of the G20 and the OECD/G20's BEPS Project and has largely adopted the OECD/G20's transfer pricing recommendations and guidelines into its legislation, SA is yet to implement APAs (SAIT (2022: 24)).

SARS issued out a discussion paper in 2020, which in summary provides its intention to have the APA system introduced into SA. The release of this discussion paper should be considered against the backdrop of the increased focus by SARS on transfer pricing matters and the SA government's call for more foreign businesses to invest in SA. (Du Toit (n.d.).)

The discussion paper provides that the purpose for implementing the APA is to avoid transfer pricing disputes which will ultimately reduce the number of MAPs and create an environment of tax certainty that foreign investors look for prior to making any investments. It also clarifies that SA has adopted an advance tax ruling (ATR) system, but that the ATR system does not properly cater for pricing of goods supplied or services rendered to a connected person; and therefore, the implementation of an APA system has been recommended by the Davis Tax Committee. (Du Toit (n.d.).)

The discussion paper together with various other publications written by prominent individuals in the tax industry have highlighted their concern that SA has fallen behind its peers on the African continent, since other countries on the African continent such as Liberia, Morocco, Nigeria, Tanzania and Uganda have adopted APAs into their domestic legislation (but it must be noted that the APA programmes adopted in these countries have been largely inactive, with the revenue authorities hesitant to issue any APAs mainly due to the lack of transfer pricing capacity) and that this has put a dent in SA's status as a leader on the African continent and its position as a gateway for foreign investment into the African continent (Du Toit (n.d.); SAIT (2022: 24 – 25)).

Irrespective of the abovementioned concerns and the necessity to implement an APA programme into our SA legislation, SARS has indicated that the APA programme will only be prioritized once the practice of profit shifting has been curtailed and SARS' transfer pricing skills and expertise, including capacity constraints, have been addressed. SARS has further indicated that it will take an estimate of three to four years from 2020 for an APA programme

to be successfully implemented in SA, and that such a programme's implementation will be enforced through a phased approach, given its limited capacity. (Du Toit (n.d.); SAIT (2022: 25).)

Following from the above information, in 2021 SARS released a draft enabling legislation for an APA programme (a copy is provided in **Annexure D** below), and is a step in the right direction, but SARS' lack of urgency in enforcement is concerning in view of the potential opportunities for foreign direct investment in the country and economic growth (SAIT (2022: 25)).

Discussion on the proposed implemented process

According to the proposed model, SARS intends to implement the APA programme in a phased approach, starting with an APA pilot project once the legislative framework is in place. The APA pilot project will only accept bilateral APA applications, since according to SARS, this will give them an opportunity to learn from other jurisdictions and expand the capacity in the APA space before deciding to introduce the full APA programme or expand the programme to include unilateral and multilateral APA applications. (SARS (2021: 1).)

The proposed model together with the draft legislation has certain shortfalls which require the Commissioner to provide written confirmation in the form of a public notice in the *Government Gazette* to be made available to applicants prior to considering entering the APA process. These shortfalls include:

- Factors to be considered in determining the most appropriate transfer pricing method;
- The parameters within which the competent authority of SA may enter into an APA with an applicant;
- Clarification of the persons who qualify to apply for an APA;
- The quantum of the relevant fees (SARS (2021: 3)) – per the draft legislation, it provides the following regarding fees:

The Commissioner is to publish a public notice providing the prescribed fees payable by an applicant for:

- (a) A pre-application consultation fee;
- (b) An application fee;
- (c) A cost recovery fee for processing an application; and
- (d) Any fees associated with the maintenance or extension of an existing agreement (SARS (2021: 5)).

The applicant must pay the abovementioned fees based on an invoice issued by SARS (SARS (2021:5)).

SARS is authorised to retain the fees, or a portion thereof, if it rejects an application or terminates an APA (SARS (2021: 5)).

If there is more than one prospective applicant or applicant in respect of an APA, SARS may upon written request and by agreement among the prospective applicants or applicant impose fees on one of the prospective applicants or applicants (SARS (2021: 5)).

The fees that are imposed under this section constitute fees imposed by SARS in terms of section 5(1)(h) of the SARS Act, as well as constituting funds of SARS within the meaning of section 24 of that Act (SARS (2021: 5)).

- The minimum value of affected transactions in order to qualify for an APA process; and
- Procedures and guidelines for the implementation and operation of the APA process (SARS (2021: 3)).

Following from the above information, SARS disclosed a “high-level proposed model” in its written publication (**Annexure E** below). This “high-level proposed model” is a summary version of the step form approach discussed below (SARS (2021: 1 – 2)).

The step form approach when entering into the advance pricing agreement programme

Step 1: Advance pricing agreement pre-application (see section 90F of the draft legislation in Annexure D below)

Initially, the prospective applicant must submit a request in the prescribed form and manner together with proof of payment for a pre-application consultation meeting to take place (SARS (2021: 2 & 5)).

SARS is obliged to set up a pre-application consultation meeting within 60 days of receipt of such request (SARS (2021: 5)).

The pre-application consultation meeting must, among other things:

- Traverse the scope of the APA;
- Identify the parties to the APA, their organisational structure and connection;
- Examine the most recent annual financial statements of the prospective applicant;
- Analyse the suitability of the affected transaction to form part of the APA;
- Determine the most appropriate transfer pricing methodology to be applied to each affected transaction;
- Discuss the arm’s length issuance, the arm’s length price and any compensating adjustments, where necessary, in respect to the affected transaction;

- Identify the jurisdiction in which the arm's length allocation and compensation adjustments, where necessary, should be taxed;
- Identify and discuss any legislation which may be applicable in terms of the tax act;
- Identify and discuss any provision in the APA which may apply, and by its application may avoid any double taxation;
- Discuss whether the prospective applicant, associated enterprises or connected persons have had prior consultations or discussions with the competent authority in the foreign jurisdiction/s which may be a party to the APA, and whether or not this competent authority will support the entering into this APA;
- Evaluate the time period within which it will take till completion of the APA;
- Determine the applicable fees; and
- Identify and discuss any other information which may be relevant for purposes of the prospective applicant in submitting an application for an APA (SARS (2021: 5 – 6)).

SARS must within 90 days from the last pre-application consultation notify the prospective applicant if he/she may proceed to submit an APA application (SARS (2021: 6)).

Step 2 – Submitting an application for an advance pricing agreement (see section 90G of the draft legislation in Annexure D below)

The prospective applicant is obliged to submit an APA application within 60 days after being notified by SARS that the prospective applicant may submit an APA application together with proof of payment of the application fee (SARS (2021: 2 & 6)).

An APA may not apply for the tax period that:

- Ended before the date on which the application is submitted;
- Is due to end within 180 days from the date on which the application is submitted; or
- Is subject to inspection, verification or audit (SARS (2021: 6)).

If there is more than one prospective applicant in respect to the APA, the prospective applicants must join their applications and designate one representative for the applicants (SARS (2021: 6)).

The APA application must be in the prescribed form and manner and must disclose the following:

- The full name, physical and postal address, email address, telephone number, reference number or proof of identity and the country of residence of the applicant;

- List of all the people who will be parties to the APA, their physical and postal addresses, email addresses and telephone numbers;
- The organisational structure of the applicant in relation to the associated enterprises and connected persons and their organisational structures;
- The applicants most recent annual financial statements;
- The business activities of the applicant, the affected transactions which will be covered by the APA, a quantification of the affected transactions, the associated enterprises and connected persons that are party to the affected transaction and their country of residence, most suitable transfer pricing method for each affected transactions, critical assumptions to be applied to the affected transactions, the arm's length allocations and compensating adjustments, where necessary and in respect to the affected transactions;
- The expressed view of the competent authorities who will be party to the APA;
- The interpretation and application of any legislation which may be applicable in terms of the tax act;
- Any provision in the APA which may apply, and by its application may avoid any double taxation;
- Anticipated duration of the APA, not exceeding five years;
- The proposed APA;
- Confirmation that the applicant is tax compliant; and
- Confirmation that the applicant has paid the prescribed fee (SARS (2021: 6 – 7)).

SARS may request that further documents be made available, if and when requested (SARS (2021: 6 – 7)).

Step 2A: Amending, withdrawing or rejecting an application for an advance pricing agreement (see section 90H, 90I and 90J of the draft legislation in Annexure D below)

Amendment to the application

The applicant may submit a request, in writing, to SARS for the amendment of the application within 30 days from submission date (SARS (2021: 7)).

SARS may agree to amend the application on condition that the proposed amendment does not have the effect of altering the nature of the application that was originally filed (SARS (2021: 7)).

An application for the amendment of the APA will only be considered in the case whereby the applicant agrees and pays an additional cost recovery fee (SARS (2021: 7)).

Withdrawing of the application

The applicant may withdraw an application within 30 days from submitting such application (SARS (2021: 7)).

The withdrawal of such application does not absolve an applicant from the liability for any fees that are due and payable (SARS (2021: 7)).

Rejection of the application

SARS is authorised to reject an application if the application does not meet the requirements of this part, including:

- The value of the affected transaction being lower than an amount prescribed by the Commissioner by public notice;
- The proposed APA does not guarantee the alignment of the true economic activity and profit outcomes in SA;
- The application requires consideration by SARS of the legal form of a transaction without taking the substance of the transaction into account;
- The affected transaction lacks commercial substance and is primarily entered into for purposes of avoiding tax;
- The application covers the interpretation or application of a general or specific anti-avoidance provision or doctrine;
- The application is identical or has similarities to an issue that is:
 - (a) Currently before SARS in relation to an audit, investigation or other proceeding involving the applicant, an associated enterprise or connected person in relation to the applicant;
 - (b) Subject to a “Binding General Ruling” as defined in section 75 or proposed amendments to the tax act that has been published; or
 - (c) Subject to a dispute resolution;
- The submission of such application is purely for academic purposes;
- The application submitted is in respect of a frivolous or vexatious issue;
- The application omits to provide additional information requested by SARS;
- The applicants suggested request to effect changes to a preliminary APA are not acceptable to SARS; and

- The applicant does not pay the prescribed fees (SARS (2021: 7 – 8)).

Step 3: Processing of an application for an advance pricing agreement (see section 90K of the draft legislation in Annexure D below)

SARS, after accepting the application in a notice setting out the terms and conditions under which the application will be submitted, must process the application (SARS (2021: 8)).

During the processing of the application, SARS is obliged to give the applicant an update on the progress it has made in processing the application at 90-day intervals, and subsequently issue invoices in respect thereto for payment (SARS (2021: 8)).

With reference to the information previously provided by the taxpayer in the accepted application, SARS must prepare a preliminary APA which must include the following:

- The full names, postal and physical addresses, email addresses and country of residence of the parties to the APA;
- If a unilateral, bilateral or multilateral APA is being entered into;
- A definition clause, describing each of the key terms in the APA;
- The affected transactions;
- The applicable accounting standards on which the applicants financial statements are based;
- Critical assumptions;
- The most appropriate transfer pricing methodology to be applied to the affected transactions;
- The arm's length allocation, arm's length transfer price or compensation adjustment, where necessary;
- The jurisdiction within which the proportionate income from an affected transaction should be taxed, and a quantification thereof; and
- The duration of the APA, not exceeding five years (SARS (2021: 8)).

Step 4: Negotiating the advance pricing agreement (see section 90K of the draft legislation in Annexure D below)

When entering into a bilateral APA: Negotiations are to take place by and between the competent authority of the country that will be a party to the APA, in order to reach an agreement regarding the terms and conditions set out in the preliminary APA (SARS (2021: 2 & 8)).

After an agreement has been reached with the competent authority in the country that will be a party to the agreement, SARS is obliged to send the draft APA to the applicant for review, upon which he/she/it must thereafter accept, reject or suggest changes to the draft APA within 60 days of receipt thereto (SARS (2021: 8)).

The applicant may suggest that changes are to be made to the APA by SARS, and SARS may agree to amend the APA provided the amendment falls within the scope of the application for the APA (SARS (2021: 8)).

Step 5: Finalization of the advance pricing agreement (see section 90L of the draft legislation in Annexure D)

The applicant is liable for payment of any outstanding fees based on invoices, irrespective of whether or not he/she/it agrees to proceed with the preliminary APA (SARS (2021: 2)).

If in the case the applicant accepts a preliminary APA, then the accepted APA is to be signed as follows:

- The applicant must initially sign the APA and return a copy to SARS;
- Secondly, SARS will then require that at least two SARS officials and the competent authority of SA must sign the preliminary APA; and
- Lastly, the competent authority of the country that will be a party to the APA, must then sign the APA (SARS (2021: 8 – 9)).

The APA will become effective from the date that all the parties have signed the agreement (SARS (2021: 9)).

A copy of the signed agreement must be sent by SARS to the applicant and competent authority (SARS (2021: 9)).

Step 6: The implementation and monitoring of the advance pricing agreement (see section 90M, 90P and 90Q of the draft legislation in Annexure D below)

Compliance report

A compliance report is to be submitted by the applicant to SARS within 60 days from the end of the tax period that falls within the term of the APA or from the date on which an APA is terminated (SARS (2021: 9)).

An application must be in the prescribed form and manner and must include the following in respect to the latest tax period:

- The applicant's affected transaction;
- Confirmation that the circumstances of an APA application have not changed subsequent to submitting the application;
- Demonstrated compliance with the terms and conditions set out in the APA; and
- Confirmation of the assumptions in the APA have been complied with (SARS (2021: 9)).

Record retention

In addition to the prescribed obligation set out in the tax act, the applicant is required to maintain books of account, records or documents that will authorise SARS to determine the applicant's extent of compliance with the advance pricing agreement (SARS (2021: 8 – 10)).

Any information requested by SARS with regards to the compliance with this section must be made available by the applicant to SARS within 30 days of receipt of such written request (SARS (2021: 10)).

If the applicant requires additional time to submit the information requested by SARS, SARS is authorised to grant an extension of the abovementioned time period to the maximum of 30 days (SARS (2021: 10)).

Procedures and guidelines

A public notice may be issued by the Commissioner which provides the procedures and guidelines for the implementation and functioning of the APA system (SARS (2021: 10)).

Step 7: The extension, termination and amendment of the advance pricing agreement (see section 90N and 90O of the draft legislation in Annexure D below)

The extension of the APA

A request by an applicant for the extension of an APA must be made no less than 60 days before the date on which the agreement is due to expire, together with proof of payment of the invoiced extension fee (SARS (2021: 2 & 9)).

SARS will grant an extension of the APA for a period not exceeding 3 years, if the facts and circumstances of the APA application have not changed materially (SARS (2021: 9)).

Following from the above information, insofar as the applicant intends making an application for the extension of the APA, such application must make a declaration in the prescribed form and manner that includes the following:

- That there are no material changes to the facts and circumstances, as well as the critical assumptions remaining valid and relevant; and
- The terms and conditions of the existing APA have been complied with (SARS (2021:9)).

The applicant is obliged to inform SARS of any changes that must be taken into account in the extended APA such as:

- Any updated studies, analysis and supporting documents;
- Any changes to the facts, circumstances or critical assumptions underlying the APA; or
- Any subsequent economic, technical, product or industrial developments that were not taken into account in the existing APA (SARS (2021: 9)).

Steps 2, 3, 4 and 5 discussed above will apply with the necessary changes for the extension of the APA (SARS (2021: 9)).

SARS may reject a request to extend an APA, and subsequently request the applicant to submit a new application under *Step 2* (SARS (2021: 9)).

The termination of an APA

Any of the parties may choose to terminate the APA by informing the other parties to the agreement of its reason for such termination (SARS (2021: 9)).

SARS can terminate the APA retrospectively if:

- The applicant hasn't commenced the affected transaction or has suffered major costs in respect to the transaction;
- Any of the parties other than the applicant will suffer a substantial tax disadvantage if the APA is not withdrawn or amended retrospectively and the applicant will suffer comparatively less if the APA is withdrawn or amended retrospectively;
- The APA will materially erode the tax base of SA and it is in the public interest for the APA to be withdrawn or amended retrospectively;
- An affected transaction was performed in a materially different manner from that disclosed in the application;
- There is a breach of any of the critical assumptions conditions on which the APA is based;
- The applicant omits to comply with the terms and conditions of the agreement; or

- There is fraud, misrepresentation or non-disclosure of certain material facts by the applicant (SARS (2021: 10)).

An APA will be terminated if:

- An amendment is made to the legislation on which this APA is based. In other words, the APA will cease to be effective from the date when the amendment is affected to the legislation, unless the general interpretation upon which the APA was based is unaffected by the amendment;
- A court overturns or amends an interpretation of the legislation on which the APA is based, in which case the agreement will cease to be operative from the date of judgement unless:
 - (a) The decision is being appealed;
 - (b) The decision is fact-specific and the general interpretation upon which the APA was based is unaffected; or
 - (c) The reference to the interpretation upon which the agreement was based was *obiter dicta*;
- There are changes made to the APA for purposes of avoiding double taxation on which the agreement is based, unless the general interpretation upon which the APA was based is unaffected by the changes. (SARS (2021: 10).)

Within 30 days of either party becoming aware of the application of any of the conditions mentioned above, then this party is required to inform the other party/ies to the termination of the APA (SARS (2021: 10)).

SARS is obliged to inform all parties to the agreement of the effective date from which the APA has been terminated (SARS (2021: 10)).

Post advance pricing agreement

The post-APA requirements form part of the step form approach discussed above (see *Step 6* and *Step 7* above).

Advantages and disadvantages of the advance pricing agreement programme

After considering a holistic view of the proposed model for establishing an APA programme, as well as the draft legislation in SA, we briefly discuss the apparent advantages and disadvantages below.

A clear advantage is derived by taxpayers when entering into the APA programme, since APAs can be used to decrease or even disregard regulatory uncertainties associated with MNEs having to determine the transfer prices on an arm's length basis as well as the standards set out in the OECD guidelines. Assuming an arm's length price is agreed upon,

this ultimately will reduce the risk of entities from being audited and assessed with additional tax liability. Furthermore, through enforceability of the APA programme in SA, this will enhance SARS' efficiency in combating BEPS as less time will be required to focus on monitoring compliance through audits and more time can be focused on implementation. (SAIT (2022: 24).)

The APA process has been a driving force for corporate governance. On the one hand, it improves governance for MNEs as far as tax administration is concerned, since tax compliance indicates a MNE's inclination to comply with tax laws and to voluntarily meet their tax obligations; and on the other hand, it guarantees tax authorities to receive a fair allocation of the profits from MNE intra-group transactions, therefore authorising the tax authority to reallocate its resources to other tax compliance issues. (SAIT (2022: 25).)

It is therefore evident that through implementation of the APA programme, it will be beneficial for both the taxpayer and SARS, and will create reduction in potential future disputes, thereby reducing the workload and capacity constraints on SARS' officials/representatives (SARS (2021)).

However, there are certain disadvantages to consider when implementing the APA programme – while there is appetite from taxpayers to apply for APAs upon implementation, there are gaps in the draft legislation which result in reluctance regarding the implementation of the APA process. It is further noted that, although the applicable fee rates have not yet been disclosed by the Commissioner, it seems from the draft legislation there will be more than just one application fee applicable, which will therefore result in the process most likely being costly and unaffordable to many taxpayers. Furthermore, the process also suggests that the process may be lengthy due to a limitation in the number of skilled staff available to complete the process effectively and efficiently. (SARS (2021).)

Similarities and differences/shortfalls in the advance pricing agreement programme in comparison with the USA and UK

While there is a growing number of jurisdictions which have adopted the APA programme, the approach followed in these different jurisdictions is not uniform (DLA Piper (n.d.)).

An in-depth discussion is set out above which indicates the process for entering into an APA both in the USA and UK, and prospective process to be followed when entering into an APA in SA.

It is evident that there are certain similarities with regards to the steps to be taken for completing an APA, but that there are certain shortfalls/differences when making a comparison to these different legislations.

Following on from the information provided in the chapters above, the basis on which the APA process was formulated in the USA and UK is similarly being applied in the SA, per the draft legislation.

As a starting point, it is noted in the draft APA legislation in SA that a consistent amount of communication is to take place by and between the taxpayer, SARS and the competent foreign

authorities by way of the setting up of pre-filing consultation meetings and informal discussions during the negotiation/evaluation process, as applied in both the USA and UK. Furthermore, when submitting an APA application the taxpayer is required to provide a list of information and/or documentation; however, on this note, it is the author's opinion that the manner in which the information and/or documentation required to be disclosed in an application, both in SA and the UK, is far less administrative than that which is required when formulating an APA request in the USA. (IRS (n.d. c); GOV.UK (2023); SARS (2021).)

Further points of interest are that all three jurisdictions under discussion apply a five-year term period to the lifespan of the APA, with the possibility of extending/renewing it with certain limitations. However, both the USA and UK allow for the outcome of an APA to be applied retrospectively to previous years; whereas, in SA, it is specifically excluded per the draft legislation. (IRS (n.d. c); GOV.UK (2023); SARS (2021).)

The points raised above are discussed in Chapter 6 that deals with recommendations and conclusions. Chapter 6 below clearly sets out in a detailed summary version the APA process followed in each jurisdiction, easing the identification of both the similarities and differences in the legislation, and thus providing a list of recommendations for improvement of the draft APA legislation with consideration to these differences/shortfalls in the SA draft legislation in comparison to that which is followed in the USA and UK.

Chapter 6 – Conclusion and recommendations

	UNITED STATES OF AMERICA (USA)	UNITED KINGDOM (UK)	SOUTH AFRICA (SA) – (Draft legislation)
General comments, shortfalls, and recommendations			
Types of APAs	Unilateral, Bilateral; and Multilateral APAs	Unilateral, Bilateral; and Multilateral APAs	Bilateral APAs
	<p>Conclusion:</p> <p><i>In respect of the USA and UK:</i> Both the USA and UK make provision for entering into unilateral, bilateral and multilateral APAs.</p> <p><i>In respect of SA:</i> If and when SA implements the APA programme, it intends for such a programme to be implemented by way of a phased-in approach, starting with an APA pilot project as soon as the legislative framework is in place. This APA pilot project will only accept bilateral APA applications with the intention of addressing transfer pricing issues of a particular transaction from the perspective of competent authorities that are affected by it. (SAIT (2022: 26).)</p> <p>The proposed implementation of only bilateral APAs being applicable to SA has been up for public criticism. Both bilateral and multilateral APAs are guaranteed to give multilaterals a higher degree of certainty than unilateral APAs – since entering into a bilateral and multilateral APA reduces the risk of a transaction being challenged by one revenue authority where it is accepted by another – as these types of APAs require the involvement of two or more foreign competent authorities in the negotiation process. This results in a far more complicated process in relation to establishing an agreement between parties, in addition to the fact that the process may be lengthy and burdensome (SAIT (2022: 26)).</p> <p>An initial implementation of unilateral APAs in SA may be far simpler and more logical as it would mirror the process of applying for and obtaining an advance tax ruling, which is well established and familiar in the SA landscape. Furthermore, implementing unilateral APAs would also assist with strategically processing existing transfer pricing disputes that are currently in the dispute resolution phase, and also assist in settling negotiations between parties and finalising lengthy and costly transfer pricing disputes, as well as possibly providing further clarity on future open years of assessment for the taxpayers. (SAIT (2022: 26).)</p> <hr style="width: 60%; margin-left: auto; margin-right: auto;"/> <p>Recommendations for SA:</p> <ol style="list-style-type: none"> 1. That SARS should consider implementing the simpler process of unilateral APAs together with bilateral APAs and over time following up with multilateral APAs (SAICA (2022)). 		
Persons eligible to apply to participate in the APA programme	Covers all matters	Covers complex matters only, with certain exceptions	*To be confirmed
	<p>Conclusion:</p> <p><i>In respect of the USA:</i> The USA’s domestic legislation provides that the APMA Program undertakes to govern <u>all matters</u> within its jurisdiction in a manner which is in line with USA’s treaty obligations, and secures the appropriate tax bases of the USA and its treaty partners; prevents fiscal evasion; advocates consistency and reasonableness in its</p>		

	<p>conclusions; and provides taxpayers access to competent authority assistance and to the APA process in accordance with considerations of principled, effective and efficient tax administration (IRS (n.d. c: 13 – 14)).</p> <p><i>In respect of the UK:</i> The UK on the other hand provides that in order to reduce the workload on the HMRC, it has <u>restricted accessibility to the programme to only those cases where the transfer pricing may be regarded as “complex”</u>; but exceptions to the rule are provided under the SP02/10. According to the SP02/10, the HMRC stated that it was susceptible to admit those APA applicants into the programme in cases where the transfer pricing is not too complex but where the taxpayers risk assessment would be regarded as “high risk” without the use of an APA, or where the transfer pricing methodology is tailored to the taxpayers’ own circumstances. (GOV.UK (2019).)</p> <p><i>In respect of SA:</i> SA’s draft legislation provides that the Commissioner must issue a public notice to determine which persons are eligible to apply to SARS for an APA (SARS (2021:5)).</p> <hr/> <p>Recommendations for SA:</p> <p>2. That SARS makes it their priority to disclose the persons who will be entitled to participate in the APA programme. However, due to a limitation on skilled resources, it is the author’s recommendation that SA follows a similar approach to the UK, by limiting accessibility to the programme to only those cases where the transfer pricing may be regarded as “complex” or “high risk”, as doing this will ease capacity constraints on the SA APA division.</p>
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Confidentiality of agreed APAs	Confidentiality of agreed APA has been disclosed	Confidentiality of agreed APA has been disclosed	*To be confirmed
	<p>Conclusion:</p> <p><i>In respect of the USA:</i> Per the legislation in the USA, it provides that all information and/or documentation in relation to the APA is confidential (IRS (n.d. c: 58)).</p> <p><i>In respect of UK:</i> Per the legislation in the UK, it provides that all APA information and/or documentation disclosed to the HMRC is subject to the same rules of confidentiality in respect to information relating to a taxpayer – see <i>Step 2</i> on page 51 for more information regarding this topic (GOV.UK (2023)).</p> <p><i>In respect of SA:</i> *Still to be confirmed.</p> <hr/> <p>Recommendations for SA:</p> <p>3. That SARS should provide more clarity on how it will ensure that agreed APAs will be kept confidential, as well as provide an indication in what situations the foreign competent authorities can obtain independent industry experts to assist with the APA process (SAICA (2022); Rampersad & McLennan (2022)).</p>		

Reference to “days”	Not clear if it is a reference to business or calendar days	– (No specific reference to days)	Not clear if it is a reference to business or calendar days
	Conclusion:		

<p><i>In respect of the USA:</i> Various parts of the legislation refer to a specified number of days for specific steps by the USA and/or the applicant, but it is not clear whether this reference includes either business or calendar days.</p> <p><i>In respect of the UK:</i> There is no reference to a specific number of days in the UK legislation.</p> <p><i>In respect of SA:</i> Various parts of the legislation refer to a specified number of days for specific steps by SARS and/or the applicant, but it is not clear whether this reference includes either business or calendar days (SAICA (2022)).</p> <hr/> <p>Recommendations for SA:</p> <p>4. That SARS should refer to “business days” as defined in the TAA (SAICA (2022)).</p>

<p>Gaps in the definition section of the draft APA legislation</p>	<p style="text-align: center;">–</p> <p><i>(OECD member country – definitions section is in line with international standard)</i></p>	<p style="text-align: center;">–</p> <p><i>(OECD member country – definitions section is in line with international standard)</i></p>	<ol style="list-style-type: none"> 1. “advance pricing agreement”; 2. “arm’s length transfer price”; 3. “compensating adjustment”; 4. “critical assumptions” and 5. “transfer price”.
	<p>Conclusion –</p> <ol style="list-style-type: none"> 1. “advance pricing agreement” makes reference to “associated enterprises and connected persons” (SARS (2021: 1)). Depending on the facts, a person may be classified as a “connected person, an associated enterprise or both. In other words, connected persons and associated enterprises are not mutually exclusive.” (SARS (2023: 3)). 2. “arm’s length transfer price” is defined as “a transfer price in respect of an affected transaction that would have been priced in respect of the transaction if the participants in the transaction had been dealing at arm’s length with each other” (SARS (2021: 1)). This definition has received public criticism and the Rampersad & McLennan (2022) describes this definition as circular and confusing (Rampersad & McLennan (2022)). 3. “compensating adjustment” is defined as “an application of the most appropriate transfer pricing method, as agreed to in an advance pricing agreement, to an affected transaction, and the attribution of the income from the affected transaction to be taxed in one or more countries.” (SARS (2021: 1)). This definition fails to consider the spirit of the OECD guidelines, neither in its Glossary nor Chapter IV when they should be aligned entirely (Rampersad & McLennan (2022)). 4. “critical assumptions” is defined as “the fundamental factors that are necessary for each party to an advance pricing agreement to remain bound by the advance pricing agreement” (SARS (2021: 1)). 5. “transfer price” is defined to mean “the price at which connected persons or associated enterprises trade a service, tangible property or intangible property with and among each other across international borders in an affected transaction” (SARS (2021: 2)). This definition appears to exclude financial transactions, rents, and others (Rampersad & McLennan (2022)). <hr/>		

	<p>Recommendations for SA:</p> <ol style="list-style-type: none"> 5. Re the definition of “advance pricing agreement”, specifically relating to “associated enterprises and connected persons”: SARS should consider deleting the word “and” and replacing it with “or” as follows: “associated enterprises or connected persons”. 6. Re: the definition of “arm’s length transfer price”: SARS should consider amending the definition to align with the OECD’s Chapter I of the OECD guidelines (Rampersad & McLennan (2022)). 7. Re: the definition of “compensating adjustment”: SARS should consider amending the definition to align in its entirety with both the Glossary and Chapter IV of the OECD guidelines (Rampersad & McLennan (2022)). 8. Re the definition of “critical assumptions”: SARS should provide guidance on what factors will be included in these critical assumptions (SAICA (2022)). 9. Re: the definition of “transfer price”: SARS should consider clarifying only when certain categories of transactions qualify for the APA programme (Rampersad & McLennan (2022)).
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Applicable fees for APAs	Fees are disclosed	– (No charges)	*To be confirmed
	<p>Conclusion:</p> <p><u>In respect of the USA:</u> Fees become due and payable no later than the filing date of the APA request, and unless all fees have been paid, the APA request will not be regarded as complete. Separate fees will become due and owing in respect to those APA requests submitted by each controlled group. (IRS (n.d. c: 79).)</p> <p>General user fee amounts are as follows: \$60 000 for each APA request, except otherwise stated; (b) \$35 000 for renewal of an APA, provided there are no significant amendments in respect thereto; (c) \$30 000 for each APA request eligible for small case APA user fee and (d) \$12 500 for each amendment to a current unilateral, bilateral or multilateral APA (IRS (n.d. c: 79 – 80).)</p> <p>Any multilateral APA requests for the same controlled group within a 6-day period will amount to a maximum total fee charge of \$60 000, plus \$30 000 for each foreign competent authority involved (if any) beyond the first two (IRS (n.d. c: 79 – 80)).</p> <p><u>In respect of the UK:</u> From inception to date, the UK APA programme is free of charge to all UK taxpayers (GOV.UK (2019)).</p> <p><u>In respect of SA:</u> The Commissioner is to publish a notice providing the prescribed fees payable by an applicant for: (a) a pre-application consultation fee; (b) An application fee; (c) a cost recovery fee for processing an application; and (d) any fees associated with the maintenance or extension of an existing agreement (SARS (2021: 5)).</p> <hr style="width: 60%; margin-left: auto; margin-right: auto;"/>		

	<p>Recommendations for SA:</p> <p>10. SARS should give an indication of the proposed fee structure since there are various fee levels pertaining to the process which may create concern with affected taxpayers knowing the proposed amounts. SARS, when considering implementing these fees, should consider international best practice on fees. (SAICA (2022).)</p> <p>11. SARS should provide clarity on whether the cost recovery fees will include international travel of SARS officials and/or other indirect costs and whether the taxpayer will be consulted on this (SAICA (2022)).</p>
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<p>Independence of the APA unit from the transfer pricing unit</p>	<p>Not independent</p>	<p>Unclear</p>	<p>Not independent</p>
	<p>Conclusion:</p> <p><u>In respect of the USA:</u> The APA programme was merged with that portion of the office of the USCA that resolves transfer pricing cases under the MAP of the USA's bilateral income tax conventions to form the Advance Pricing and Mutual Agreement Program (APMA Program) (IRS (n.d. c)).</p> <p>The TAIT later joined the APMA Program. TAIT endeavours to resolve competent authority issues arising under all other articles of the USA's tax treaties, including those issues relating to estate and gift taxes (IRS, (n.d. c)).</p> <p><u>In respect of the UK:</u> Unclear.</p> <p><u>In respect of SA:</u> The APA unit will require its independence from the transfer pricing unit; however, it is envisaged that during the early stages of the development of the APA unit it will relatively be relatively fluid in relation to the transfer pricing unit, necessitating the exchange of expertise and personnel between the units (SAICA (2022)).</p> <hr/> <p>Recommendations for SA:</p> <p>12. SARS must provide comfort to taxpayers on how it intends implementing insurmountable barriers to prevent APA matters that were rejected from being audited. In other words, if an APA application is rejected, SARS must indicate how it assures the taxpayer that the information previously disclosed will not be used to audit the relevant transaction. (SAICA (2022).)</p> <p>It's important that conflicts of interest are managed effectively (SAICA (2022)).</p>		

The step form approach when entering into the APA programme.

*See summary diagrams under Annexure F, Annexure G and Annexure H below.

Pre-application	<u>Step 1: The pre-filing protocol</u>	<u>Step 1: The initial contact</u>	<u>Step 1: APA pre-application</u> (see section 90F of the draft legislation in Annexure D below)
	<p style="text-align: center;">Step 1.1.</p> <p><u>Pre-filing conference</u></p> <ul style="list-style-type: none"> ▪ Between the taxpayer and the IRS (IRS (n.d. b: 1)). ▪ Purpose: for a more productive and efficient APA process (IRS (n.d. b: 1)). ▪ Taxpayer to submit a request for a pre-filing conference together with its mandatory or optional pre-filing memoranda, prior to filing an APA request (IRS (n.d. b: 1)) – see pages 21 – 23 on when a mandatory or optional pre-filing memoranda is to be submitted (IRS (n.d. b: 1); IRS (n.d. c: 24 – 25 & 32 – 33)). ▪ The mandatory or optional pre-filing memoranda must be length and content appropriate to the substantive or procedural issues and the mandatory memoranda have a specific format to follow; whereby, the taxpayer can decide the format for presenting the optional memoranda (IRS (n.d. c: 25 – 26)). ▪ The information to be disclosed in the mandatory and optional pre-filing memoranda is provided on pages 23 – 25 above, as well as the manner in which it is to be submitted is disclosed therein (IRS (n.d. b: 1 – 2); IRS (n.d. c: 25 – 26)). ▪ The APMA division must decide either to accept or decline the taxpayer’s request to hold a pre-filing conference (IRS (n.d. c: 27 – 28)). ▪ If a pre-filing conference takes place, it is required to deal with the procedural and substantive issues pertaining to the APA request. Furthermore, the taxpayer shall be prepared to discuss the relevant facts and circumstances surrounding the issue/s, method/s, terms and conditions it proposes to cover in the APA, as well as justify the reason why it has requested to file an abbreviated APA request. (IRS (n.d. c: 27 – 28).) 	<ul style="list-style-type: none"> ▪ Between the taxpayer and the HMRC (GOV.UK (2023)). ▪ HMRC requests the taxpayer to arrange for an informal meeting to take place (GOV.UK (2023)). ▪ Purpose: to allow the HMRC the opportunity to understand the basis for such APA application, and following from this to ensure that both resources and time is not wasted on an unstable application (GOV.UK (2023)). ▪ In order for the taxpayer to secure an informal meeting with the HMRC, it must email the HMRC with its expressions of interest in an APA and for making the APA. The expression of interest must include the following: (a) nature of transfer pricing issue to be covered in the APA; (b) transfer pricing methodology; (c) tax residency status of all parties; and (d) to disclose the nature of any current transfer pricing enquiries, competent authority claims and other issues; further, the taxpayer must provide a detailed description of the business. (GOV.UK (2023).) ▪ Upon identifying that the application is not one that may be regarded as unstable, the HMRC is given an opportunity to inform the taxpayer of its shortfalls in the application, to provide an outline of the anticipated practical timetable for agreeing to an APA based on previous experiences and to discuss any practical process issues which may arise (GOV.UK (2023)). ▪ The HMRC believes this meeting helps to make decisions faster (GOV.UK (2023)). ▪ Upon completion, the HMRC more often than not can decide if an APA application should be accepted or not; if not the HMRC will give reasons for its decision (GOV.UK (2023)). 	<ul style="list-style-type: none"> ▪ The prospective applicant is to submit a request together with proof of payment to SARS for a pre-application consultation meeting to take place (SARS (2021: 2 & 5)). ▪ SARS is obliged to set up a pre-application consultation meeting within 60 days of receipt of the request (SARS (2021: 5)). ▪ The following topics are to be discussed: scope; parties, their organisational structure and connection; annual financial statements; the suitability of the affected transactions to form part of the APA; transfer pricing methodology; arm’s length issuance, price and any compensation adjustments and the jurisdiction in which it should be taxed; the applicable legislation; provisions in the APA which are to apply to avoid double taxation; any prior consultations or discussions with the competent authority in the foreign jurisdiction who shall be a party to the APA, and whether the competent authority will support the application to enter into an APA; the time period till completion of the APA; applicable fees and any other information which may be of relevance to submitting the APA application (SARS (2021: 5 – 6)). ▪ SARS must notify the prospective applicant within 90 days from the last pre-application consultation meeting if the prospective applicant may submit an APA application (SARS (2021: 6)).

- A pre-filing conference can be held on an anonymous basis, provided an optional memoranda is filed; however, this is not a recommended method by the APMA division (IRS (n.d. c: 27 – 28)).
- All statements or representations are made on an informal basis and are not binding on the IRS (IRS (n.d.) c: 28)).

Informal consultations

- Such consultations will address potential covered issues and the APA process in general (IRS (n.d. c: 20 – 21)).
- Taxpayers are required to provide sufficient information to make an informal consultation meaningful and are encouraged to consider the contents of the pre-filing conference for ideas about information that may be useful to present to the APMA division (IRS (n.d. c: 20 – 21)).
- All statements or representations are made on an informal basis and are not binding on the IRS (IRS (n.d. c: 20 – 21)).

Step 1.2.

Preparation and submission of the APA request

- *Time for filing an APA request:* (a) the APA will apply to both prospective years and roll back years (if any), and will cover a term of at least 5 years; and (b) the APA request may be regarded as complete on a date earlier than the actual date that the APA request was filed – see notes in *Step 1.2.* above (IRS (n.d. c: 28 – 31 & 35)).
- *The content and form of the complete APA request:* the APA request will be regarded as complete provided (a) the correct user fees are paid – see page 28 and 29, (b) the request contains all the information mentioned in **Annexure B** below; and (c) it proposes covered methods that provide a reasonable basis on which to consider resolution of the proposed covered issues (IRS (n.d. c: 31)).

Step 1.3.

Requested and supplemental items of the APA request

- The taxpayer may be required to provide subsequent information and/or documentation upon request by the IRS (IRS (n.d. c: 35 – 36)).

- This information and/or documentation must be provided to all parties to the APA request, i.e., competent authority/ies (IRS (n.d. c: 36)).

Step 1.4.

Corrected and updated information of the APA request

- Material errors or omissions are to be corrected or remedied and then notified to the APMA division (IRS (n.d. c: 36)).
- Financial data produced in connection with the APA request is to be updated annually or on a schedule mutually acceptable by both the taxpayer and APMA division (IRS, (n.d. c: 37)).
- Such supplemented submissions to the APA request must be provided within 180 days of the close of the taxpayer's taxable year, or by a date that is acceptable by both the taxpayer and the APMA division; however, an extension may be granted (IRS (n.d. c: 37)).

Step 1.5.

Withdrawal of the APA request

- The taxpayer may request for the APA request to be withdrawn at any time before it is executed; however, the APMA division will not refund user fees if the taxpayer withdraws the request after the APMA division begun its due diligence (IRS (n.d. c: 37)).

Step 1.6.

Final stages of the APA request

- *Decision letter and contact information:* this letter will be provided by the APMA division to the taxpayer and will: confirm receipt of the APA request; name and contact details of APMA division leader assigned to this request; confirm that the request is complete and the APA process will proceed, or confirm the APA request is provisionally accepted pending certain deficiencies to be addressed, or that the APA request is provisionally rejected, describing the reason and circumstances, as well as what can be done in order for the request to be reconsidered and accepted at a future date (IRS (n.d. c: 38)).
- *Denial or discontinuation of the APA process:* (a) the APMA division may decline to enter or continue to enter an APA

process, either right from the beginning or by terminating or suspending the APA request after it has accepted the request. The reasons for which the APMA division can make such decision are disclosed in *Step 1.6* discussed above; and (b) the APMA division may not refund the taxpayer user fees if it proceeded to perform the necessary due diligence and analysis prior to making a decision to terminate or suspend the APA request. (IRS (n.d. c: 38 – 39).)

Conclusion:

In respect of the USA: **The pre-filing protocol** followed in the USA is both time-consuming and administratively burdensome. During this process taxpayers will participate in various correspondence with the APMA division. Taxpayers may start the process by submitting a request for a pre-filing conference and/or informal consultation, together with a mandatory or optional pre-filing memoranda which will disclose the information and/or documentation necessary to be considered and discussed for purposes of identifying whether or not an APA request may be submitted. The APMA division may take a decision to accept or reject participation in such pre-filing conference and/or informal consultation depending on the complexity of the matter and if such a pre-filing conference and/or informal consultation is concluded, these discussions are executed on a non-binding basis on the IRS. The taxpayer will thereafter be required to submit a formal APA request, in the form and manner set out in *Step 1* discussed above. After the taxpayer submits the APA request to the APMA division, further information and/or documentation may be requested, and taxpayers may be required to submit a correction/amendment or withdrawal of the APA request. Lastly, correspondence will be received by taxpayers from the APMA division in the form of a final decision letter which shall advise the taxpayer on whether or not the APMA division agrees to accept or reject entering into the APA process. (IRS (n.d. c.)

In respect of the UK: The HMRC requests that taxpayers submit a request for an informal meeting. Prior to the meeting taking place, the HMRC requires that an email be formulated and sent to it by taxpayers disclosing the expressions of interest in an APA and for making the APA before being able to secure a consultation with the HMRC. Upon completing this meeting, the HMRC is more often than not in the position to disclose whether or not it will accept or reject an APA application as well as to provide a reason for their decision. (GOV.UK (2023).)

In respect of SA: SARS requests that the taxpayer must submit a request for an informal meeting to take place, together with proof of payment. SARS has 60 days from the date on which the request was received to set up the informal meeting. The topics to be discussed in the informal meeting are disclosed in the draft legislation summarised above, and no further information and/or documentation is to be provided by the prospective applicant to SARS. Upon completing this informal meeting, SARS is obliged to notify the prospective applicant in 90 days whether or not an APA application must be submitted. (SARS (2021: 2 & 5 – 6).)

Recommendations for SA:

13. **Re: Request for a pre-application consultation meeting:** SARS should require applicants to provide certain information and/or documentation, on submission of a request for a pre-application consultation meeting; and which information and/or documentation will enable SARS' APA officials the opportunity to identify the continuity of future applications. By implementing this requirement, SARS will eliminate spending unnecessary time on an unstable application.
14. **Re: SARS to set up a pre-application consultation meeting within 60 days of receipt of the request:** SARS should give consideration to shortening the time periods from 60 and 90 days to 30 and 60 business days respectively – this recommendation is made on the basis that the 60 and 90 day rule is in favour of SARS only, therefore prejudicing the taxpayer by instituting a waiting period of four and half months (SAICA (2022)).

<p>Submitting an APA application</p>	<p><u>Step 2: The initial stages of the APA process</u></p> <ul style="list-style-type: none"> ▪ The APMA division will reach out to the taxpayer once it has determined that the APA request is complete, and that the APA process should continue (IRS (n.d. c: 39)). ▪ The APA process is started off by holding an opening conference – this is not necessary in the case whereby the APMA division is experienced and familiar with the proposed covered issue/s and method and other aspects of the APA request (IRS (n.d. c: 39)). ▪ If the APMA division believes than an opening conference is required, then it will reach out to the taxpayer to set up a suitable day and time for both parties to meet. Furthermore, it may submit a list of questions and expect answers prior to the opening conference taking place – a delay in providing answers to the APMA division can result in the postponement of the opening conference. (IRS (n.d. c: 39).) ▪ The opening conference is necessary to enable the APMA division to understand the facts and circumstances underlying the taxpayer’s issue/s, method/s and terms and conditions covered; and it may discuss procedural matters, including whether a case plan will be beneficial and must be considered for adoption at a future date – see page 35 – 36 which provides more information regarding the case plan. Therefore, following from the above information, the taxpayer must be open to discussing the APA request and be in a position to answer all questions relating to the facts, suggested proposals and any other relevant information. (IRS (n.d. c: 40 – 41).) 	<p><u>Step 2: The formal submission of the APA</u></p> <ul style="list-style-type: none"> ▪ The taxpayer is required to submit an APA application within 6 months or any longer period which was explicitly agreed by and between the parties, from the date which he/she/it receives written or verbal confirmation from the HMRC that it is willing to consider an application for an APA. With any delays in the submission, the HMRC reserves the right not to accept the application (GOV.UK (2023)). ▪ The SP02/10 – Annex 1 sets out the details to be included in the APA application – see pages 49 – 51. This list requires the taxpayer to make full disclosures when submitting a formal application (GOV.UK (2023)). ▪ The HMRC is amenable to agree to work from the same format as is mandated by other administrators, provided the different approach will make for a better process. The taxpayer is reciprocally obliged to ensure that any/all information disclosed to the one tax authority is available at the same time to the other tax authority/ies involved. (GOV.UK (2023).) ▪ All APA information disclosed to the HMRC is subject to the same rules of confidentiality in respect to information relating to a taxpayer – see page 51 for more information (GOV.UK (2023)). 	<p><u>Step 2: Submitting an application for an APA</u> (see section 90G of the draft legislation in Annexure D below)</p> <ul style="list-style-type: none"> ▪ The taxpayer must submit an APA application within 60 days after being notified by SARS that the prospective applicant can submit an APA application, together with proof of payment of the applicable fee (SARS (2021: 2 & 6)). ▪ The APA may not apply for a tax period that: (a) ended before the date on which the application is submitted; (b) is due to end within 180 days from the date on which the application is submitted; or (c) is subject to inspection, verification or audit (SARS (2021: 6)). ▪ There must be a joining of the APA applications in a case where there is more than one prospective client in respect to that APA (SARS (2021: 6)). ▪ The application must be in the prescribed form and manner and must include the information disclosed under section 90G of the draft legislation (SARS (2021: 6 – 7)). ▪ SARS is authorised to request further documents to be made available, if and when required (SARS (2021: 6 – 7)).
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Conclusion –

In respect of the USA: The APMA division in the USA will reach out to the taxpayer once it is satisfied that the APA request is complete, and that it is ready to proceed with the APA process. The APMA division will hold an opening conference, if and when necessary, enabling the APMA division the opportunity to familiarise themselves with all the relevant information and/or documentation required to complete the APA process. (IRS (n.d. c: 40 – 41).)

In respect of the UK: Taxpayers in UK must submit an APA application within 6 months, or any longer period as agreed between the parties and from the date of receiving written or verbal confirmation from the HMRC that it is willing to consider the application. All information and/or documentation to be disclosed in the APA application submitted to the HMRC is described in detail above. Further, the taxpayer must disclose this information and/or documentation to the foreign competent authorities who are parties to the APA, and such APA information and/or documentation disclosed to the HMRC is subject to the same rules of confidentiality in respect of information relating to the taxpayer. (GOV.UK (2023).)

In respect of SA: Taxpayers in SA are required to submit an APA application within 60 days of receiving confirmation from SARS that it will consider the APA application, together with proof of payment. SARS may request the taxpayer to provide further supporting information and/or documentation, if and when necessary; it may also request that the joining of applications may be necessary where there is more than one prospective client involved in that particular APA. (SARS (2021: 2 & 6 – 7).)

SARS indicates in its draft APA legislation the prescribed form and manner in which an APA application is to be presented – see Chapter 5 above; further, specific reference is made to the periods which are to be excluded in the APA application (see section 90G(2) in **Annexure D** below) – this refers to (a) roll-back years (APAs operate for a specific period of time from date of enforceability, but since it can take a considerable length of time to negotiate and to reach agreement, this leads to situations where some of the years for which the agreement is sought will have already expired while the taxpayer may have already needed to submit its return for those years. Therefore, taxpayers may want to be given the choice of having a “roll-back” arrangement as an appropriate means of resolving a transfer pricing issue from previous years. However, in bilateral and multilateral APAs, this is dependant on the ability and willingness of the tax authority of the other country/ies involved to do so (SAICA (2022).); (b) tax periods subject to inspection, verification or audit and other (SARS (2021: 6 – 7)).

Recommendations for SA:

15. **Re Roll back years:** SARS should allow for the permissibility of roll back arrangements incorporated in the APA process in cases where the foreign competent authorities permit; roll backs are permitted both in the USA and UK. This could be a valuable settlement tool and provide prospective assurance for taxpayers; therefore, it should be afforded consideration in the applications. (SAICA (2022).)
16. **Re Tax periods subject to inspection, verification or audit:** The scope of this provision is far too wide, and transactions should preferably not be excluded where it makes commercial sense to roll the audit findings/settlement into an APA, as mentioned above (SAICA (2022)).

Amending, withdrawing or rejecting an APA application	N/A	N/A	<u>Step 2A: Amending, withdrawing or rejecting an application for an APA</u> (see section 90H, 90I and 90J of the draft legislation in Annexure D below) (A) <u>Amendment to the application</u>
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			<ul style="list-style-type: none"> ▪ Applicant to submit a request to SARS within 30 days from submission date of the APA application (SARS (2021: 7)). ▪ SARS will authorise the amendment provided that the amended request does not alter the nature of the application originally filed (SARS (2021: 7)). ▪ SARS will only consider such amendments provided the applicant agrees to and pays an additional cost recovery fee (SARS (2021: 7)). <p style="text-align: center;">(B)</p> <p><u>Withdrawing of the application</u></p> <ul style="list-style-type: none"> ▪ The applicant can request a withdrawal within 30 days from submitting APA application (SARS (2021: 7)). ▪ This withdrawal will not absolve the applicant from the liability for any fees that are due and payable (SARS (2021: 7)). <p style="text-align: center;">(C)</p> <p><u>Rejection of the application</u></p> <p>SARS may reject an application if the applicant does not meet the requirements mentioned below: the affected transaction value is lower than the amount prescribed by the Commissioner by public notice; the APA does not guarantee alignment of the true economic activity and profit outcomes in SA; the applicant requires SARS to consider the legal form of a transaction without taking the substance of the transaction into account; the affected transaction lacks commercial substance and is primarily entered into for purposes of avoiding tax; the application covers the interpretation and application of a general or specific anti-avoidance provision or doctrine; the application is identical or similar to an issue currently before SARS, subject to a “Binding General Ruling” or subject to a dispute resolution; the submission of the application is for academic purposes, is in respect of frivolous or vexatious issues and omits to provide additional information; the applicant’s submitted request to effect changes to a preliminary APA is not accepted by</p>
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			SARS; and the applicant does not pay the prescribed fee (SARS (2021: 7 – 8)).
<p>Conclusion:</p> <p><u>In respect of SA:</u> This Step 2A purely relates to the amendments, withdrawal and rejection of the APA application in SA.</p> <p><i>Amendment:</i> An application for an amendment must be submitted within 30 days from the date on which the APA application was originally submitted to SARS. SARS will consider the amendment provided that it does not materially change the facts and circumstances of the originally filed APA, together with proof of payment. (SARS (2021: 7).)</p> <p><i>Withdrawal:</i> An application for the withdrawal must be submitted within 30 days from the date on which the APA application was originally submitted to SARS. A withdrawal of the APA application will not absolve the applicant of its liability in the form of fees. (SARS (2021: 7).)</p> <p><i>Rejection:</i> An application may be rejected by SARS, if the applicant does not meet the requirements mentioned above (SARS (2021: 7 – 8)).</p> <hr/>			
<p>Recommendations for SA:</p> <p><u>Rejection:</u></p> <p>17. Re: SARS omits to explain the process when an applicant disagrees with its rejection of the APA application: SARS, before issuing a formal notice of the rejection of an application, must give the taxpayer an opportunity to provide an explanation or present its case as the reasons for an APA (SAICA (2022); IRS (n.d. c: 38); GOV.UK (2023)).</p> <p>Following on from the above information, SARS should provide further confirmation of the process to be followed if and when the application is rejected and the applicant/taxpayer has disagreed with such decision. SARS should clarify in this process the person/s to whom the applicant/taxpayer may escalate the objection/disagreement to; whether the disagreement will be covered by a review process under section 9 of the TAA; and whether SARS can utilise the factual information previously disclosed as part of the APA application process (SAICA (2022)).</p> <p>18. Re: SARS rejects on the basis that the value of the affected transaction is less than an amount prescribed by the Commissioner by public notice: SARS should give an indication of the “minimal value of affected transactions” it intends introducing; and it is further recommended that this minimal value should align with the Master File/Local File thresholds (SAICA (2022)).</p> <p>19. Re: SARS rejects on the basis that the application is in respect of a frivolous or vexatious issue: SARS should provide confirmation on how it will determine if the subject matter of an application is in respect of a frivolous or vexatious issue (SAICA (2022)).</p>			
Processing an APA application	N/A	N/A	<p>Step 3 – Processing of an application (see section 90K of the draft legislation in Annexure D below)</p> <ul style="list-style-type: none"> ▪ After SARS submits a notice setting out the terms and conditions of the accepted APA application,

			<p>SARS is then obliged to process the application (SARS (2021: 8)).</p> <ul style="list-style-type: none"> ▪ SARS when processing the application must provide the applicant with updates every 90 days, together with an issued invoice for payment (SARS (2021: 8)). ▪ SARS must prepare a preliminary APA which will include personal details regarding the applicant; if a unilateral, bilateral or multilateral APA will be entered into; definition clause; the affected transaction; the accounting standards on which the applicant's financial statements are based; critical assumptions; appropriate transfer pricing methodology; jurisdiction within which the proportionate income from the affected transaction should be taxed, and quantum thereof and the duration of the APA, not exceeding 5 years (SARS (2021: 8)).
<p>Conclusion:</p> <p><u>In respect of SA:</u> This Step 3 purely relates to the processing of the APA applications in SA.</p> <p>SARS, after informing the taxpayer that it has accepted the APA application, is then obliged to process this application, and provide the applicant with updates of its progress every 90 days, together with an invoice for payment. SARS when processing the preliminary APA application shall specifically provide the information mentioned above (SARS, 2021: 8).</p> <hr/>			
<p>Recommendations for SA:</p> <p>20. Re: SARS is afforded 90 day intervals to inform the applicant of the progress of the application: The period in which SARS is to provide an applicant with progress on an application may be considered relatively lengthy, and therefore it should rather consider reducing the period to 60 days. Furthermore, SARS should indicate what the implications are when it does not adhere to this 60/90 day rule (SAICA (2022)).</p> <p>21. Re: SARS indicated that it should prepare a preliminary APA based on information provided: SARS should include a provision in the draft legislation which permits the Commissioner to enter into an APA drawn up by a foreign revenue authority and not SARS.</p>			

<p>Evaluating the APA application</p>	<p><u>Step 3: The evaluation and presentation stages of the advance pricing agreement</u></p> <p style="text-align: center;">Step 3.1.</p> <p><u>For bilateral and multilateral APA requests</u></p>	<p><u>Step 3: Evaluation of the advance pricing agreement</u></p> <ul style="list-style-type: none"> ▪ The HMRC will evaluate the content of the APA and request for any further information/documentation where necessary (GOV.UK (2023)). 	<p><u>Step 4: Negotiating the advance pricing agreement</u> (see section 90K of the draft legislation in Annexure D below)</p> <ul style="list-style-type: none"> ▪ Negotiations to take place by and between the competent authority of the country that will be a party to the APA to reach an agreement regarding the
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	<ul style="list-style-type: none"> ▪ The APMA division may consider requests from, and may invite or require that a taxpayer make presentations jointly to the APMA division and the foreign competent authority/ies. These presentations are for the purpose of facilitating efficient case processing. (IRS (n.d. c: 41).) ▪ The APMA division will consult with the foreign competent authority/ies to discuss its interest in the joint presentation and notify the taxpayer accordingly (IRS (n.d. c: 41)). ▪ Further communication to discuss the questions and concerns of the APMA division, or the APMA division’s temporary views on the request may take place by and between the APMA division and the taxpayer via teleconferences or in-person meetings. Following on from this, the APMA division or the APMA division together with the foreign competent authority/ies may offer the taxpayer the opportunity to provide written responses to memoranda discussing such issues. (IRS (n.d. c: 41 – 42).) ▪ The APMA division may formally make a presentation of its views of the APA request to the foreign competent authority/ies – this presentation will disclose the size and complexity of the proposed covered issue/s and method/s and other relevant facts and circumstances surrounding the case; however, prior to disclosing this presentation to the foreign competent authority/ies, it may present the paper or memorandum to the taxpayer for comments, or in other cases make a disclosure of this paper or memorandum to both the foreign competent authority/ies and taxpayer; and this taxpayer will thereafter be given an opportunity to provide its comments to both the APMA division and foreign competent authority/ies for their discussion and consideration for purposes of reaching a resolution. The ultimate decision lies with the APMA division to determine the approach to be followed (IRS (n.d. c: 42)). <p>Both the APMA division and foreign competent authority/ies will reach a competent authority resolution that will underlie the APA to be executed between the taxpayer and the IRS. If in the case parties cannot agree, the competent authority/ies may refer certain cases to mandatory arbitration found in the DTA between contracting parties, and in doing this they are able to identify the extent to which</p>	<ul style="list-style-type: none"> ▪ The examination is a collaborative process whereby the transfer pricing issues are discussed openly with access to all forms of required information/documentation. However, if there is a lack of collaborative engagement on the taxpayer’s behalf, then the HMRC is authorised to reject the application with no further consideration. (GOV.UK (2023).) ▪ If a bilateral or multilateral APA is being sought, then the taxpayer is required to ensure that: (a) it discloses all relevant information to the other tax authority/ies; and (b) treaty partners are to keep contact with each other to discuss the process of its examination, any key issues which arise and the progress of the bilateral or multilateral APA process (GOV.UK (2023)). <p>Whilst it is noted that the finalisation of a bilateral or multilateral agreement with a treaty partner is a government-to-government process, the HMRC encourages joint meetings involving both the taxpayer and other tax authority/ies to assist in the exploration and evaluation of key factual issues. (GOV.UK (2023)).</p>	<p>terms and conditions will be set out in the preliminary APA (SARS (2021: 2 & 8)).</p> <ul style="list-style-type: none"> ▪ After negotiation, SARS is obligated to send a draft APA to the applicant to accept, reject or suggest changes to within 60 days of receipt (SARS (2021: 8)). ▪ Changes may be made to the preliminary APA provided it falls within the scope of the application for the APA (SARS (2021: 8)).
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the mandatory arbitration article applies to the cases initiated in the bilateral or multilateral APA request. (IRS (n.d. c: 42 – 43).)

Step 3.2.

For unilateral APA requests

- A similar approach set out above is applied to unilateral APAs; however, the main difference is that when entering into a unilateral APA, the APMA division and the taxpayer will continue to finalise an APA after the APMA division has completed its due diligence and evaluation of the APA request, and the APMA division and taxpayer have agreed to the covered issue/s, method/s and terms and conditions (IRS (n.d. c: 43)).

Conclusion:

In respect of the USA: The APMA division and the foreign competent authorities will consider the bilateral and multilateral APA requests. Upon completion of the necessary presentation, the APMA division and foreign competent authorities will determine their interest in the presentation and subsequently notify the taxpayer accordingly. The taxpayer may then be required to discuss possible questions and concerns of the APMA division; and the APMA division, or the APMA division together with the foreign competent authorities, may offer the taxpayer the opportunity to provide written responses to memoranda discussing such issues. (IRS (n.d. c: 41 – 42).)

The APMA division may formally make presentation to the foreign competent authorities of its views regarding the APA request; however, prior to making presentations to the foreign competent authorities it may give the taxpayer an opportunity to view the paper or memorandum and to make comments in respect thereto. Alternatively, the APMA division may disclose the paper or memorandum simultaneously to both the taxpayer and foreign competent authority and then require the taxpayer to submit comments to both the APMA division and the foreign competent authorities for discussion and consideration and thereafter to reach a resolution. (IRS (n.d. c: 41 – 42).)

Both the APMA division and foreign competent authorities will reach a competent authority resolution that will underlie the APA to be executed between the taxpayer and the IRS; however, in cases where the parties are unable to reach an agreement, the matter may be referred to mandatory arbitration per the applicable DTA (IRS (n.d. c: 42 – 43)).

The above process is applicable to unilateral APAs in the USA, and the only differences are that when entering into a unilateral APA, the APMA division and the taxpayer will continue to finalise an APA after the APMA division has completed its due diligence and evaluation of the APA request, and the APMA division and taxpayer have agreed to the covered issue/s, method/s and terms and conditions (IRS (n.d. c: 43)).

In respect of the UK: During the evaluation of the APA in the UK, the HMRC will evaluate the content of the APA and request for any further information/documentation, if and when necessary. The examination is a collaborative process whereby the transfer pricing issues are discussed openly with access to all forms of required information/documentation; however, a if there is a lack of collaborative engagement on the taxpayer's behalf, the HMRC is authorised to reject the application with no further consideration. (GOV.UK (2023).)

If in the case the parties enter into a bilateral or multilateral APA in the UK, the taxpayer is then required to ensure that it has disclosed all information and/or documents to the foreign competent authorities; and that treaty partners are to communicate and discuss the process of its examination, any key issues which arise, and progress of the bilateral

	<p>or multilateral APA process. Irrespective that this bilateral or multilateral agreement with a treaty partner is a government-to-government process, the HMRC encourages joint meetings involving the taxpayer and other foreign competent authorities to assist on the exploration and evaluation of key factual issues. (GOV.UK (2023).)</p> <p><i>In respect of SA:</i> Upon completing the negotiations regarding the terms and conditions of the APA by and between SARS and the foreign competent authorities, SARS must send a draft APA to the applicant indicating its acceptance, rejection or suggested changes within 60 days of receipt. These proposed changes may be made to the preliminary APA provided it falls within the scope of the application for the APA. (SARS (2021: 8).)</p> <hr/> <p>Recommendations for SA:</p> <p>22. Re: Parties involved during the negotiations: SARS should encourage joint meetings involving both the taxpayer and other competent authorities to assist on the exploration and evaluation of key factual issues, in the attempt to reach a competent authority resolution that will underly the APA to be executed between the parties.</p> <p>23. Re: Parties are unable to reach an agreement: SARS should address in the legislation instances where an APA between the competent authorities is not reached, and the process to be followed should this situation arise (SAICA (2022)).</p>
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<p>Executing the APA</p>	<p><u>Step 4: The execution of the advance pricing agreement</u></p> <ul style="list-style-type: none"> ▪ The unilateral, bilateral and multilateral APA will become operative as and when it is signed by both the IRS and the taxpayer – see definition on page 38 (IRS (n.d. c: 43 – 44)). ▪ The APA agreement must be signed by the following persons: (a) in the case when an APA's covered group includes a member of a consolidated group other than the common parent, the common parent must sign the APA as provided for in Tres Reg. §1.1502-77; (b) in the case of a company, the authorised signatory acting on behalf of the company. The authorised signatory must have personal knowledge of the information set out in the APA, must perform duties not limited to receiving letter rulings or determination letters from the IRS on entering into APAs, and must have permission to sign corporate tax returns; (c) in the case of a non-corporate taxpayer, the APA must be signed by the individual who has personal knowledge of the context, as well as having the authority to sign the taxpayers income tax return; and (d) in the case of a partnership, the APMA division may request that some or all partners are to sign the APA. (IRS (n.d. c: 44).) 	<p><u>Step 4: Concluding an advance pricing agreement</u></p> <ul style="list-style-type: none"> ▪ APA is a binding agreement entered into by and between the HMRC and the taxpayer (GOV.UK (2023)). ▪ The APA sets out the manner in which the transfer pricing issues are treated for a specific period of time, as well as contains the following terms and conditions: (a) the business commits to adhering to the transfer pricing methodology for dealing with the transfer pricing issue during the tenure of the APA – this is illustrated through completion of a regular compliance form; and (b) the identification of critical assumptions is necessary, since it impacts on the reliability of the methodology followed and which, if subject to change, may render the APA invalid. Ordinarily, the APA includes assumptions that the relevant transfer pricing law and OECD guidelines remain materially the same. (GOV.UK (2023).) ▪ A draft APA is attached, see Annexure C below. The person responsible for signing the APA is the person signing the tax return, and who is authorised within the multilateral group to commit the group to the terms of the APA (GOV.UK (2023)). 	<p><u>Step 5: Finalization of the advance pricing agreement</u></p> <ul style="list-style-type: none"> ▪ The applicant must pay any outstanding fees, irrespective of whether he/she/it agrees to proceed with the preliminary APA (SARS (2021: 2)). ▪ A preliminary APA accepted by the applicant is to be signed as follows: (a) the applicant is to initially sign and return a copy to SARS; (b) SARS will then require that at least two SARS officials and the competent authority of SA must sign the preliminary APA; and (c) the competent authority of the country that will be a party to the APA must then sign the APA (SARS (2021: 8 – 9)). ▪ The APA will become enforceable from the date that all the parties have signed the agreement (SARS (2021: 9)). ▪ A copy of the signed APA is to be sent by SARS to the applicant and competent authority (SARS (2021: 9)).
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		<ul style="list-style-type: none"> ▪ The HMRC aims to complete an APA within an 18 to 21 month period from the date of the formal submission; however, this is dependent upon the complexity of the matter – in the case of bilateral and multilateral applications, the period is dependent upon the working practice of the administrators in the other authority/ies as well as the co-operation from the taxpayer (GOV.UK (2023)). ▪ If the HMRC receives a limited amount or no interest by the taxpayer, it is authorised to terminate the APA process (GOV.UK (2023)). 	
<p>Conclusion:</p> <p><i>In respect of the USA:</i> Following from the above information, in the USA the APA will become effective as and when it is signed by both the IRS and the taxpayer – see information above regarding the persons authorised to sign the APA on the taxpayer’s behalf (IRS, (n.d.) b: 43 – 44).</p> <p><i>In respect of the UK:</i> An APA is regarded as a binding agreement in the UK, by and between the HMRC and taxpayer and ordinarily, these agreements are signed by those persons signing the tax return, and who are authorised to commit the group to the terms of the APA. The HMRC aims to complete these APA agreements within an 18 to 21-month period; however, this is dependent upon the complexity of the matter, the manner in which the foreign competent authority who is a party to the agreement conducts its working practice as well as the co-operation of the taxpayer. In situations where taxpayers who fail to co-operate with the HMRC, the HMRC is authorised to terminate these APAs. Lastly, the APA is required to set out the manner in which transfer pricing issues are treated during the tenure of the APA, as well as to provide confirmation of the transfer pricing methodology and identified assumptions. (GOV.UK, 2023).</p> <p><i>In respect of SA:</i> An APA will become enforceable in SA provided: (a) the applicant pays all outstanding fees, irrespective if he/she/it agreed to proceed with the preliminary application; and (b) when all parties to the agreement have signed the agreement, these parties being the applicant themselves, two SARS officials, the competent authority of SA and the foreign competent authority. A copy of the signed agreement is to be made by SARS to the applicant and competent authority. (SARS, 2021: 2 and 8 – 9).</p> <hr/>			
<p>Recommendations for SA:</p> <p>24. Re: The time period for signing the APA: SARS should set prescribed time limits in respect to when each party to the APA must sign the agreement (SAICA (2022)).</p>			

<p>Post-APA</p>	<p><u>Other: Post advance pricing agreement</u></p> <p style="text-align: center;">(A)</p> <p><u>Reporting of income, APA primary adjustment, conforming adjustment, and repatriation of funds</u></p> <ul style="list-style-type: none"> ▪ <i>Reporting of income and APA primary adjustment:</i> the taxpayer must report in addition to the income, deductions, credits, allowances, basis or any other items or elements 	<p><u>Other: Post advance pricing agreement</u></p> <p style="text-align: center;">(A)</p> <p><u>The submission, monitoring and reviewing of annual reports</u></p> <ul style="list-style-type: none"> ▪ Annual reports are to be submitted to the HMRC proving that the terms and conditions of the APA have been complied with (GOV.UK (2023)). 	<p><u>Step 6: The implementation and monitoring of the advance pricing agreement</u></p> <ul style="list-style-type: none"> ▪ <i>Compliance report:</i> this report is to be submitted by the applicant to SARS within 60 days from the end of the tax period that falls in the tenure of the APA or from the date the APA is terminated. The application must include the following: (a) the applicant’s
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	<p>affecting the taxable income during the APA period, as well as reflect the application of the covered method/s to the covered issue/s. In certain circumstances, the reported information for an APA year may require an adjustment to the amounts reflecting in the books and records for that APA year and/or to the amounts reflecting on the USA return – this is known as the APA primary adjustment. (IRS (n.d. c: 49).)</p> <p>The manner which the primary adjustment is to be reported and further information in respect thereto is set out on page 39 above (IRS (n.d. c: 49 – 50)).</p> <ul style="list-style-type: none"> ▪ <i>Conforming adjustment and repatriation of funds</i> – A “conforming” adjustment must be made to conform a taxpayer’s account to reflect the allocated amount; and subsequently, the repatriation of funds must confirm the accounts following from an APA primary adjustment. The repatriation of funds is governed under the Rev. Proc. 2015 – 40 which indicates the terms and conditions applicable. (IRS (n.d. c: 50 – 51).) <p>A unilateral, bilateral or multilateral APA will set out the terms and conditions relating to conforming adjustments, as well as the repatriation of any funds and no further discussions are made below (IRS (n.d. c: 51)).</p> <p style="text-align: center;">(B)</p> <p><u>Annual reports</u></p> <ul style="list-style-type: none"> ▪ The annual report will prove compliance with the APA terms and conditions, as well as include the amount for any APA primary adjustment for a given APA year. Furthermore, the APA report must disclose any pending requests to renew, modify or cancel the APA, as well as identify and correct any materially false, incorrect or incomplete information submitted during the APA process. (IRS (n.d. c: 51 – 52).) ▪ Annual reports are to be filed for each APA year to both the APMA division and any competent authority(ies) together with the original signed “penalties of perjury” declaration – this annual report itself must be filed on or before the later of (a) the fifteenth day of the twelfth month following the close of the APA year; or (b) 90 days after the effective date 	<p style="text-align: center;">(B)</p> <p><u>Nullifying and revoking APAs and penalties</u></p> <ul style="list-style-type: none"> ▪ The HMRC is authorised to revoke a APA provided the taxpayer does not comply with terms and conditions set out in the agreement, or where critical assumptions cease to be valid (GOV.UK (2023)). ▪ Prior to the HMRC revoking this agreement, it must consult with all interested parties involved, including the taxpayer and competent authority/ies (GOV.UK, (2023)). ▪ Intentional or negligent disclosure of false or misleading information may result in the HMRC being entitled to a penalty and/or nullifying the APA (GOV.UK (2023)). <p style="text-align: center;">(C)</p> <p><u>Revising and renewing APAs</u></p> <ul style="list-style-type: none"> ▪ <i>Amending of the APA</i> must be in accordance with section 225 of the TIOPA 2010, and after the necessary consultation has taken place by and between the taxpayer, the HMRC and the competent authority/ies (GOV.UK (2023)). ▪ <i>Renewal of the APA:</i> (a) a request for renewal must be submitted no later than 6 months before the expiry of its current term, unless the tax authorities have agreed to an extended period or provided this application for renewal is made before the end of the first chargeable period affected by the renewal; (b) the HMRC will consider a request for renewal of the APA for a fixed period of time provided there are no changes to the facts and circumstances of an APA, (c) as and when the renewal is being considered, the HMRC will review and amend the interest, APA methodology and monitoring requirements if or where necessary; and (d) the taxpayer must not assume a renewal will always be beneficial – it is dependent on various factors such as the view and approach of the relevant treaty partner (GOV.UK (2023)). 	<p>affected transactions; (b) clarification that the circumstances of the APA application has not changed subsequent to submitting the application; (c) proof of compliance with the terms and conditions set out in the APA and (d) confirmation that the assumptions in the APA have been complied with. (SARS (2021: 9).)</p> <ul style="list-style-type: none"> ▪ <i>Record retention:</i> the applicant is to maintain books of account, records or documents which prove compliance with the APA. These documents are to be made available by the applicant to SARS within 30 days of receiving this request, unless agreed otherwise to a maximum of a further 30 days. (SARS (2021: 10).) ▪ <i>Procedures and guidelines:</i> A public notice may be published by the Commissioner providing the procedures and guidelines for implementation and operation of the APA system (SARS (2021: 10)). <p><u>Step 7 – The extension, termination and amendments of the advance pricing agreement</u></p> <ul style="list-style-type: none"> ▪ <i>The extension of the APA:</i> (a) a request for extension must be submitted no later than 60 days before the expiry of the APA, together with proof of payment of the invoiced extension fee; (b) SARS will grant an extension for a period not exceeding 3 years; this application for extension must disclose that there are no material changes to the facts and circumstances as well as that the critical assumptions remain valid; and that the terms and conditions of the existing APA have been complied with. Any changes to the existing APA are to be brought to SARS attention’ (SARS (2021: 2 & 9)). <p><i>Steps 2, 3, 4 and 5 will apply the changes for the extension of the APA; or SARS is authorised to reject to extend the APA and request that a new application be submitted under Step 2 (SARS (2021: 9)).</i></p>
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of the APA; an extension can be granted upon request (IRS (n.d. c: 52)).

- The taxpayer may be requested to provide additional information/documentation, and a response to this request must be made within 45 day of becoming aware of this outstanding or incorrect information (IRS (n.d. c: 52 – 53)).
- The annual report must contain the declaration as indicated- on page 41 above and the taxpayer must sign the declaration as advised in **Annexure B** below (IRS (n.d. c: 53 & 72)).
- Failure to file a annual report can result in the APMA division cancelling or revoking the APA (IRS (n.d. c: 53)).

(C)

Examination

- An examination limited to the following: (a) compliance to the terms and conditions set out in the APA; (b) correctness of the APA annual reports; and (c) the accuracy of the supporting data and computations used to apply the covered method/s (IRS (n.d. c: 54)).

(D)

Record retention

- The taxpayer is to retain books and records that indicate that it has complied with the APA terms and conditions (IRS (n.d. c: 54)).
- The APMA division may request subsequent information/documentation from the taxpayer. This information/documentation must be made available within 30 days from date of it being requested, unless an extension has been granted – any information disclosed but not regarded as reasonable by the IRS may be subject to a penalty in respect thereof. (IRS (n.d. c: 54 – 55).)

(E)

Revising the APA

- A revision will be effective upon the date of the execution of the revision (IRS (n.d. c: 55)).
- The APMA division may approve a revision of the APA *in lieu of* cancelling or revoking it (IRS (n.d. c: 55)).
- Prior consent must be obtained from the foreign competent authorities with respect to the revision of the APA; if no

- *The termination of an APA:* Any of the parties may elect to terminate the APA by informing all other parties to the agreement with reasons (SARS (2021: 9)).

SARS can terminate the APA retrospectively if: (a) the applicant has not commenced the affected transaction or incurred any substantial amount of costs in respect to the transaction; (b) any parties other than the applicant will suffer a substantial tax disadvantage by enforceability of the APA; (c) the APA will materially erode the tax base of SA; (d) the affected transaction is performed materially in a different manner from that which is disclosed in the application; (e) there is a breach of any critical assumptions on which the APA is based; (f) the applicant omits to comply with the terms and conditions of the agreement; or (g) there is fraud, misrepresentation or non-disclosure of certain material facts by the applicant (SARS (2021: 10)).

An APA will be terminated if: (a) there is an amendment to the legislation on which the APA is based; (b) a court overturns or amends an interpretation of the legislation in which the APA is based, in this case the APA will cease to be operative from date of judgement, unless the decision is appealed; the decision is fact-specific, therefore having no material effect on the interpretation of the APA; or reference to the interpretation upon which the agreement is based was *obiter dicta*; or (c) there are changes made to the APA for purposes of avoiding double taxation on which the agreement is based, unless the general interpretation upon which the APA was based is unaffected by the changes (SARS (2021: 10)).

Within 30 days of either party becoming aware that any of the conditions mentioned above are present, then this party is required to inform other parties of the termination of the APA (SARS (2021: 10)).

consent is obtained then the APA will remain in force without revision. However, alternative arrangements can be put in place by and between the APMA division and taxpayer for purposes of the US domestic legislation – see page 42 for further information. (IRS (n.d. c: 55).)

(F)

Revoking or cancelling the APA

- An APA can be revoked due to: fraud, malfeasance, a disregard of material facts or a lack of compliance (IRS, (n.d. c: 55 – 56)).
- An APA can be cancelled for various reason, including but not limited to: the taxpayer’s misrepresentation or mistake with regards to material facts; failure to state material facts; failure to file timeous annual reports; a lack of compliance in the terms and conditions; or there is a failure of a critical assumption or a material change in the governing case law, statute, regulation or applicable treaty (IRS (n.d. c: 56)).
- The APMA division can waiver the cancellation of the APA provided the taxpayer presents good faith and reasonable cause and consents to making suggested adjustments to the APA to remedy the misrepresentation, mistake of a material fact, or failure to state a material fact or non-compliance (IRS (n.d. c: 56)).
- A revoked APA is dated back to the first day of the first APA year; whereby, a cancellation is effective as of the beginning of the taxable year in which critical assumptions failed or beginning of the taxable year in which the misrepresentation, mistake regarding a material fact, or failure to state a material fact or non-compliance relates. However, a cancellation due to a change in case law, statute, regulation or treaty or coordinating agreement will be effective at the beginning of the year in which that change to the case law, statute, regulation or treaty or coordinating agreement was enforceable. (IRS (n.d. c: 56 – 57).)
- From the effective date of cancellation, the APA will have no further force and effect and the APMA division will communicate this cancellation with the foreign competent authority/ies (IRS (n.d. c: 57)).

SARS must inform all parties of the effective date from which the APA is terminated (SARS (2021: 10)).

(G)

Changes in case law, statute, regulation or treaty

- If any legislation referenced in the APA which has since been subject to amendment, the amended version of that legislation mentioned in the APA shall then apply (IRS (n.d. c: 57)).

(H)

Renewing the APA

- This can be affected by filing a complete or abbreviated APA request with permission from the APMA division. It is advisable for this request to be submitted at least 9 months before expiry of the final APA year. (IRS (n.d. c: 58).)

(I)

Disclosures

- *Confidentiality*: All information and/or documentation in relation to the APA is confidential (IRS (n.d. c: 58)).
- *Not “Written Determination”*: All information and/or documentation in relation to the APA are not “written determinations” and are not open to public inspection (IRS (n.d. c: 58)).
- *Statutory report*: The Secretary must prepare an annual report for public disclosure which will provide information regarding APAs, but will not disclose information regarding the applicant, trade secrets and the like (IRS (n.d. c: 58 – 59)).
- *Exchange of information*: Certain information and/or documentation disclosed during the APA programme is subject to exchange of information under U.S. tax treaties or U.S. income tax information exchange agreements; whereas, there is an optional disclosure of other information, which this information may be exchanged to the extent consistent with principled, effective and efficient tax administration and the practices of the relevant foreign competent authorities (IRS (n.d. c: 58 – 59)).

Conclusion:

In respect of the USA: Taxpayers are required to report income, primary adjustment, conforming adjustments and the repatriation of funds. The taxpayer is further obliged to submit annual reports, and in this report the taxpayer must provide proof that it has complied with the terms and conditions of the APA, as well as disclosed therein any pending requests to renew, modify or cancel the APA, as well as to correct any materially false, incorrect or incomplete information submitted during the APA process. An examination is

completed by the APMA division which evaluates the taxpayer's compliance with the terms and conditions, the accuracy of the APA annual report and accuracy of the supporting data and calculations used to apply the covered method/s. All reports and information and/or documentation disclosed to the APMA division is subject to the applicable legislative record retention requirements and must be disclosed upon request. (IRS (n.d. c: 49 – 59).)

All APAs in the USA are subject to renewal, revision, revoking or cancelling of the APA – reference must be made to the effective dates mentioned above:

- The APA may be **renewed** upon written request of a complete or abbreviated APA request which must be submitted at least 9 months before expiry of the final APA year (IRS (n.d. c: 58)).
- A **revised** version of the APA is subject to approval being provided by all parties to the agreement. If in the case all parties to the APA do not approve the revision to the APA, then this APA will remain in full force and effect without revision – a negotiation to amend the portion of the agreement by and between the APMA division and the taxpayer for purposes of the USA domestic legislation is possible, and reference is to be made to the information provided above. (IRS (n.d. c: 56 – 57).)
- An APA may be **revoked** for one of the various reasons set out above; however, the APMA division is authorised to waive the cancellation of the APA provided the taxpayer presents good faith and reasonable cause and consents to the recommended adjustments to the APA to remedy any misrepresentations, mistakes of material fact, or failure to state a material fact or non-compliance (IRS (n.d. c: 56 – 57)).

Should any changes occur to legislation referenced in the APA, this APA will be subjected to the revised/remedied version (IRS (n.d. c: 57)).

In respect of the UK: Taxpayers are required to submit annual reports, and these reports are reviewed by the HMRC to ensure compliance with the terms and conditions set out in the APA (GOV.UK (2023)).

All APAs in the UK are subject to renewal, revision, nullifying and revoking of the APAs and penalties:

- A request for **renewal** must be submitted no later than 6 months before the expiry date, unless agreed otherwise. The HMRC will consider a renewal provided there are no material changes to the facts and circumstances, and it will amend any necessary information therein. The taxpayer must not assume that a renewal will always be in his/her/its best interest. (GOV.UK (2023).)
- Any **amendments** must be in accordance with section 225 of TIOPA, after the necessary consultations have taken place (GOV.UK (2023)).
- The HMRC is authorised to **revoke** an APA provided the taxpayer fails to comply with the terms and conditions set out therein, where the critical assumptions cease to be valid or in the case where the taxpayer has intentionally or negligently filed false or misleading information, resulting in the HMRC being entitled to a penalty and/or nullification of the APA (GOV.UK (2023)).

In respect of SA: Taxpayers are obliged to submit annual compliance reports, and they have an obligation to comply with the legislative record retention requirements (SARS (2021: 9 – 10)).

In terms of the annual compliance report, the taxpayer must submit this report within 60 days from the end of the tax period that falls within the tenure of the APA, or from the date the APA is terminated – the information to be disclosed in this report is discussed above. Furthermore, per the record retention requirement mentioned above, the taxpayer must disclose further information and/or documentation within 30 days from the request from SARS. (SARS (2021: 9 – 10).)

All APAs in SA are subject to extension, termination and amendment:

- An APA may be **extended** providing that the taxpayer submits a request no later than 60 days before the expiry of the APA, together with proof of payment. SARS will not grant an extension for a period exceeding 3 years, and this application for extension must not disclose any material changes to the facts and circumstances, and the critical assumptions must remain valid. An application for extension is subject to the provisions set out in *Step 2, 3, 4 and 5*; however, SARS is authorised to reject a request for extension, and in this case the new application is to be submitted under *Step 2*. (SARS (2021: 2 & 9).)
 - If a party wishes to **terminate** the APA, it shall be obliged to furnish all other parties with reasons. SARS is authorised to terminate an APA retrospectively in cases where points (a) – (g) above are complied with; whereas an APA can be terminated within 30 days of either party becoming aware that any of the conditions mentioned in points (a) – (c) above are present. (SARS (2021: 9 – 10).)
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Recommendations for SA:

Compliance reports:

25. **Re: The time period for the taxpayer to submit a compliance report is currently 60 days from the end of the tax period:** SARS should extend the time period for submitting a compliance report from 60 days to 12 months after the financial year end, in line with other transfer pricing submission dates. The reason for this recommendation is that this period of time is too short when considering the fact that the applicant will be planning and preparing for its year end audit subsequent to the applicant's financial year end. (SAICA (2022).)
26. **Re: Disclosure of the compliance report with other competent authorities:** SARS should provide additional clarity on whether or not it will share the compliance report with the other competent authorities or whether the taxpayer itself is obliged to submit this compliance report separately to the other competent authorities (SAICA (2022)).

Record retention:

27. **Re: The time period for the taxpayer to submit information to confirm compliance with the APA is currently 30 days from receipt of the written request:** SARS should extend the time period for submitting additional information from 30 days to 60 days, with a possibility of at least two extension periods being granted to taxpayers considering the current practical challenges with the delivery of SARS' communication to taxpayers (SAICA (2022)).

Extension of an APA:

28. **Re: Pre-approval from competent authorities in other tax jurisdictions before giving effect to the extension of the APA:** SARS should amend the draft legislation to indicate that an extension will be granted, subject to receiving the necessary approval from the competent authorities who are party to the APA (SAICA (2022)).
29. **Re: SARS may reject a request to extend an APA and may direct the applicant to submit a new application:** SARS should indicate what processes it will implement to prevent the rejection of an extension and a submission of a new application in order to secure higher fees (SAICA (2022)).

Termination of an APA:

30. **Re: Where a court overturns or amends an interpretation of the legislation on which the APA is based, the APA will cease to be operative from date of judgement, unless the decision is appealed; the decision is fact-specific, therefore having no material effect on the interpretation of the APA; or reference to the interpretation**

upon which the agreement is based was obiter dicta: SARS should consider removing this from the draft legislation, since it seeks to align with section 85 of the TAA which applies to ATR. Section 85 of the TAA relates to an interpretation of law that is sought by the taxpayer and therefore it makes logical sense to be considered in the context of a ATR; however, in the case of an APA one is not seeking an interpretation of law, but rather a negotiated price of an affected transaction which does not rely on the interpretation of law but rather the application of the OECD transfer pricing methodology. (SAICA (2022).)

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SECTION 4. ADDRESSES AND CONTACT INFORMATION

Deputy Commissioner (International)
Large Business and International Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
SE:LB:IN:TPO:APMA:M3-370
Washington, D.C. 20224
(Attention: APMA)

All mail should be sent to this mailing address, including regular mail, express mail, overnight mail, and mail sent by USPS, FedEx, UPS, or any other carrier. Contact information for APMA and additional information is as follows.

Telephone	Telephone numbers are available through the "contact us" link on the APMA website
Website	www.irs.gov/Businesses/Corporations/APMA
Headquarters Physical Location	801 Ninth Street, N.W. Washington, D. C. 20001 (Mail not accepted at this location)

APPENDIX
CONTENT OF COMPLETE APA REQUESTS

Part 1. Executive Summary

1.1	<u>Identifying information:</u> List the name, address, and taxpayer identification number(s) of each member of the proposed covered group and the Standard Industrial Classification ("SIC") and the North American Industry Classification System ("NAICS") codes (number and code description) of the controlled group as reported on the taxpayer's most recently filed federal tax returns
1.2	<p><u>Summary of APA request:</u> Provide an executive summary of the content of the APA request that addresses the following:</p> <ol style="list-style-type: none"> a. Whether the taxpayer proposes a unilateral APA or a bilateral or multilateral APA, and, if applicable, the U.S. tax treaty(ies) and treaty articles governing the APA request; b. Whether the APA request proposes a renewal of an existing APA or the extension of a competent authority resolution from competent authority or ACAP years into APA years; c. The proposed prospective years and the proposed rollback years; d. The proposed covered issue(s) and an estimated dollar value of such issue(s) in the proposed APA years; and e. The proposed covered method(s), including, as applicable, the proposed tested party(ies), profit level indicator(s), and interquartile range(s)

Part 2. Administrative Information

2.1	<u>Authorization:</u> List the names of and contact information for all individuals authorized by a Form 2848 to represent the taxpayer in connection with the APA request and all individuals authorized by a Form 8821 to inspect or receive confidential tax information about the taxpayer in connection with the APA request, along with a designation as to which individual will serve as the point of contact for the APA team
2.2	<u>IRS Office:</u> Identify the IRS office having examination jurisdiction over the taxpayer, together with the name of and contact information for the taxpayer's IRS Examination team manager if the taxpayer is under examination when the APA request is filed

2.3	<p><u>Filed Years:</u> Provide a table with the following information for each member of the proposed covered group:</p> <ol style="list-style-type: none"> a. All open filed years in the United States and the relevant treaty country(ies), whether or not such years are currently under examination by the IRS or a foreign tax authority; b. The expiration dates of statutes of limitations for all open filed years in the United States and in the relevant treaty country(ies) c. All open filed years in which a proposed covered issue or a substantially similar issue is under review by IRS Appeals or its equivalent in the relevant treaty country(ies); and d. All open filed years in which an actual or proposed adjustment has been made by either the IRS or a foreign tax authority relating to the proposed covered issue(s) or to substantially similar issues
2.4	<p><u>Request for SAP Review:</u> If applicable, include a statement that the APA request is intended to serve as a request for SAP review for specified taxable years, pursuant to section 5.02(6) of the revenue procedure</p>
2.5	<p><u>Optional e-mail memorandum of understanding:</u> At the taxpayer's option, an executed memorandum of understanding in the form prescribed by APMA (as may be posted on the APMA website or otherwise available by contacting APMA) permitting APMA to communicate with the taxpayer's authorized representatives through encrypted e-mail</p>

Part 3. Proposed Covered Issue(s)

3.1	<p><u>Pre-filing information:</u> Provide the following information:</p> <ol style="list-style-type: none"> a. Whether a mandatory or optional pre-filing memorandum was filed; and b. Whether a pre-filing conference was held and, if so, the date of and attendees at the conference
3.2	<p><u>Rollback:</u> Provide the following information:</p> <ol style="list-style-type: none"> a. If the taxpayer is seeking consideration of a rollback, list the

	<p>proposed rollback years; and</p> <p>b. If the taxpayer is not seeking consideration of a rollback, discuss the reasons as to why a rollback is not appropriate</p>
3.3	<p><u>Background on proposed covered group:</u> Provide background on the following points, with reference to the covered issue diagrams:</p> <p>a. The general history of the business operations of the proposed covered group and of the controlled group;</p> <p>b. The worldwide gross revenue of the controlled group in the most recent taxable year available;</p> <p>c. The functional currency of each member of the proposed covered group;</p> <p>d. For each member of the proposed covered group, any business line(s) that is (are) outside the scope of the proposed covered issue(s); and</p> <p>e. The industry in which the proposed covered group operates, including discussion of relevant macroeconomic and other industry-wide factors affecting the proposed covered group, the commercial features of the markets and geographical areas in which the proposed covered group operates, and the participants and competitors in the proposed covered group's industry</p>
3.4	<p><u>Narrative with reference to proposed covered issues in covered issue diagrams:</u> For each proposed covered issue, provide a detailed discussion of the following, with reference to the covered issue diagrams in Exhibit 11:</p> <p>a. The functions performed by each member of the proposed covered group in relation to the proposed covered issue;</p> <p>b. The assets employed by each member of the proposed covered group in relation to the proposed covered issue;</p> <p>c. The risks assumed by each member of the proposed covered group in relation to the proposed covered issue;</p> <p>d. Transactional or commercial flows relating to the proposed covered issue(s) between and among members or business units of the proposed covered group, between members or business units of the proposed covered group and customers and other uncontrolled parties, and between members or business units of</p>

	<p>the proposed covered group and members or business units of the controlled group outside of the proposed covered group;</p> <p>e. Principal intercompany contracts or other agreements, written or otherwise, between and among members of the proposed covered group relating to the proposed covered issue(s); and</p> <p>f. Unless the proposed covered method involves a profit split (within the meaning of Treas. Reg. § 1.482-6 or Chapter II of the OECD Guidelines) between two or more members of the proposed covered group, the identity of the member of the controlled group that is proposed to be regarded as the principal in relation to the proposed covered issue, whether or not it is a member of the proposed covered group</p>
3.5	<p><u>Narrative with reference to non-proposed covered issues in covered issue diagrams:</u> For each issue that is not a proposed covered issue, but is an issue that APMA might reasonably consider in analyzing the proposed covered issues under the principles expressed in section 2.02(4)(a), a discussion of why in the interest of principled, effective, and efficient tax administration such issue need not be a covered issue, and of the extent to which such issue should be considered in the APA process</p>
3.6	<p><u>Rulings, determinations, and proceedings:</u> Provide information on the following:</p> <p>a. Current or expired rulings issued by a relevant foreign tax authority covering intercompany transactions or business activities of members of the proposed covered group that are similar to the proposed covered issue(s);</p> <p>b. The terms of any competent authority resolution addressing intercompany transactions or business activities of members of the proposed covered group that are similar to the proposed covered issue(s); and</p> <p>c. Any judicial or administrative proceedings in the United States or in the relevant treaty country(ies) to which any members of the proposed covered group are or have been parties involving intercompany transactions or business activities that are similar to the proposed covered issue(s)</p>
3.7	<p><u>Ancillary issues:</u> List the ancillary issues (if any) proposed to be</p>

	covered by the APA
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Part 4. Proposed Covered Method(s)

4.1	<u>Selection and application of proposed covered method(s):</u> Discuss the selection of the proposed covered method(s) with reference to the standards governing the selection of the "best method" under Treas. Reg. § 1.482-1(c) and, in the case of bilateral or multilateral APA requests, the selection of the "most appropriate" method under Chapter I of the OECD Guidelines, and how overall that method is applied, including the definition of the tested party(ies)
4.2	<u>Search and screening process:</u> Describe the research and screening process and criteria used to identify and select independent comparable agreements or independent companies or other market data upon which the proposed covered method is based, including the initial search universe, the qualitative and quantitative screens used to accept or reject potential comparable agreements or companies or other market data, the order in which different criteria were applied, the precise specification of each criterion (including for example the precise way in which multiyear averages are used, or in which requirements are applied across multiple years), and the numbers of potential comparable agreements or companies or other market data accepted and rejected at the different stages of the search and screening process
4.3	<u>Application of proposed covered method(s):</u> Provide a detailed explanation of (a) the data and assumptions used and (b) any adjustments made to the selected proposed comparable agreements or results of independent companies or other market data, or to the results of the tested party, such as adjustments relating to: (i) product line segregations, (ii) differences in accounting practices, (iii) differences in functions performed, assets employed, or risks assumed (especially noting working capital or other balance sheet adjustments made to the tested party(ies) or to the comparables and any differences between such adjustments and the adjustments incorporated into the APA template (as may be posted on the APMA website or otherwise available by contacting APMA), (iv) volume or scale differences, or (v) differences in economic or market conditions

4.4	<u>Demonstration of proposed covered method(s)</u> : Provide a table summarizing the results of applying the proposed covered method(s) to the relevant members of the proposed covered group for (i) all proposed rollback years, (ii) the most recent three back years, if they are not proposed rollback years (or as many such back years as have data available, if not all have data available), (iii) the first proposed APA year, using actual data if available and otherwise using forecasted data, and (iv) other proposed APA years, using forecasted data, to the extent forecasts are available
4.5	<u>Segmentation of financial results</u> : If the proposed covered method(s) is (are) applied to a subset of the assets, liabilities, income, and expenses in the financial statements (<u>see</u> Exhibit 18), provide a segmentation of the financial statements and describe in detail (i) those items in the segmented financial statements that have been allocated or apportioned to the applicable proposed covered issue(s) and to other issues, and (ii) the method(s) of allocation or apportionment applied

Part 5. Proposed APA Terms and Conditions

5.1	<u>Review of Proposed APA</u> : Provide a detailed discussion and explanation of the proposed APA terms and conditions as reflected in the draft APA submitted with the APA request (<u>see</u> Exhibit 15), noting, in particular, any proposed APA terms and conditions that differ from the APA terms and conditions as reflected in the model APA (<u>see</u> Exhibit 15)
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Exhibit 1	<u>Contents of exhibits:</u> Provide a table or similar comprehensive list of the exhibits submitted, indicating the form (printed, electronic, or both) in which they are submitted
Exhibit 2	<u>Authorization form:</u> Include a properly executed Form 2848 (Power of Attorney and Declaration of Representative) for all individuals authorized to represent the taxpayer in connection with the APA request or Form 8821 (Tax Information Authorization) for all individuals authorized to inspect or receive confidential tax information about the taxpayer in connection with the APA request
Exhibit 3	<u>Protective claim:</u> In the case of a bilateral or multilateral APA request, provide a statement affirming whether the APA request is to serve as a protective claim pursuant to section 11 of Rev. Proc. 2015-40 and, if so, include the information required by section 11.02(3) of Rev. Proc. 2015-40
Exhibit 4	<p><u>Waiver of ex parte communication:</u> If the APA request involves proposed rollback years in which the proposed covered issue(s) or a related issue is unresolved and under consideration by IRS Appeals, include a waiver, modeled on the following language, of the taxpayer's right to be present during communications between IRS Appeals and members of the APA team:</p> <p style="padding-left: 40px;">Waiver of Ex Parte Communication: [Name of taxpayer(s)] agrees to the participation of IRS Appeals in the consideration of this APA request and hereby waives its right to be present during, or to participate in, meetings relating to the APA request or to be a party to discussions concerning the proposed covered issue(s) between IRS Appeals and members of the APA team</p>
Exhibit 5	<u>Consent to disclosure:</u> In the case of a bilateral or multilateral APA request, include a declaration, dated and signed by an

	<p>authorized officer of the taxpayer having personal knowledge of the facts concerning the proposed covered issue(s), that the taxpayer consents to the disclosure of the contents of the APA request – other than trade secrets, if the taxpayer so requests – to the applicable foreign competent authority(ies) within the limits contained in the U.S. tax treaty(ies) governing the APA request</p>
Exhibit 6	<p><u>Consents regarding period of limitations:</u> Any executed consents to extend the period of limitations for assessment of tax that are required under section 2.03(3)(a) of the revenue procedure</p>
Exhibit 7	<p><u>"Penalties of perjury" declaration:</u> Include the following "penalties of perjury" declaration:</p> <p>Under penalties of perjury, I declare that I have examined this [APA request] [supplemental submission relating to an APA request], including accompanying documents, and, to the best of my knowledge and belief, the [APA request] [supplemental submission] contains all the relevant facts relating to the [APA request] [supplemental submission], and such facts are true, correct, and complete.</p> <p>The declaration must be signed by the taxpayer on whose behalf the request is being made and not by the taxpayer's representative. The person signing for a corporate taxpayer must be an authorized officer of the taxpayer who has personal knowledge of the facts, whose duties are not limited to obtaining letter rulings or determination letters from the IRS or negotiating APAs, and who is authorized to sign the taxpayer's income tax return pursuant to section 6062 of the Code. The person signing for any non-corporate taxpayer must be an individual who has personal knowledge of the facts and who is authorized to sign in accordance with sections 6061 or 6063 of the Code, as applicable</p>
Exhibit 8	<p><u>User fee receipt:</u> Include a copy of the receipt obtained after paying the required APA user fee (see section 3 of this Appendix)</p>
Exhibit 9	<p><u>Documents submitted to foreign competent authorities:</u> List all documents or written submissions provided to a foreign tax</p>

	<p>authority or foreign competent authority in connection with the APA request, either prior to or concurrently with the submission of the APA request to APMA, noting the documents or written submissions for which English translations are available and any documents or written submissions provided to a foreign tax authority or foreign competent authority in connection with the APA request that are not included in the APA request submitted to APMA</p>
Exhibit 10	<p><u>Pre-filing Submissions</u>: Include any pre-filing memoranda or other materials submitted in connection with the APA request</p>
Exhibit 11	<p><u>Covered issue diagrams</u>: Include diagrams, charts, or similar representations depicting the following information as it relates to the proposed covered issues and any interrelated matters that APMA might reasonably consider in analyzing the proposed covered issues under the principles expressed in section 2.02(4)(a), each presented in a manner similar to and with a degree of detail no less than that presented in the diagrams accompanying the case studies "Alpha" through "Foxtrot" in Joint Committee on Taxation, <i>Present Law and Background Related to Possible Income Shifting and Transfer Pricing</i> (JCX-37-10), July 20, 2010 (available at www.jct.gov; see also APMA website):</p> <ol style="list-style-type: none"> a. The controlled group's legal structure, with clear indications as to the members of the proposed covered group; b. The controlled group's tax structure, with clear indications as to, among other items, ownership relationships and tax filing characterizations of members of the proposed covered group under the Code and under applicable rules in the relevant treaty country(ies) (e.g., partnerships, branches, or disregarded entities); c. The controlled group's and proposed covered group's business units or similar organizational divisions as used for management purposes, together with a table, narrative, or other reconciliation showing the relationship between such business units and the legal entities comprising the controlled and proposed covered groups; d. The value chain of the proposed covered group, comprising commercial or transactional flows between and among

	<p>members or business units of the proposed covered group, between members or business units of the proposed covered group and customers and other uncontrolled parties, and between members or business units of the proposed covered group and any other members or business units of the controlled group outside the proposed covered group; and</p> <p>e. Organization or management charts identifying executive-level functional or occupational roles within the business units or within members of the proposed covered group that are relevant to the proposed covered issue(s) (<u>e.g.</u>, vice president of marketing for transactions involving sales of tangible goods), together with (i) the names of individuals occupying such executive-level functional roles at the time the APA request is filed, and (ii) headcounts for the relevant business units or members of the proposed covered group</p>
Exhibit 12	<p><u>APAs</u>: Include a copy of the most recent APA, if any, that the taxpayer or another member of the proposed covered group has entered into with (i) the IRS, and (ii) each involved foreign tax authority, concerning transactions or other business activities within the scope of the proposed covered issue(s)</p>
Exhibit 13	<p><u>Selection process</u>: Provide a table or similar report on the step-by-step results of applying criteria for selecting comparable agreements or independent comparable companies or other market data, including a table or matrix showing the reason(s) for rejecting agreements or independent companies or other market data (<u>see</u> part 4.2)</p>
Exhibit 14	<p><u>Information on selected comparables</u>: As applicable, include a detailed discussion of the contractual terms (within the meaning of Treas. Reg. § 1.482-1(d)(3)(ii)) of selected comparable agreements, including the form of consideration charged or paid, and for APA requests in which the proposed covered method(s) involve(s) an application of the comparable profits method (as defined in Treas. Reg. § 1.482-5) or the transactional net margin method (as defined in the OECD Guidelines), include (i) unadjusted income statement data for the most recent five taxable years (or as many years as are available, if fewer than five years are available) and balance sheet data for the most recent six taxable years (or as many years as are available, if fewer than six years are available) of</p>

	the selected independent comparable companies, and (ii) (if applicable) the application to such financial data of any adjustments pursuant to the proposed covered method(s) (see parts 4.3 and 4.4)
Exhibit 15	<u>Proposed draft APA</u> : Provide a proposed draft APA in a form substantially similar to APMA's current model APA (as may be posted on the APMA website or otherwise available by contacting APMA), together with a "redline" version of the same showing the differences between the model APA and the proposed draft APA
Exhibit 16	<u>Application of APA template</u> : For APA requests in which the proposed covered method involves an application of the comparable profits method (as defined in Treas. Reg. § 1.482-5) or the transactional net margin method (as defined in the OECD Guidelines), provide income statement data for the most recent five taxable years (or as many years as are available, if fewer than five years are available) and balance sheet data for the most recent six taxable years (or as many years as are available, if fewer than six years are available) for the relevant member(s) of the proposed covered group, using the APA template (as may be posted on the APMA website or otherwise available by contacting APMA)
Exhibit 17	<u>Federal income tax filings</u> : Provide copies of the following federal income tax forms for each of the three most recent filed years of the taxpayer: <ul style="list-style-type: none"> a. Form 1120 or applicable equivalent; b. Form 5471 ("Information Return of U.S. Persons With Respect to Certain Foreign Corporations"); c. Form 5472 ("Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business"); and d. Form 8858 ("Information Return of U.S. Persons With Respect to Foreign Disregarded Entities")
Exhibit 18	<u>Financial statements</u> : Provide copies of financial statements, including full income statements, balance sheets, and cash flow statements (audited, if available, and in English, if available), for

	each relevant member of the proposed covered group for each of the most recent three back years and specify the accounting standard used (e.g., U.S. GAAP)
Exhibit 19	<u>Section 6662 documentation</u> : Include a copy of the documentation prepared in consideration of section 6662(e) of the Code (and, if applicable, a copy of similar documentation filed with or subject to request by the relevant foreign tax authority(ies)) relating to intercompany transactions or business activities that are within the scope of the proposed covered issue(s) for each relevant member of the proposed covered group for each of the most recent three back years
Exhibit 20	<u>Regulatory filings</u> : Include a copy of the Form 10-K or similar annual SEC filing submitted for U.S. regulatory purposes by the controlled group for each of the most recent three back years
Exhibit 21	<u>APA annual reports</u> : For renewal APA requests, provide all APA annual reports filed with APMA with respect to the current APA
Exhibit 22	<u>Intercompany agreements</u> : Include copies of any written intercompany contracts or agreements between the taxpayer and other members of the proposed covered group that are within the scope of the proposed covered issue(s), with a statement of when each contract or agreement was actually executed, and a summary of any oral intercompany agreements that are material to the proposed covered issues. For proposed APAs relating to intangible development arrangements, these agreements or contracts would include, as applicable, documents forming or revising the intangible development arrangement and documents relating to use under the intangible development arrangement of rights, resources, and capabilities owned by participants or related non-participants.

SP02/10 - Advance Pricing Agreements Annex 2 – Sample Agreement
(Instructions, explanations and comments in italics)

ADVANCE PRICING AGREEMENT

Between

TAXPAYER

And

H.M. REVENUE AND CUSTOMS

This Advance Pricing Agreement (“APA”) is made between

Taxpayer, and

HM Revenue and Customs acting through BAI Transfer Pricing Team (“HMRC”)

The Taxpayer and HMRC (collectively “The Parties”) wish to enter into an APA, and to include in it an appropriate Transfer Pricing Methodology (“TPM”) to be applied to the transactions between the Taxpayer and the related party (or parties) identified below.

(For bilateral/multilateral cases this agreement replicates under UK statute on Advance Pricing Agreements the terms of an agreement reached under the Mutual Agreement Procedure Article of the relevant Tax Treaty covering the same transactions)

1. Identifying Information

Taxpayer(s): *(typically - a company registered in (country), under registration number XXXXXXXX, Resident in (country), having a tax reference YYYYY YYYYY, (with a Permanent Establishment in (country)) and a Registered Office at (address) (or place of business at (address))*

Related Party: *(similar information as for the taxpayer above – there may be a number of related parties)*

Set out the relationship between Taxpayer and Related Party – e.g. one a subsidiary of the other or both companies members of the multi-national group Z headquartered in (country)

2. Covered Transactions

The transaction(s) covered by this APA (the “Covered Transactions”) comprise: *Add succinct explanation of all Covered Transactions here.*

3. Legal Effect

This APA is made pursuant to and for the purposes of S218 Taxation (International and Other Provisions) Act 2010 (“TIOPA 2010”) and binds the Parties, for the term of this APA, to determine questions relating to the transfer pricing (or branch or PE attribution) matters covered by the APA in accordance with its terms.

If the Taxpayer complies with the terms and conditions of this APA then HMRC will not contest the application of the Transfer Pricing Methodology (“TPM”) as defined in clause 5 below to the Covered Transactions and will not make or propose any reallocation or adjustment that would be necessary in order for effect to be given to the provisions of Part 4 TIOPA 2010 with respect to the Taxpayer concerning the transfer prices for the APA term (*this will have to be amended or extended if we are/are also looking at a PE issue and also refer to Rollback years if relevant*).

If, for any year during the APA term, the Taxpayer does not comply with the terms and conditions of this APA, or the Critical Assumptions (as defined in Clause 6 below) cease to be valid, HMRC may (subject to clause 9 below) revoke this APA and S.221 TIOPA 2010 shall apply.

HMRC may also revoke this agreement if, after the date of the agreement, Part 4 TIOPA 2010 or the transfer pricing guidelines as defined in Section 164(4) TIOPA 2010 are either amended or repealed and this would have an effect on the approach to pricing within this agreement. Such a revocation would have effect from the start of the chargeable period from which that amendment or repeal has effect.

For PE cases: HMRC may revoke this Agreement if, after the date of this agreement, Chapter 4 of Part 2 CTA 2009, S43 TIOPA 2010, or Chapter 2 Part 24 CTA 2010 are amended or repealed and this would have an effect on the approach to pricing within this agreement. Such a revocation would have effect from the start of the chargeable period from which that amendment or repeal has effect.

The terms and conditions of this APA may also be modified or amended upon the agreement of the Parties, subject to the terms of any bilateral/multilateral agreement

Where the conditions of S.226 TIOPA 2010 (Annulment of agreement for misrepresentation) apply the agreement is to be treated as never made.

4. Term of the APA

Detail the rollback period too as relevant

5. Transfer Pricing Methodology

This is the “core” of the APA. This section may need to be very detailed, but it will always be highly tailored to the taxpayer’s particular circumstances. If necessary it can be done as a separate Appendix to the agreement.

In a bilateral or multilateral APA case it is necessary that the terms of the TPM are entirely consistent with the terms of any mutual agreement between HMRC and its treaty partner(s) on the covered transactions for the same period. Where it is not feasible or appropriate to have identical wording the TPM will be interpreted as if it were expressed in identical terms to the methodology set out in the bilateral or multilateral agreement between the relevant treaty partners.

6. Critical Assumptions

Critical Assumptions will be specific to the case and require careful consideration but generally they will include a clause to the effect that there should be no major commercial changes governing the Covered Transactions. In volatile, dynamic or cyclical businesses this may need some elaboration.

Similarly, in cases involving trading or managing portfolios of Financial Products, consideration may be needed at the time of negotiating the agreement as to whether and when “new generation” Products are or are not covered by the APA and when this would breach the critical assumptions. In these kinds of situations there will generally be a requirement for relevant information to be automatically reported in Annual Reports, see below.

Other typical Critical Assumptions could include clauses relating to changes of control, the possibility that acquisitions might impact upon the APA, to profit share and competition issues, and those involving Regulation, or arising from Government Policy or Laws.

7. Annual Reports

Annual Reports will generally be required to confirm that the Critical Assumptions continue to have been met and clearly demonstrate that the Transfer Pricing Methodology required has been used/complied with. Commonly, unless this can be put very simply, the format of a one or two sheet or spreadsheet “proof” document is attached as an Appendix.

Some bilateral or multilateral agreements may require a standard report to be sent to all involved Tax Administrations. In that case any UK specific information required should be detailed in the APA agreement e.g. conversion into UK currency or UK accounts standards.

8. Disclosure

This APA and the information, data and documents related to this APA, are subject to the same rules of confidentiality as any other taxpayer’s information provided to

HMRC, and any unauthorised disclosure of information by HMRC will be a breach of those rules.

9. Revocation

HMRC will not revoke this APA unless and until it has explained in detail to the Taxpayer why and from when it is considered the taxpayer is in breach of the terms and conditions of this APA and the taxpayer has been given a reasonable opportunity to rectify any breach.

(Note - this clause may need to be aligned with any relevant requirements in a bilateral or multilateral agreement. In a multilateral for instance the possibility of the taxpayer no longer being felt to satisfy the terms of the APA in one territory only may be considered. Or, similarly, the consequences for the agreement between the other Administrations of there no longer being Covered Transactions in one territory may be tackled. HMRC may also want to emphasise that it will be working from the standpoint of seeking the continuance of the APA in the event of any such difficulty.)

10. Tax Laws

Notwithstanding any statement in this APA agreement, the taxpayer remains subject to all applicable taxation laws not directly affected by this APA. The Taxpayer is entitled to any benefits or relief otherwise available under all such laws.

Signatories:

Responsible Officer or Director on behalf of Taxpayer:

Date:

Delegated Competent Authority on behalf of HMRC (*usually this will be the Delegated Competent Authority who negotiated the agreement*):

Date:

CHAPTER 7 OF THE TAX ADMINISTRATION ACT

Part A
ADVANCE RULINGS

Part B
ADVANCE PRICING AGREEMENTS

90A. Definitions.—In this Chapter, unless the context indicates otherwise, the following terms, if in single quotation marks, have the following meanings—

'advance pricing agreement' means an agreement for a defined period of time between an applicant, the competent authority of South Africa and the competent authority of another country, which has an agreement for the avoidance of double taxation with South Africa, regarding the advance pricing arrangement of an affected transaction between and among associated enterprises and connected persons in relation to the applicant;

'advance pricing agreement application' means a request by a person to SARS in the prescribed form and manner for an advance pricing agreement and includes supporting documents and additional information required by SARS to consider entering into an advance pricing agreement with the person;

'advance pricing arrangement' is an arrangement that determines the most appropriate transfer pricing method, the arm's length transfer price, the arm's length allocation and, where necessary, the compensating adjustments in respect of an affected transaction over a defined period of time;

'affected transaction' means an "affected transaction" as defined in section 31 of the Income Tax Act;

'agreement for the avoidance of double taxation' means an agreement that is effected under section 108 of the Income Tax Act that contains an Article similar to Article 9 of the Model Tax Convention on Income and on Capital of the OECD;

'applicant' means a person who submits an advance pricing agreement application to SARS;

'arm's length allocation' means an allocation in an affected transaction that would have been the allocation if the participants had been dealing at arm's length with each other;

'arm's length transfer price' means a transfer price in respect of an affected transaction that would have been the price in respect of the transaction if the participants in the transaction had been dealing at arm's length with each other;

'associated enterprise' means an "associated enterprise" as defined in section 31 of the Income Tax Act;

'compensating adjustment' is an application of the most appropriate transfer pricing method, as agreed to in an advance pricing agreement, to an affected transaction and the attribution of the income from the affected transaction to be taxed in one or more countries;

'competent authority' is an official in a country who is authorised by the government of the country to enter into and administer an agreement for the avoidance of double taxation with another country;

'connected person' is a "connected person" as defined in section 31 of the Income Tax Act;

'country of residence' is the country in which a person is considered to be a resident according to income tax legislation after the application of an agreement for the avoidance of double taxation;

'critical assumptions' means the fundamental factors that are necessary for each party to an advance pricing agreement to remain bound by the advance pricing agreement;

'most appropriate transfer pricing method' means a transfer pricing method, having regard to the nature of an affected transaction performed between and among associated enterprises and connected persons, and such other relevant factors prescribed by the Commissioner in a public notice, that forms the basis for establishing an arm's length transfer price or arm's length allocation in terms of section 31 of the Income Tax Act and an agreement for the avoidance of double taxation for the affected transaction;

'transfer price' means the price at which connected persons or associated enterprises trade a service, tangible property or intangible property with and among each other across international borders in an affected transaction;

'transfer pricing method' means any of the transfer pricing methods referred to in the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*;

90B. Purpose—To promote tax certainty in respect of affected transactions that will prevent or minimise double taxation and associated dispute resolution procedures.

90C. Scope—The competent authority of South Africa may enter into an advance pricing agreement with an applicant after consulting with the competent authority of the country, which will be party to the agreement, within the parameters prescribed by the Commissioner in a public notice.

90D. Persons eligible to apply.—The Commissioner must issue a public notice to determine which persons are eligible to apply to SARS for an advance pricing agreement.

90E. Fees for advance pricing agreements.—(1) In order to defray the cost of the advance pricing agreement system, the Commissioner may by public notice prescribe fees payable by an applicant including—

- (a) a pre-application consultation fee;
- (b) an application fee;
- (c) a cost recovery fee for processing an application; and
- (d) any fees associated with the maintenance or extension of an existing agreement.

(2) An applicant must pay the fees in subsection (1) based on an invoice issued by SARS.

(3) SARS may retain the fees in subsection (1), or a portion thereof, if it rejects an application or terminates an agreement.

(4) If there is more than one prospective applicant or applicant in respect of an advance pricing agreement, SARS may, upon written request and by agreement among the prospective applicants or applicants, impose the fees in subsection (1) on one of the prospective applicants or applicants.

(5) The fees imposed under this section constitute fees imposed by SARS in terms of section 5(1)(h) of the SARS Act and constitute funds of SARS within the meaning of section 24 of that Act.

90F. Pre-application consultation.—(1) A prospective applicant must together with proof of payment of the prescribed fee in section 90E(1)(a) request in the prescribed form and manner a pre-application consultation meeting.

(2) SARS must arrange a pre-application consultation meeting with the prospective applicant within 60 days of receipt of the request in subsection (1).

(3) The pre-application consultation meeting must, among other things—

- (a) discuss the scope of the advance pricing agreement;
- (b) identify the parties that will be involved in the advance pricing agreement, their organisational structures and the relationship between the parties;
- (c) discuss the most recent annual financial statements of the prospective applicant;

- (d) discuss the suitability of the affected transactions to form part of the advance pricing agreement;
- (e) discuss the most appropriate transfer pricing method to apply to each affected transaction;
- (f) discuss the arm's length allocation, arm's length transfer price and compensating adjustments, where necessary, in respect of each affected transaction;
- (g) discuss in which country the arm's length allocations and compensating adjustments, where necessary, should be taxed;
- (h) discuss the legislation in a tax Act that may be applicable;
- (i) discuss the provisions in the relevant agreement for the avoidance of double taxation that may be applicable;
- (j) discuss if the prospective applicant, associated enterprise or connected person has consulted with the competent authority in the country who may be party to the advance pricing agreement as a prerequisite to determine if the competent authority will support the agreement;
- (k) discuss the duration of the advance pricing agreement, which may not exceed five years;
- (l) estimate the time required to finalise the advance pricing agreement;
- (m) discuss the applicable fees in section 90E;
- (n) determine any further information that may be required from the prospective applicant.

(4) SARS must notify the prospective applicant within 90 days from the last pre-application consultation meeting if the prospective applicant may submit an advance pricing application.

90G. Application for an advance pricing agreement.—(1) A prospective applicant that chooses to submit an advance pricing agreement application after receiving notification from SARS under section 90F(4) must do so within 60 days from receipt of the notification.

(2) An application may not be made in respect of a tax period that:

- (a) ended before the date on which the application is submitted;
- (b) is due to end within 180 days from the date on which the application is submitted; or
- (c) is subject to inspection, verification or audit under Chapter 5.

(3) If there is more than one applicant in respect of an advance pricing agreement, the applicants must join their applications into a joint application and designate one representative for the applicants.

(4) An application must be in the prescribed form and manner and must include the following—

- (a) the name, reference number or proof of identity, e-mail address, postal address, physical address, telephone number and country of residence of the applicant;
- (b) a list of persons that will be party to the advance pricing agreement and their e-mail addresses, postal addresses, physical addresses and telephone numbers;
- (c) the organisational structure of the applicant in relation to associated enterprises and connected persons and their organisational structures;
- (d) the most recent annual financial statements of the applicant;

- (e) the primary business activities of the applicant, the affected transactions that will be covered by the agreement, a quantification of the affected transactions, the associated enterprises and connected persons that are party to the affected transactions and their countries of residence, the most appropriate transfer pricing method for each affected transaction, the critical assumptions that should apply to the affected transactions, the arm's length allocations and compensating adjustments, where necessary, in respect of the affected transactions;
 - (f) any views the competent authority in the country that will be party to the proposed advance pricing agreement being sought has expressed;
 - (g) the applicable legislation in a tax Act and an interpretation thereof;
 - (h) the applicable provisions in the relevant agreement for the avoidance of double taxation and an interpretation thereof;
 - (i) the expected duration of the advance pricing agreement but not exceeding five years;
- (5) SARS may at any time require the application to be supplemented by further information.
- (j) the proposed advance pricing agreement;
 - (k) confirmation that the applicant is tax compliant to the extent referred to in section 256(3); and
 - (l) confirmation that the prescribed fee in section 90E(1)(b) has been paid.

90H. Amendments to an application.—(1) An applicant may request in writing for an amendment to an application within 30 days from submitting an application to SARS.

(2) SARS may allow the amendment to the application if the amendment does not have the effect of altering the nature of the application that was originally filed.

(3) The amendment will be considered only if the applicant agrees and pays any additional cost recovery fee in terms of section 90E(1)(c) and invoiced in terms of section 90E(2).

90I. Withdrawing an application.—(1) An applicant may withdraw an application within 30 days from submitting an application.

(2) The withdrawal does not absolve an applicant from the liability for any fees that are due and payable in terms of section 90E.

90J. Rejection of an application.—(1) SARS may reject an application if the application does not meet the requirements of this Part including—

- (a) the value of the affected transactions is less than an amount prescribed by the Commissioner by public notice;
- (b) the proposed advance pricing agreement would not ensure that there is alignment between true economic activity and profit outcomes in South Africa;
- (c) the application requires SARS to consider the legal form of a transaction without taking the substance of the transaction into account;
- (d) the affected transactions appear to lack commercial substance or are entered into primarily to avoid tax;
- (e) the application involves the interpretation or application of a general or specific anti-avoidance provision or doctrine;
- (f) the application is in respect of an issue that is the same as or substantially similar to an issue that is—
 - (i) currently before SARS in relation to an audit, investigation or other proceeding involving the applicant, an associated enterprise or a connected person in relation to the applicant;

- (ii) the subject of a 'binding general ruling' as defined in section 75 or proposed amendments to a tax Act that have been published; or
- (iii) subject to dispute resolution under Chapter 9;
- (g) the application is submitted for academic purposes;
- (h) the application is in respect of a frivolous or vexatious issue;
- (i) the applicant fails or refuses to provide additional information requested by SARS with regard to the application;
- (j) the applicant requests changes to a preliminary advance pricing agreement in section 90K(5) that are not acceptable to SARS; or
- (k) the applicant does not pay the prescribed fees in section 90E.

90K. Processing an application.—(1) SARS must process an application after accepting the application in a notice that must set out the terms and conditions under which the application will be considered.

(2) SARS must inform the applicant of the progress it has made in processing the application at 90-day intervals and must issue invoices for purposes of section 90E(2).

(3) Based on the information provided in the accepted application, SARS must prepare a preliminary advance pricing agreement that includes the following—

- (a) the names, e-mail addresses, postal addresses, physical addresses, and countries of residence of the parties to the advance pricing agreement;
- (b) the type of advance pricing agreement being entered into;
- (c) a definition of each of the key terms in the advance pricing agreement;
- (d) the affected transactions;
- (e) the applicable accounting standards on which the applicant's financial statements are based;
- (f) critical assumptions;
- (g) the most appropriate transfer pricing method to be applied to affected transactions;
- (h) the arm's length allocation, arm's length transfer price or compensating adjustment, where necessary;
- (i) the basis of the arm's length allocation, arm's length transfer price or compensating adjustment, where necessary;
- (j) in which country the proportionate income from an affected transaction should be taxed and a quantification thereof;
- (k) the duration of the advance pricing agreement which must not exceed five years.

(4) After reaching agreement with the competent authority in the country that will be party to the agreement, SARS must send the preliminary advance pricing agreement reflecting such agreement to the applicant to accept, reject or suggest changes within 60 days of being sent.

(5) SARS may make changes to a preliminary advance pricing agreement, as required by the applicant, if the requested changes fall within the scope of the application for the advance pricing agreement.

(6) Subsection (4) will apply with the necessary changes if subsection (5) is applicable.

90L. Finalisation of an advance pricing agreement.—(1) If an applicant accepts a preliminary advance pricing agreement, the applicant must sign the agreement and return it to SARS.

(2) At least two senior SARS officials and the competent authority of South Africa must sign the preliminary advance pricing agreement after subsection (1) has been complied with.

(3) The competent authority of the country that will be party to the agreement must sign the preliminary advance pricing agreement after subsections (1) and (2) have been complied with.

(4) An advance pricing agreement will only come into effect after subsections (1), (2), and (3) have been complied with.

(5) SARS must send the advance pricing agreement to the applicant and the competent authority of the country that is party to the agreement.

90M. Compliance report.—(1) An applicant must submit a compliance report to SARS within 60 days from the end of a tax period that falls within the duration of an advance pricing agreement or from the date on which an advance pricing agreement is terminated.

(2) The compliance report must be in the prescribed form and manner and include the following in respect of the latest tax period—

- (a) the applicant's affected transactions;
- (b) confirmation that the circumstances in the advance pricing agreement application have not changed subsequent to submitting the application;
- (c) a demonstration of compliance with the terms and conditions of the advance pricing agreement; and
- (d) confirmation that the critical assumptions in the advance pricing agreement have been complied with.

90N. Extension of an advance pricing agreement.—(1) An applicant may request SARS to extend an advance pricing agreement not less than 60 days before the date on which the agreement is due to expire.

(2) Where the facts and circumstances have not changed materially from the advance pricing agreement application, SARS may grant the extension for a defined period that does not exceed three years.

(3) For subsection (2) to apply, the applicant must make a declaration in the prescribed form and manner that includes the following—

- (a) there have been no material changes in the facts and circumstances underlying the advance pricing agreement that is due to expire and the critical assumptions remain valid and relevant; and
- (b) all terms and conditions of the existing advance pricing agreement have been complied with.

(4) The applicant must inform SARS of any changes that need to be taken into account in the extended advance pricing agreement such as—

- (a) updated studies, analyses, and supporting documents;
- (b) changes that have occurred in the facts, circumstances, or critical assumptions underlying the advance pricing agreement; or
- (c) subsequent economic, technical, product, or industry developments that were not taken into account in the existing advance pricing agreement.

(5) Sections 90G, 90H, 90I, 90J, 90K, and 90L will apply with the necessary changes for the extension of an advance pricing agreement.

(6) SARS may reject a request to extend an advance pricing agreement and may direct the applicant to submit a new application under section 90G.

90O. Termination of an advance pricing agreement.—(1) A party to an advance pricing agreement may choose to terminate the agreement by informing the other parties to the agreement of the reasons for the termination.

(2) SARS may terminate an advance pricing agreement retrospectively if—

- (a) the applicant has not yet commenced the affected transaction or has not yet incurred significant costs in respect of the transaction;
- (b) a person other than the applicant will suffer a significant tax disadvantage if the agreement is not withdrawn or modified retrospectively and the applicant will suffer comparatively less if the agreement is withdrawn or modified retrospectively;
- (c) the effect of the agreement will materially erode the tax base of South Africa and it is in the public interest to withdraw or modify the agreement retrospectively;
- (d) an affected transaction was carried out in a materially different manner from that disclosed in the application;
- (e) there is a breach of any of the critical assumptions or any condition on which the agreement is based
- (f) the applicant failed to comply with the terms and conditions of the agreement; or
- (g) there is fraud, misrepresentation or non-disclosure of a material fact by the applicant.

(3) An advance pricing agreement will be terminated if—

- (a) there is an amendment to the legislation on which the agreement is based in which case the agreement will cease to be effective from the date of the amendment unless the general interpretation upon which the advance pricing agreement was based is unaffected by the amendment (or SARS issues a notice to the contrary);
- (b) a court overturns or modifies an interpretation of the legislation on which the agreement is based in which case the agreement will cease to be effective from the date of judgment unless—
 - (i) the decision is under appeal;
 - (ii) the decision is fact-specific and the general interpretation upon which the agreement was based is unaffected; or
 - (iii) the reference to the interpretation upon which the agreement was based was *obiter dicta*;
- (c) there is a change to the agreement for the avoidance of double taxation on which the agreement is based unless the general interpretation upon which the agreement was based is unaffected by the change (or SARS issues a notice to the contrary).

(4) Any party to an advance pricing agreement must inform other parties to the agreement within 30 days of becoming aware of a condition in subsection (2) or subsection (3) that will result in the termination of the agreement.

(5) SARS must inform all parties to an advance pricing agreement of the effective date from which the agreement has been terminated.

90P. Record retention.—(1) In addition to obligations under a tax Act, an applicant must maintain books of account, records or documents that will enable SARS to determine the extent of the applicant's compliance with the advance pricing agreement.

(2) Information requested by SARS with regard to compliance with this Part must be made available to SARS within 30 days of receipt of the written request.

(3) If additional time is required to submit the information requested in subsection (2), SARS may grant one extension not exceeding 30 days.

90Q. Procedures and guidelines.—The Commissioner may by public notice specify procedures and guidelines for the implementation and operation of the advance pricing agreement system.

4. Proposed process model

The envisaged high-level process flow through the various stages is as follows:

- 4.1. **APA Pre-application** (entry point for all new applications – outbound & inbound): includes a request for an APA pre-application consultation; payment of the pre-application consultation fee; initial screening; pre-application consultation; initial indication of quantum of cost recovery fees; and the decision by SARS as to whether or not an APA application may be made.
- 4.2. **APA Application** (entry point for extensions, amendments & re-negotiations): includes the submission of the formal APA application; payment of the application fee; and initial screening of the APA application to determine the completeness and acceptability of the application.
- 4.3. **APA Processing**: includes allocation of the case to an APA team; comprehensive examination and analysis of the application; engagement with the applicant (as required) on any relevant aspect (including fees); regular progress reports and fee invoices; establishing and approval of the SARS position and parameters for negotiation with foreign tax authority; and drafting of a preliminary advance pricing agreement.
- 4.4. **APA Negotiations**: includes negotiations with the foreign tax authority in order to reach agreement in respect of the preliminary advance pricing agreement (including amendments where required); sending the preliminary advance pricing agreement and invoices to the applicant; allowing input by the applicant in respect of the agreed preliminary advance pricing agreement (including allowing amendments where in scope); and the decision by applicant whether or not to proceed to signature.
- 4.5. **APA Finalisation**: includes payment of any outstanding fees based on invoices (whether proceeding or not); signature by applicant of the final preliminary advance pricing agreement; signature by SARS of the preliminary advance pricing agreement; signature by the foreign tax authority of the preliminary advance pricing agreement; and dissemination of signed APA agreement to all relevant parties.
- 4.6. **APA Implementation & Monitoring**: APA holder implements APA and submits an APA compliance report after the end of each period; APA unit conducts a compliance review and, if necessary, audit after receipt of the compliance report; APA holder to correct any non-compliance; APA unit to initiate amendment / termination procedures (whichever is relevant) in case of continued non-compliance or fraud / misrepresentation.
- 4.7. **APA Termination / Amendment / Extension**: includes the APA amendment and re-negotiation process (necessitated by changes in law, or initiated by APA holder when there is a change in circumstances); the APA termination process (necessitated by fraud, misrepresentation, non-compliance, unwillingness by APA holder to amend APA when law changes, or the APA reaches the end of its term); and the APA extension process (initiated by the APA holder) with the necessary fees based on invoices.

