

**A COMPARATIVE STUDY OF INTERNATIONAL MODELS OF THE  
REGULATIONS IN RESPECT OF TAX PRACTITIONERS WITH THE  
EMPHASIS ON SOUTH AFRICA**

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- i -

## ABSTRACT

### **A COMPARATIVE STUDY OF INTERNATIONAL MODELS OF THE REGULATIONS IN RESPECT OF TAX PRACTITIONERS WITH THE EMPHASIS ON SOUTH AFRICA**

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The former Minister of Finance, Mr Trevor Manuel, announced in his 2002 budget speech that legislation would be implemented to regulate tax practitioners. In November 2002, a discussion paper was issued proposing a model for regulating the tax industry. Following various discussions and meetings between relevant parties, a revised draft bill was issued in June 2008. To date, Government has not promulgated this draft bill because the relevant parties have been unable to agree on the best model for regulating the tax industry in South Africa.

The purpose of this study was to compare the proposed South African model with various international models for regulating tax practitioners. The three other countries used in the comparison are Germany, the United States of America and Australia.

Three categories were identified as the focus of the comparison: the regulatory board; the registration requirements and duties of tax practitioners; and disciplinary matters applicable to tax practitioners.

After considering the relevant research, it can be concluded that there are many similarities between the proposed South African model and the Australian model. Certain applicable provisions exist in the United States of America model and the German model, but these are not necessarily the type of model acceptable to the South African tax authority. However, all the international models were compared and analysed contain provisions were found which could be incorporated into the South African model.

During this investigation, areas for further research were identified, which will go towards formulating a South African model acceptable to all relevant parties.

## OPSOMMING

# 'N VERGELYKENDE STUDIE VAN INTERNASIONALE MODELLE VAN DIE REGULASIES MET BETREKKING TOT BELASTINGPRAKTISYNS MET DIE KLEM OP SUID-AFRIKA

deur

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Die destydse Minister van Finansies, Mnr Trevor Manuel, het in sy begrotingsrede van 2002 aangekondig dat wetgewing geïmplementeer sal word vir die regulering van belastingpraktisyns. In November 2002 is 'n besprekings dokument uitgereik wat die model vir die regulering van belastingpraktisyns voorstel. Verskeie daaropvolgende gesprekke en vergaderings tussen die betrokke partye is gehou, waarna 'n hersiene wetsontwerp in Junie 2008 uitgereik is. Hierdie wetsontwerp is tot op datum nie deur die regering aanvaar nie as gevolg van die feit dat die betrokke partye nie tot 'n vergelyking kan kom oor wat die beste model vir die regulasie van belastingpraktisyns in Suid-Afrika moet wees nie.

Die doel van die studie was om verskeie internasionale modelle vir die regulering van belastingpraktisyns met die voorgestelde Suid-Afrikaanse model te vergelyk. Die drie lande wat in die vergelyking met Suid-Afrika gebruik is, is Duitsland, die Verenigde State van Amerika en Australië.

Drie kategorieë is geïdentifiseer waarop die vergelyking van die modelle fokus. Hierdie kategorieë is die beheerraad, registrasievereistes en pligte van belastingpraktisyns en dissiplinêre aangeleenthede van toepassing op belasting praktisyns.

Na al die navorsing in ag geneem is, kan die gevolgtrekking gemaak word dat daar baie ooreenkomste tussen die Suid-Afrikaanse voorgestelde model en die Australiese model bestaan. Sekere toepaslike bepalings bestaan in die Verenigde State van Amerika se model sowel as die Duitse model, maar hierdie modelle is nie noodwendig aanvaarbaar vir die Suid-Afrikaanse belastingowerheid nie. Al die internasionale modelle wat vergelyk en ontleed is bevat egter bepalings wat in die Suid-Afrikaanse model geïnkorporeer kan word.

Tydens die navorsing is gebiede geïdentifiseer vir verdere navorsing. Verdere navorsing in hierdie areas sal nodig wees om te help in die formulering van 'n Suid-Afrikaanse model wat aanvaarbaar sal wees vir al die betrokke partye.

## TABLE OF CONTENTS

1

BACKGROUND AND INTRODUCTION .....	1
1.1 BACKGROUND.....	1
1.2 PROBLEM STATEMENT .....	2
1.3 PURPOSE STATEMENT .....	3
1.4 RESEARCH OBJECTIVES .....	3
1.5 IMPORTANCE AND BENEFITS OF THE PROPOSED STUDY .....	4
1.6 DELIMITATIONS AND ASSUMPTIONS .....	4
1.6.1 Delimitations.....	4
1.6.2 Assumptions.....	5
1.7 DEFINITION OF KEY TERMS.....	5
1.8 RESEARCH DESIGN AND METHODS .....	7
1.9 CONCLUSION.....	7
REGULATORY BOARDS FOR TAX PRACTITIONERS.....	9
2.1 INTRODUCTION.....	9
2.2 SOUTH AFRICAN REVISED DRAFT BILL .....	9
2.3 GERMAN LEGISLATION .....	12
2.4 UNITED STATES OF AMERICA LEGISLATION.....	16
2.5 AUSTRALIAN LEGISLATION.....	17
2.6 CONCLUSION.....	20
REGISTRATION REQUIREMENTS AND DUTIES OF TAX PRACTITIONERS.....	22
3.1 INTRODUCTION .....	22
3.2 SOUTH AFRICAN REVISED DRAFT BILL .....	22
3.3 GERMAN LEGISLATION .....	27

3.4	UNITED STATES OF AMERICA LEGISLATION.....	29
3.5	AUSTRALIAN LEGISLATION.....	32
3.6	CONCLUSION.....	35
	DISCIPLINARY MATTERS APPLICABLE TO TAX PRACTITIONERS .....	36
4.1	INTRODUCTION .....	36
4.2	SOUTH AFRICAN REVISED DRAFT BILL .....	36
4.3	GERMAN LEGISLATION .....	42
4.4	UNITED STATES OF AMERICA LEGISLATION.....	43
4.5	AUSTRALIAN LEGISLATION.....	50
4.6	CONCLUSION.....	55
	SUMMARY OF FINDINGS .....	57
5.1	INTRODUCTION .....	57
5.2	REGULATORY BOARDS FOR TAX PRACTITIONERS .....	57
5.3	REGISTRATION REQUIREMENTS AND DUTIES OF TAX PRACTITIONERS .....	59
5.4	DISCIPLINARY MATTERS APPLICABLE TO TAX PRACTITIONERS.....	61
5.5	CONCLUSION.....	66
	CONCLUSION.....	68
6.1	INTRODUCTION .....	68
6.2	PROBLEM STATEMENT .....	68
6.3	CONCLUSION.....	69
6.3.1	Regulatory board for tax practitioners .....	69
6.3.2	Registration requirements and duties of tax practitioners.....	70
6.3.3	Disciplinary matters applicable to tax practitioners.....	71
6.4	LIMITATIONS.....	72
6.5	RECOMMENDATIONS FOR FURTHER RESEARCH.....	72
	LIST OF REFERENCES.....	73



## LIST OF ABBREVIATIONS

ATO:	Australian Taxation Office
German Tax Consultancy Service Act:	<i>Steuerberatungsgesetz</i> (1961)
Income Tax Act	Income Tax Act 58 of 1962
IRB:	Independent Regulatory Board
IRS:	Internal Revenue Service
Revised draft bill:	Revised Draft Bill: Regulation of Tax Practitioners Bill (2008)
SAICA:	South African Institute of Chartered Accountants
SAIPA:	South African Institute of Professional Accountants
SAIT:	South African Institute of Tax Practitioners
SARS:	South African Revenue Service
Tax Agent Services Act	Tax Agent Services Act 13 of 2009
TPB:	Tax Practitioners Board

## CHAPTER 1

### BACKGROUND AND INTRODUCTION

#### 1.1 BACKGROUND

The regulation of tax practitioners was first introduced in South Africa by Minister Trevor Manuel in his 2002 budget speech (National Treasury, 2002:70). According to Klue (2008:24), the main aim of the regulation was to achieve better compliance and to ensure that taxpayers received advice consistent with the legislation. At that stage the greatest problem was that the South African Revenue Service (SARS) said that a great deal of their time and resources was spent correcting errors made by a significant number of tax practitioners (South African Revenue Service, 2002:3). This unprofessional conduct on the part of tax practitioners could, in fact, have placed the taxpayer at risk of non-compliance or tax evasion.

In November 2002, in response to the budget speech, SARS (2002) issued a discussion paper proposing a model for regulating the tax industry. After consultations and meetings with the relevant stakeholders, it was decided that the regulations would be implemented in two phases. In the first phase, all tax practitioners would have to register with SARS by 30 June 2005 (SARS 2002). This phase would supply SARS with information on the practitioner's details, such as their qualifications, experience and contact details. The second phase would establish an independent regulatory board (SARS 2002). Following the comments and meetings with stakeholders, the Revised Draft Bill: Regulation of Tax Practitioners Bill (2008), was issued in June 2008, comment on which should have been submitted by July 2008.

Almost three years have passed and as yet Government has promulgated no legislation on the regulation of tax practitioners. The main reason is that no consensus with other professional bodies and stakeholders on the model of regulation could be reached (Hassan, 2009). Klue (2008:25) indicated another area of concern. An article by PriceWaterhouseCoopers (Klue, 2008:25) referred to the fact that "nowhere in the literature so far provided by the South African Revenue Service, on the regulation of tax

practitioners, is it expressly stated that one of the objectives is to subject tax practitioners to sanctions if they advise or assist their clients in relation to tax avoidance schemes”. The cause for concern in this statement is exactly what regulations SARS will attach once the regulation process has been decided on (Klue, 2008:25). These problem areas also caused concern as to the appropriateness of the SARS model to the South African environment. According to Du Plessis (2003:1), “the main purpose of the regulation of tax practitioners is to achieve a suitable equilibrium between loyalty to the tax system and the client”. These areas of concern will have to be addressed by the relevant parties before an agreed model can be introduced.

While research has been conducted on the different types of regulation (Thuronyi & Vanistendael, 1996:1-25), attention should be given to how the proposed model of regulation in South Africa will compare with international regulation models. The comparison could be helpful in formulating a model that would be best suited to the South African environment, as requested in the joint submission by various professional bodies in South Africa (Hassan, 2009). Thuronyi and Vanistendael (1996:1) are of the opinion that the position of tax practitioners cannot be determined if the country’s cultural, legal and economic systems are not also considered. If one country’s regulation process is efficient, this does not necessarily mean that it will be appropriate for another country. For this reason, one country cannot copy another’s specific model, as the economic, legal or cultural systems of the former would differ from those of the country being emulated.

Thuronyi and Vanistendael (1996:1-25) addressed many of the various existing types of regulation of tax practitioners. The different legislation and regulation models of the countries mentioned provide the background to the specific knowledge on the topic. In addition to this document, the legislation and regulations of, but not limited to, Australia, Germany, South Africa and the United States of America will also provide necessary background and knowledge.

## **1.2 PROBLEM STATEMENT**

Although almost nine years have elapsed since the ministerial announcement of discussion and revision of the regulation model for tax practitioners in South Africa, there

is still no consensus on the most suitable model. In comparing the present revised draft regulation bill with other international regulations and legislation, a better guideline could be established to formulate a regulation model that would be acceptable to all the relevant parties in South Africa.

According to Hassan (2009) and Retief (2007), the currently contentious issues are:

- the position of the relevant professional bodies in the regulation of tax practitioners;
- the procedures for creating an independent regulatory board that would regulate and provide services to tax practitioners;
- the position and function of the tax authority in the independent regulatory board;
- requirements for tax practitioners to report irregularities to the tax authority; and
- the academic qualifications and practical experience required to qualify for membership.

### **1.3 PURPOSE STATEMENT**

The main purpose of the study is to critically compare various international models regulating tax practitioners with the proposed South African model. Three categories of the Revised Draft Bill: Regulation of Tax Practitioners Bill (2008) has been selected to compare with the selected international countries legislation. The categories are:

- the regulatory board for tax practitioners;
- registration requirements for tax practitioners; and
- disciplinary matters applicable to tax practitioners.

### **1.4 RESEARCH OBJECTIVES**

The research objectives of this study are:

- to critically analyse literature on the topic in order to establish the theoretical construct of this study; and
- to compare various international models, applied to regulate tax practitioners, to the South African draft legislation.

## **1.5 IMPORTANCE AND BENEFITS OF THE PROPOSED STUDY**

Nine years have passed since the former Minister of Finance, Trevor Manuel, proposed the regulation of tax practitioners (National Treasury, 2002:70). Since then, no consensus has been reached on the model of regulation between the tax authority and the professional bodies, such as the South African Institute for Chartered Accountants (SAICA), the South African Institute for Professional Accountants (SAIPA), the South African Institute of Tax Practitioners (SAIT) and the Law Society of South Africa.

The study will therefore attempt to compare the regulation of tax practitioners in South Africa with regulations internationally. The study is also expected to provide guidelines on the best model for regulation of tax practitioners in South Africa.

## **1.6 DELIMITATIONS AND ASSUMPTIONS**

### **1.6.1 Delimitations**

The objective of this study is to critically compare international models regulating tax practitioners with the South African draft legislation. This study's literature review will be limited to legislation specific to the regulation of tax practitioners. Germany was selected for its approach to full regulation of tax practitioners and the United States of America for its partial approach to the regulation of tax practitioners (Thuronyi & Vanistendael, 1996:15). The Australian legislation, on the regulation of tax practitioners, will also be used for comparison, as it is assumed that there are similarities between its economic and legal policies and those of South Africa, both countries being former British colonies.

Secondly, the study will be limited to the requirements as set out in the legislation of each country, without any additional requirements by any other professional body of which the tax practitioner may be a member.

Thirdly, the study will, as far as possible, be limited to the regulation of accountants and those whose activities are similar to those of a tax practitioner.

Fourthly, the study will be limited to the legislation when accessed. Amendments following the date when the legislation was accessed will be ignored.

### 1.6.2 Assumptions

Leedy and Ormrod (2010:6) define an assumption as “a condition that is taken for granted, without which the research projects would be pointless”. It is therefore important to validate these assumptions to ensure a meaningful research proposal. The following basic assumptions are made in the proposed study:

- the Revised Draft Bill on the Regulation of Tax Practitioners(2008) will be enacted by the South African Government without any amendments;
- Germany follows a full regulation model for tax practitioners (Thuronyi & Vanistendael 1996:15-16);
- the United States of America follows a partial regulation model for tax practitioners (Thuronyi & Vanistendael 1996:16-17);
- the economic climate of Australia is similar to the economic climate of South Africa, so it can be assumed that the taxation laws of Australia are comparable with those of South Africa; and
- the need for tax practitioners and tax practitioner services will continue and expand.

### 1.7 DEFINITION OF KEY TERMS

The research necessitated use of a number of keywords: regulation, tax and practitioners. The following key terms have been defined for the purpose of this study and are set out below.

**Commissioner** is the Commissioner of South African Revenue Service (section 1 of the Revised Draft Bill: Regulation of Tax Practitioners Bill 2008).

**Minister** means, for the purpose of this study, the Minister of Finance for the relevant country or the Minister in charge of Finance for that specific country.

**Practise before the Internal Revenue Service** is defined in section 10(2)(4) of the Treasury Department Circular 230(4/2008) as all matters connected with a presentation to the Internal Revenue Service.

**Practitioner** means, for the purpose of this study, any person who practises in the tax profession.

**Regulation** is defined as: “[a] rule designed to control the conduct of those to whom it applies. Regulations are official rules, and have to be followed” (Investorwords, 2010).

**Tax** is defined as: “[a] fee charged (“levied”) by a government on a product, income or activity” (Investorwords, 2010).

**BAS agents** includes: “bookkeepers who prepare Business Activity Statements” (Smartcompany, 2010). (Australia).

**BAS service** is defined in section 90(10) of the Tax Agent Services Act (13/2009) as “a tax agent service that relates to:

- ascertaining liabilities, obligations or entitlements of an entity arising under BAS provision; or
- advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise or could arise under a BAS provision; or
- representing an entity in their dealings before the Commissioner; or
- a service that is provided in circumstances where the entity can be reasonably expected to rely on the service.”

**Federal tax chamber** can be defined according to section 85 of the *Steuerberatungsgesetz* (1961) as a corporation under public law formed by all the different chambers of tax accountants.

**Penalty units** are defined by section 4AA of the Crimes Act 12 of 1914 as AU\$100.

**Tax agent** means, in terms of section 32(1) of the *Steurberatungsgesetz* (1961), any person advising and submitting documents administered by taxation laws, in accordance of the provisions of the *Steuerberatungsgesetz* (1961).

**Tax chamber** includes tax agents or tax consultants in a specific area, who form a professional association (section 73 of the *Steuerberatungsgesetz* (1961)).

**Tax consultants** includes, in terms of section 49(1) *Steuerberatungsgesetz* (1961), limited liability companies, partnerships limited by shares, limited liability companies, general partnerships, limited partnerships and partnerships companies.

## 1.8 RESEARCH DESIGN AND METHODS

The purpose of the study is to compare various models of the regulation of tax practitioners. This non-empirical study will contain a review of available literature pertaining to the topic of the regulation of tax practitioners. The relevant legislation in selected countries will be reviewed and compared. Articles, comments and features written and conducted by leading institutions, academics and organisations will also be reviewed.

The strategy of the proposed non-empirical study can be described as a literature review. Mouton (2001:179) describes a literature review as “a study that provides an overview of scholarship in a certain discipline through an analysis of trends and debates”. The literature review will be central to the comparison between different models for regulating tax practitioners internationally. The review will provide a good understanding of how tax practitioners are regulated internationally and will offer information essential to comparing these regulations with the currently proposed South Africa model of regulation.

## 1.9 CONCLUSION

In Chapter 1, the research topic was introduced. It was established that the proposed bill to regulate tax practitioners in South Africa requires restructuring. Various concerns and issues with the current model proposed by SARS were highlighted. The study will give attention to three areas of the model:

- the regulatory board for tax practitioners;
- registration requirements and duties of tax practitioners; and
- disciplinary matters applicable to tax practitioners.

Chapter 2 will compare the establishment, objectives and power of an Independent Regulatory Board (IRB) for tax practitioners in South Africa with international legislation. Chapter 3 contains a review of the registration requirements and duties of tax practitioners in South Africa, and international legislation. Chapter 4 will examine the disciplinary action that can be taken against tax practitioners. Chapter 5 contains a summary of the findings, while the conclusions of this study are contained in Chapter 6.

## CHAPTER 2

### REGULATORY BOARDS FOR TAX PRACTITIONERS

#### 2.1 INTRODUCTION

In chapter 1 the research topic was introduced and three areas were identified, in the current proposed model issued by SARS, which will be compared and analysed with international legislation. This chapter will compare the establishment and working of the regulatory boards for tax practitioners, with the international legislation by the countries chosen for this study.

#### 2.2 SOUTH AFRICAN REVISED DRAFT BILL

Section 4 of the Revised Draft Bill: Regulation of Tax Practitioners Bill (2008)), states that an independent regulatory board (IRB) for tax practitioners must be established, which is subject to the provisions of both the Constitution of the Republic of South Africa (1996) and the Public Finance Management Act 1 of 1999. Sections 5 to 21 of the revised draft bill further set out the requirements and functions of the independent regulatory board. The sections are discussed below.

The objectives of the IRB are set out in section 5 of the revised draft bill. The independent regulatory board, either independently or in conjunction with another body, has to:

- guarantee that reasonable and necessary requirements are in place which an individual must fulfil in order to register as a tax practitioner;
- lay down continuing professional development requirements to ensure the continuance of competence; and
- ensure that the integrity of the profession is upheld.

In achieving these objectives the IRB will be obliged to:

- specify the minimum requirements regarding qualifications needed for registration as a registered tax practitioner;
- ensure that the standards of the qualifications and ethics are maintained;
- establish and preserve a register of different practitioners. The register must be available to the public;
- prescribe guidelines where an allegation or a charge of improper conduct can be investigated, punished if necessary, and publish the findings of the investigation in the press or publication of their choice;
- compile and publish a professional code of conduct;
- prescribe registration and annual fees and/ or charges for services rendered by the tax practitioners;
- publish a journal and issue newsletters or any other publication containing information and guidelines relating to the profession; and
- establish the timelines according to which the tax practitioner's accreditation with the Board must be renewed.

Section 7(1) of the revised draft bill states that, the IRB must consist of seven principal members appointed by the Minister. A notice should be published in the *Gazette* and in any national newspaper, inviting nominations for consideration for appointment as an independent regulatory board member. Section 7(2) of the revised draft bill, provides that appointments made by the Minister must, as far as possible, be representative of the population of South Africa. In order to be considered, a person must be available to serve on the IRB. In terms of section 7(4) of the revised draft bill at least three of the principal members must be tax practitioners registered under the revised draft bill and nominated by other registered tax practitioners. According to section 9 of the revised draft bill the independent regulatory board member's appointment will be valid for the period indicated, but may not exceed three years. The appointment may be extended but a member may not serve in excess of two uninterrupted terms of office.

The Minister is authorised in terms of section 7(6) of the revised draft bill, to appoint a SARS representative as a bystander to the IRB. This representative will have privileges equal to those of principal members, excluding voting rights. The representative may not serve on the investigating or disciplinary committees. Section 7(7) of the revised draft bill states that the IRB is authorised to request persons to serve in an advisory role and to take part in all events except that of voting.

In terms of section 11 of the revised draft bill, a person may not serve as a IRB member if he or she has previously been removed from an office of trust on account of misconduct, or has been convicted of theft, fraud, corruption, money-laundering, forgery, lying under oath or any other offence which involves dishonesty. If the person is an unrehabilitated insolvent who has at any time been declared unable to manage his own affairs, or has been convicted of inappropriate behaviour, he or she will be disqualified from being a member of the IRB. If the person is not a resident of the Republic of South Africa, he or she will also be disqualified from membership. Appointment as a IRB board member will terminate in terms of section 12 of the revised draft bill, if the appointment expires, the member resigns, the member is disqualified, the Minister terminates the appointment on the grounds of bad behaviour, inability or lack of skill, or if the member has not been present in two consecutive meetings of the IRB, without approval.

Section 13 of the revised draft bill states that the board members must convene no less than twice every calendar year or as often as circumstances require, on a date and at a venue as indicated by the IRB. The quorum for a meeting shall be more than 50% of its members permitted to vote at the specific meeting. (Section 14(2) of the revised draft bill.) Section 14(3-4) of the revised draft bill states that each board member, together with the chairperson attending the meeting, will have one vote. In the event of an equality vote the chairperson of the meeting has a subsequent and casting vote. Section 15(3) of the revised draft bill states that, any decision taken by the IRB will be valid, even if a person not permitted to act as member of the IRB, participated in the meeting.

The IRB may establish in terms of section 19(1) of the revised draft bill, committees for support in the execution of its tasks. The IRB may also at any time disband or rearrange any such committee. The following permanent committees have to be established:

- an investigating committee;
- a disciplinary committee;
- an education committee; and
- an ethics committee (section 19(2) of the revised draft bill.)

In terms of section 19(4) of the revised draft bill, the investigating and disciplinary committees must comprise of persons with the relevant and necessary legal knowledge. The disciplinary committee should be chaired by a retired judge or a senior advocate.

In terms of section 22 of the revised draft bill the following documents must be submitted, by the IRB, within six months of their financial year end:

- a copy of the audited financial statements;
- a list of registered practitioners on the last day of the financial year; and
- an overview of the achievements and performance of the committee and the IRB in respect of the relevant financial year.

If at least three principal members of the IRB are displeased with a decision taken by the IRB, they may, in terms of section 22(3) of the revised draft bill, communicate to the Minister their disagreement with that decision, together with their reason. The Minister may then request the IRB to provide him or her with its explanation and information regarding this matter.

Section 22(5) provides that the IRB must furnish advice on questions in connection with the tax practitioner's profession when requested by the minister or any person in the service of the state in charge of the administration of the act. This advice or information must be of public importance.

## **2.3 GERMAN LEGISLATION**

Sections 74 - 88 of the Steuerberatungsgesetz (1961)(German Tax Consultancy Service Act) provide that tax consultants and tax agents who act in a chief financial district or the

state government specified district have their own professional establishment, which will be known as a tax chamber. Accountants and agents who are registered under the German legislation will be the members of the tax chamber. If the person is not an accountant or tax agent, but is a director, manager or general partner in a tax consulting company, he or she will also be regarded as a member of the tax chamber.

The tax chamber must assist in the professional interests of their members as well as preserve and monitor their performance and professional duties. The tax chamber is responsible in particular for:

- advising the members on issues of ethics and training;
- mediating in disputes at the request of the members of the tax chamber;
- fulfilling the obligations incumbent upon the members, monitoring and managing the right to complaint;
- submitting a proposed list of honorary associate members in the professional courts of the State Justice;
- providing care facilities for accountants, tax agents and their survivors;
- giving advisory opinions requested by a court, a state tax authority or any other administrative authority in the country; and
- performing the assigned tasks, by law, in the field of vocational training (section 76 of the German Tax Consultancy Service Act).

A board of the chamber of tax advisors must be selected by the members of the tax chamber in terms of section 77 of the German Tax Consultancy Service Act and can be elected only out of the members of the tax chamber. The board of the tax chamber may set up more departments as they decide. Each department must consist of at least three members of the board (section 77(a)(2) of the German Tax Consultancy Service Act). The departments will be within the jurisdiction, rights and duties of the board. Each tax chamber shall develop its own statutes but the constitution will require the approval of the supervisory authority (section 78 of the German Tax Consultancy Service Act).

Members are obliged to pay contributions and fees as prescribed. Section 79(2) of the German Tax Consultancy Service Act provides that, the tax chamber may levy a fee on the use of specific facilities or activities or for official acts.

In cases of investigation the tax agent must appear before the tax chamber board, except when the tax agent feels this is in conflict with secrecy and professional duty (section 80 of the German Tax Consultancy Service Act). Section 80(2) of the German Tax Consultancy Service Act provides that, should the tax agent fails to appear before the tax chamber, a written warning must be forwarded to the tax agent by the Tax chamber, after which a fine will be levied.

In terms of section 81(1) of the German Tax Consultancy Service Act the board of the tax chamber may censure the conduct of a tax agent if obligations incumbent upon him by the regulations have been violated. The tax agent must first appear before the board of the tax chamber before a decision can be made. The decision can be appealed within one month of its being made. If the appeal is denied, it can be appealed in writing at the Regional Court. Any penalty will accrue to the specific Tax chamber. (Section 80(a) of the German Tax Consultancy Service Act.)

The board members, even after leaving the board, must maintain secrecy in relation to all people, as is provided for in section 83(1) of the German Tax Consultancy Service Act. These members are released from their obligation to secrecy if the evidence must be given as part of court proceedings or to authorities.

In terms of section 85 of the German Tax Consultancy Service Act, a Federal Chamber of Tax Advisors must also be formed by the tax chamber. This is a corporation under public law and a seat is determined according to the statutes. Section 85(3) of the German Tax Consultancy Service Act provides that the board of the Federal Chamber of Tax Advisors is elected by the statutes but the constitution requires the approval of the supervisory authority.

The Federal Chamber of Tax Advisors has to fulfil the task assigned to it by the law, and is responsible in particular for:

- deciding on issues that address the totality of the tax appeal to determine the opinion of each house and by means of community debate and determine the view of the majority;
- adopting and amending the statute to uphold professional discipline;
- establishing guidelines for welfare institutions of tax appeals;
- effecting the view of the Federal Chamber of Tax Accountants in all tax appeals matters;
- representing the totality of tax appeals before the authority and organisations;
- giving advisory opinions in legislative drafting to Federal Courts and the Federal Government; and
- promoting vocational training in the tax consulting industries (section 86 of the German Tax Consultancy Service Act).

Section 86(a) of the German Tax Consultancy Service Act provides for the composition and functioning of the Statutory Assembly. The Statutory Assembly includes all members as well as the President of the Federal Chamber of Tax Advisors, the President of Tax advisors and other delegates. Each member of the Statutory Assembly is independent and has one vote. The Chairmanship of the Statutory Assembly is the President of the Federal Chamber of Tax Advisors, or, in his or her absence, his or her representative in office (section 86(a)(5) of the German Tax Consultancy Service Act). In terms of section 86(a)(6) of the German Tax Consultancy Service Act a quorum will be established if 66,6% of the members are present at the meeting. Once a quorum has been established, decisions by the Statutory Assembly on the adoption or amendment of the professional code are adopted by a majority vote of all members of the quorum.

According to section 87 of the German Tax Consultancy Service Act, contributions to the Federal Chamber of Tax Advisors are levied in accordance with a contribution order, and the number of contributions is fixed by the General Assembly. In terms of section 87(a)(1) of the German Tax Consultancy Service Act the Federal Chamber of Tax advisors shall establish a business plan and keep the accounting records according to the rules of commercial accounting and the requirements for Financial Statements.

The statutory authority responsible for financial management supervises the local chambers, while the Federal Minister of Finance has supervisory authority over the Federal Chamber of Tax Accountants. The supervisory role is limited to fulfilment of the laws and statutes.

## **2.4 UNITED STATES OF AMERICA LEGISLATION**

Regulations governing practice by tax practitioners in the United States of America are set out in the Treasury Department Circular 230(4/2008). The approach to regulation in the United States of America can be seen as partial (Thuronyi and Vanistendael (1996:16-17)).

Section 10(1) of the Treasury Department Circular 230 states that “a[n] Office of Professional Responsibility must be established in the Internal Revenue Service (IRS)”. The head of the Office of Professional Responsibility will be appointed by the Secretary of Treasury, and will be known as the Director of the Office of Professional Responsibility. In the absence of vacancy of office of the director an officer or employee of the Treasury department will act as director.

The duties of the director of the Office of Professional Responsibility are:

- to decide on applications for enrolment to practise before the IRS;
- to make inquiries with respect to matters under his or her jurisdiction;
- to institute and provide for conducting of disciplinary proceedings relating to practitioners and appraisers; and
- to perform the necessary or appropriate duties and functions as prescribed by the Secretary of the Treasury or a delegate (section 10(b) of the Treasury Department Circular 230).

Section 10.38 of the Treasury Department Circular 230 entitles the director to establish one or more advisory committees in order to maintain and improve public confidence in the industry. These committees must be composed of a minimum of five persons who have the authorisation to practise before the IRS. The director is obliged to make certain that

there is balance in the committee among persons practising as accountants, attorneys and enrolled agents. The advisory committee, under the guidance of the director of the Office of Professional Responsibility, may construct and re-assess recommendations on professional standards or best practices for tax practitioners.

Stromsem (2009:784) points out that the proposed bill, H.R.3216: Consumer Financial Protection Agency Act of 2009, would establish a Consumer Protection Agency to which the routine service of Certified Public Accounts would be subject. This agency also requires and applies the strict regulation of independent professional services, because the bill also includes tax planning and preparation.

## **2.5 AUSTRALIAN LEGISLATION**

The provisions for the establishment of the Tax Practitioners' Board (TPB) are provided for in Part Six of the Tax Agent Services Act 13 of 2009 (Tax Agent Services Act). Subdivisions 60-A to 60-F of the Tax Agent Services Act contains the provisions relating to the establishment of the, the appointment of board members and other administrative procedures. The TPB must comprise of a chairperson and six or more board members. The exercise of the powers of the TPB or the performance of functions is not affected by a vacancy in the membership of the TPB.

In terms of section 60-15 of the Tax Agent Services Act the duties of the tax practitioners' board are:

- to administer the registration structure for registered tax agents and BAS agents;
- to consider applications for registration and misconduct;
- to impose sanctions if the tax agents are in breach of the code of professional conduct; and
- to issue, by legislative instrument, guidelines to assist in achieving the abovementioned functions.

A board member is appointed by the Minister by written notification and the appointment may be on a full-time or a part-time basis (section 60-25(1) of the Tax Agent Services Act). The chairperson must also be appointed by the Minister. However, in terms of section 60-25(2) of the Tax Agent Services Act this person cannot be:

- a person who holds any office or appointment under a law of the Commonwealth; or
- a person appointed or engaged under the Public Service Act 147 of 1999.

If any irregularity or defect in connection with the appointment of a board member is detected, the appointment remains valid in terms of section 60-25(3) of the Tax Agent Services Act. A TPB member is appointed for a period of time, as specified in the appointment documents (section 60-30 of the Tax Agent Services Act). A full-time TPB member may not engage in paid employment outside the duties of his or her office without the Minister's approval. A part-time board member may not engage in paid employment that conflicts with the proper performance of his or her duties as a member of the TPB. (Section 60-45 of the Tax Agent Services Act.) A TPB member must give written notice, in terms of section 60-50 of the Tax Agent Services Act, to the Minister of any direct or indirect pecuniary interest that the board member has or acquires that may conflict with his or her proper performance as a board member.

A TPB member will be remunerated as determined by the Remuneration Tribunal. If no determination of remuneration is in operation, the board member is paid the remuneration and allowances prescribed by the regulations. Remuneration of members or an allowance is subject to the Remuneration Tribunal Act of 1973.(Section 60-35 of the Tax Agent Services Act.)

Resignation by a TPB member must be submitted by written notice to the Minister, specifying the date of resignation according to section 60-55(1) of the Tax Agent Services Act. Section 60-55(2) of the Tax Agent Services Act also provide that, the chairperson may resign from his or her position as chairperson without resigning as a member of the TPB. The appointment of a board member can be terminated by the Minister, in terms of section 60-60(1) of the Tax Agent Services Act, on the following grounds:

- misconduct or physical or mental handicap;

- the board member becomes bankrupt; or
- the board member applies to take the benefit of any law for the relief of bankruptcy or insolvent debtors; or
- the board member makes an assignment of his or her remuneration for the benefit of his or her creditors; or
- the board member fails to disclose his or her conflicting interests, as discussed above.

The Minister can, in terms of section 60-60(2) of the Tax Agent Services Act terminate the membership of a full-time board member if he or she is absent without leave for 14 successive days. If the board member is engaged in full-time paid employment outside his or her duties as a board member, this period will be extended to 28 days in any 12-month period. A part-time board member's appointment may be terminated in terms of section 60-60(3) of the Tax Agent Services Act, if the member is absent without leave for three successive meetings of the TPB, or if the board member engages in any paid employment that conflicts or may conflict with his or her proper performance of duties.

Section 60-70(1) of the Tax Agent Services Act provides that more than 50% of board members constitute a quorum at meetings. The chairperson presides at all meetings at which he or she is present. If the chairperson is absent, a board member who is present must preside over the meeting. This member may not be a person who holds office or appointment under a law of the Commonwealth or a person appointed or engaged under the Public Services Act 147 of 1999. If necessary, the chairperson will have the casting or deliberative vote. The TPB may control proceedings at its meetings as it considers fit.

A decision can be made outside a meeting only if the TPB determines that the decision can be made in this way and the majority of the board members indicate their agreement to the proposed decision. All members must be informed of the proposed decision, or reasonable efforts must be made to inform all the board members. Records must be kept of the decision made. (Section 60-75 of the Tax Agent Services Act.) In terms of section 60-80 of the Tax Agent Services Act the TPB is to be assisted by an Australian Public Service employee whose services are made available to the TPB by the Commissioner of the Australian Taxation Office (ATO).

The TPB may in terms of section 60-85(1) of the Tax Agent Services Act institute committees to help them carry out their duties. The committee is to consist of such persons as the TPB determines. In terms of section 60-85(2) of the Tax Agent Services Act, committee members are not obliged to be members of the TPB. Section 60-90 of the Tax Agent Services Act, states that the member of the committee, other than a TPB member, is to be remunerated as determined by the Remuneration Tribunal. If no determination is applicable, the member is to be paid remuneration and or allowances as prescribed by the regulations.

The chairperson must, as soon as possible after the end of the financial year, prepare and present to the Minister, for presentation to parliament, a report on the TPB's operations during that year (section 60-130 of the Tax Agent Services Act).

The TPB must establish and maintain a register of:

- registered tax agents and BAS agents; and
- each entity who was a registered tax agent or BAS agent and whose registration has been terminated other than because the entity surrendered the registration or because of a reason prescribed by the regulations (section 60-135(1) of the Tax Agent Services Act).

In terms of section 60-135(3) of the Tax Agent Services Act details of an entity who has been a registered tax agent or BAS agent must be kept on the register for a 12-month period, commencing on the day on which the registration was terminated. A register must be available for inspection on the internet. Section 60-135(4) of the Tax Agent Services Act provides that the TPB is obliged to issue a notice in the *Gazette* of their decision to terminate or suspend registrations.

## **2.6 CONCLUSION**

In this chapter, the establishment and duties of the different regulatory boards were discussed, comparing the proposed South African model with the international models. Although not all the countries used in the comparison provide specifically for a regulatory board independent of the tax authority, they each have some sort of regulatory authority.

Regulatory boards, independent of tax authorities, are provided for in South Africa, namely the Independent Regulatory Board and in Australia namely the Tax Practitioners Board. While the German and United States of America models provide for regulatory authority from the Government or relevant tax authority.

In Chapter 3, the registration requirements and duties of tax practitioners will be discussed, comparing the proposed South African model with the international legislation.

## CHAPTER 3

# REGISTRATION REQUIREMENTS AND DUTIES OF TAX PRACTITIONERS

### 3.1 INTRODUCTION

In the previous chapter, the establishment and workings of a regulatory board were discussed and a comparison was made between the proposed South African model and international legislation. It was established that in South Africa, the Independent Regulatory Board, Germany, the Tax chamber, in the United States of America, the Office of Professional Responsibility and on Australia the Tax Practitioners Board, should regulate the tax practitioner industry and uphold all the provisions of the legislation.

In this chapter, a review of those who can be regarded as tax practitioners will be conducted. This will refer to the respective countries' legislation as well as the registration requirements for the tax practitioners.

### 3.2 SOUTH AFRICAN REVISED DRAFT BILL

Any natural person engaged in the following activities is obliged to register with the IRB as a tax practitioner. These activities are as follows:

- providing advice to any other person in respect of the application of the any act administered by the Commissioner;
- completing or assisting in completing any document or return to be submitted to the Commissioner (section 23(1) of the Revised Draft Bill: Regulation of Tax Practitioners Bill (2008).

However, according to section 23(2) of the revised draft bill, these registration requirements do not apply to persons who:

- provide advice or complete any document for no consideration;

- provide advice or complete any document solely as supplementary to or a subordinate part of providing goods to another person, for no fee or consideration;
- provide the relevant services solely to or in respect of the employer and persons connected with the employer working according to a time basis under the direct supervision of a registered tax practitioner; and
- are licensed clearing agents as referred to in section 64B of the Customs and Excise Act 91 of 1964.

Section 24(1) of the revised draft bill provides that an individual, not yet registered and required to register as a practitioner must submit a written application to the IRB inside 30 days from the date on which the abovementioned requirement becomes applicable. The application for registration must be in the form and contain such information as prescribed by the IRB. A fee as prescribed must accompany the application. Currently, section 67A of the Income Tax Act 58 of 1962 requires that a person who has to register as a tax practitioner must do so with the Commissioner. Section 75(1)(aB) of the Income Tax Act also provides that a person who fails to register will be guilty of an offence and will be legally responsible on conviction to a fine or to imprisonment for a period of not more than 24 months.

Section 25(1) of the revised draft bill states that the IRB must approve the application to become a registered tax practitioner if they are satisfied that the applicant:

- complies with the appropriate qualification standards and experience as determined by the IRB;
- will comply with the professional conduct for registered tax practitioners determined by the IRB;
- is a fit and proper person;
- is ordinarily resident in the Republic;
- is not disqualified from registration by any provisions of the regulations of the Tax Practitioners Act once it has been promulgated by Government; and
- complies with any other requirements as determined by the IRB.

The IRB may, however, decline the application for registration, in terms of section 25(2) of the revised draft bill, if:

- the applicant has at any time been removed from an office of trust on account of misconduct;
- the applicant has at any time been convicted of fraud, theft, money-laundering, corruption, forgery, perjury or any other offence that may involve dishonesty, in respect of which the applicant has been sentenced to imprisonment without the option of a fine or to a fine exceeding an amount determined from time to time by the Minister;
- the applicant is an unrehabilitated insolvent;
- the applicant is for the time being declared by a competent court to be of unsound mind or unable to manage his own affairs;
- the applicant is disqualified or suspended from registration under a disciplinary or other measure imposed in terms of:
  - the act on Regulation of Tax Practitioners, once promulgated by the Government;
  - act of a statutory body as provided for in section 3(2) of the revised draft bill;
  - the Attorneys Act 53 of 1979; or
  - the Admission of Advocates Act 74 of 1964.

In terms of section 25(3) of the revised draft bill, the IRB can relax the qualification and experience standards as a transitional rule during the initial period of registration. Section 25(3)(b) of the revised draft bill provides that the IRB may register a tax practitioner referred to in section 3(2) of the revised draft bill, if all the information required by them, was submitted. Section 25(3)(a) of the revised draft bill provides that, if the IRB requires further deliberation on qualifications and experience, the tax practitioner may be allowed one year to operate as a registered tax practitioner. This period may be extended by the Minister. However, this will be allowed only if the tax practitioner has registered in terms of section 67A of the Income Tax Act or in terms of the requirements of the regulations of the Tax Practitioners Act, once it has been promulgated by Government and the tax practitioner has or will have carried on the profession of tax practitioner for a period of three years prior to the expiry of the period of temporary registration.

If the IRB approves the application for registration the applicant's name must be recorded in the register of registered tax practitioners. A certificate of registration must also be issued to the tax practitioner. (Section 26 of the revised draft bill.)

A registered tax practitioner may, in terms of section 27 of the revised draft bill, not knowingly employ any person who has, for the time being, been suspended from practice in terms of:

- the act on Regulation of Tax Practitioners, once promulgated by the Government;
- any act of a statutory body contemplated in section 3(2) of the revised draft bill;
- the Attorneys Act 53 of 1979; or
- the Admission of Advocates Act 74 of 1964.

Section 27(b) of the revised draft bill provides that the practitioner may also not consciously and in connection with the practice employ any person who has been removed from the register of registered practitioners because of inappropriate conduct.

In terms of section 27(c) of the revised draft bill the practitioner may not practise if any fees, as determined by the IRB under the regulations of the Tax Practitioners Act, once they have been promulgated by Government, are unpaid and may not take on employment in the practice of a registered practitioner during a period in which he or she may be suspended from practising. The practitioner must, according to section 27(f) of the revised draft bill carry out the accounting of any funds or assets received for or on behalf of a client or any other person when called upon to do so, and may not unreasonably delay this. In terms of section 27(d) of the revised draft bill the practitioner may not sign any document, statement or reports which represent an opinion or work performed by a registered tax practitioner, unless it was performed by a registered tax practitioner. However, section 27(2) of the revised draft bill states that, this will not apply to work performed:

- in terms of the personal supervision or direction of a registered practitioner or any other registered practitioner who is a partner, co-director, co-member or supervisor in relation to him;

- by another registered tax practitioner in a partially completed assignment which that other practitioner could not complete, owing to disability or other causes not under his or her control; or
- by a member of a professional body outside the Republic whose status, in the opinion of the IRB, is at least equal to the requirements of the IRB for the profession in the Republic of South Africa.

The terminated tax practitioner is obliged to act in agreement with any act administered by the Commissioner and the code of professional conduct as determined by the IRB regulating tax practitioners (section 28 of the revised draft bill.)

In terms of section 29 of the revised draft bill the registered practitioner must, inside 14 days of receipt of a written request from any person, furnish to that person his or her full names and surname along with the business address, details of the title under which he or she practises and the details of the place or places in which he or she practises. The registered tax practitioner must notify the IRB, in terms of section 30 of the revised draft bill, of any changes relating to his or her name and business address within 30 days of the changes being effected.

The IRB must terminate the registration of a practitioner if:

- the registration was made in error;
- the information supplied in the application is proved to be fraudulent and untrue;
- the practitioner becomes subject to any disqualifications as provided in section 25(2) of the revised draft bill; or
- the practitioner is guilty of improper conduct (section 31(1) of the revised draft bill).

In terms of section 31(2) of the revised draft bill the IRB may also withdraw the registration, as a tax practitioner, if the practitioner fails to settle any fee or levy thereof after it has become payable. Before any steps are taken to withdraw the registration, the IRB has to notify the practitioner in writing of their intention to withdraw the registration and must give their reasons.

In terms of section 31(3) of the revised draft bill the practitioner will have 30 days after receiving the notice regarding withdrawal of registration to respond to the IRB. According to section 32 of the revised draft bill the IRB must remove a registered practitioner from the register upon written request from the practitioner. As soon as practically possible after such a removal, the IRB must publish a notice concerning the removal in the *Gazette* or any official publication dealing with the tax practitioner profession and distributed nationally (section 33 of the revised draft bill.) Section 34 of the revised draft bill provides that even if the practitioner has been removed from the register, the IRB will retain the power to institute any disciplinary proceedings for matters committed before the removal.

### **3.3 GERMAN LEGISLATION**

According to section 1(1) of the *Steuerberatungsgesetz (1961)* (German Tax Consultancy Service Act) the legislation applies to persons providing assistance in matters covered by federal law, law of the European Communities or the parties to the Agreement on the European Economy in taxes and regulated fees to the extent that it is regulated by federal tax authorities or are managed by state tax authorities. The legislation also applies to matters affecting real estate transfer taxes as well as in matters concerning state law pursuant to an authorization of land taxation or in federal revenue from other managed or state fiscal matters.

In terms of section 1(2) of the German Tax Consultancy Service Act assistance in tax matters includes:

- providing assistance in criminal matters because of a tax offence;
- providing assistance in conducting books, accounting records and preparation of the financial statements which are used for taxation purposes; and
- providing assistance in the collection of a tax refund or compensation claims.

Section 3 of the German Tax Consultancy Service Act states that the following are entitled to provide professional assistance in tax matters:

- accountants, tax agents, lawyers;
- tax consulting firms, law firms and accounting firms; and

- partnership companies as long as all the partners are people mentioned above.

Persons who are practitioners in another European Union member state and are allowed to render assistance in that state will be permitted to temporarily assist in tax matters in Germany. Advertising directed at obtaining a contract to provide professional assistance in tax matters is prohibited by section 8(2) of the German Tax Consultancy Service Act. Section 8(4) of the German Tax Consultancy Service Act provides that the practitioners may, however, refer to their ability to give professional assistance in tax matters in their advertising. According to section 9(a)(1) of the German Tax Consultancy Service Act the person giving tax assistance may under no circumstances receive commission on the work he or she performs and is also prohibited from levying fees on the level of output when a case succeeds.

Section 35(1) of the German Tax Consultancy Service Act provides that tax practitioners may be appointed only if they have passed the examination for tax practitioners or have been exempted from examination. In terms of section 35(4-5) of the German Tax Consultancy Service Act the examination may be completed twice and admission to the examination is administered by the particular tax chamber. In order to qualify for the examination, the candidate must have completed the relevant university study and must thereafter have had practical experience for at least three years, if the standard period of university studies was less than four years. A candidate will also be allowed to write the examination if he or she:

- has already passed an examination in a commercial occupation; or
  - has undergone training for 10 years; or
  - has passed the examination to qualify as a certified accountant; or
  - has undergone at least seven years' training as a tax specialist; or
  - is a tax official in the high civil service with at least seven years' practical experience.
- (Section 36(2) of the German Tax Consultancy Service Act.)

Section 158 of the German Tax Consultancy Service Act states that after consultation with the Federal Chamber of Tax Accountants, the Federal Government is authorized to issue provisions regarding:

- procedures for admission;
- re-evaluation regarding the examination principles;
- the procedure for retesting;
- procedures for the appointment of tax agents; and
- procedures for recognition as a tax consulting company.

In terms of section 66(1) of the German Tax Consultancy Service Act files and documentation must be held by the accountant or tax agent for a period of at least 10 years. Section 66(2) of the German Tax Consultancy Service Act provides that the accountant or tax agent may refuse to surrender the client's files and documents until all outstanding fees and expenses have been settled. According to section 67 of the German Tax Consultancy Service Act, independent accountants and tax agents must be adequately insured against any related liability against their work. In terms of section 69 of the German Tax Consultancy Service Act, tax firms and tax agents must appoint a representative if they are prevented from performing their duties for a period of longer than a month. The representative will have the same powers as the tax agent or tax consultant they represent.

### **3.4 UNITED STATES OF AMERICA LEGISLATION**

The following persons are regulated by the Treasury Department Circular 230(4/2008):

- attorneys who are not currently under suspension or disbarment from practice before the IRS;
- certified public accountants who are not currently under suspension or disbarment from practice before the IRS;
- enrolled agents;
- actuaries who are enrolled by the Joint Board for the Enrolment of actuaries pursuant to 29 U.S.C; and
- enrolled retirement-plan agents pursuant to this part who are not currently under suspension or disbarment.

Section 10.3(g) of the Treasury Department Circular 230 provides that the persons by not practise before the IRS, if such practise is in breach of section 203 and 205 of 18 U.S.C. These persons are as follows:

- officer or employee of the executive, legislative or judicial branch of the United States Government;
- officer or employee of the District of Columbia;
- a member of Congress; or
- resident commissioner.

Section 10.3(h) of the Treasury Department Circular 230 states that a officer or employee of the state, who is dealing with tax matters of the State are not allowed to practise before the IRS if in the course of his duties any facts or information relating to federal tax matters will be disclosed.

In terms of section 10.3(b) of the Treasury Department Circular 230 a certified public accountant must submit a written declaration, confirming that he or she is currently registered and qualified as a certified public accountant and has the power to represent the party or parties, before representing a party before the IRS. However, certified public accountants that are currently not under suspension or expulsion are not required to submit a written declaration when rendering written advice or covered opinions. This will, nevertheless, still be seen as a practice before the IRS. The same requirement is applicable to attorneys, the only difference being that the attorney must file a written declaration with the IRS that he or she is currently qualified as an attorney.

In terms of section 10.20(a)(1) of the Treasury Department Circular 230 a practitioner must, on proper and lawful request by a duly authorised officer or employee of the IRS, as well as the director of the Office of Professional Responsibility, promptly submit documentation and/ or information. When the practitioner believes in good faith and on reasonable grounds that the documents and/ or the information are privileged, he or she will be exempt from supplying the information. Section 10.20(2)(c) of the Treasury Department Circular 230 states that the practitioner may not deliberately hinder or attempt to hinder any effort of the IRS or director of the Office of Professional Responsibility to obtain the information or records. In terms of section 10.21 of the Treasury Department

Circular 230 a practitioner who knows that a client has not complied with the revenue laws or has omitted any information from the returns, documents or affidavits must inform the client of such non-compliance and of its consequences.

The practitioner must exercise due diligence in the preparation and representation of any return, document or affidavit, or other paper submitted to the IRS. Due diligence must also be exercised in the preparation of written or covered opinions. The practitioner will be assumed to have exercised due diligence if he or she relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training and evaluating that person.(Section 10.22 of the Treasury Department Circular 230.) The practitioner may not knowingly accept assistance from any person who is currently under disbarment or suspension from practising before the IRS or a former government employee where the provisions of section 10.25 of the Treasury Department Circular 230 or any federal law will be dishonoured.

In terms of section 10.25(2) of the Treasury Department Circular 230 no former Government employee who personally participated in a particular manner involving specific parties or subsequently did so may represent the parties before the IRS. Section 10.25(3) of the Treasury Department Circular 230 states that if a Government employee was involved in a specific matter, within one year before termination of employment, he or she, may not represent any party, within two years after terminating employment with the Government. Section 10.29(a) of the Treasury Department Circular 230 a practitioner may not represent an individual before the IRS if the representation is going to involve a conflict of interest.

A practitioner may not, in terms of section 10.26 of the Treasury Department Circular 230 take acknowledgements, administer oaths, certify papers or perform any official act as a notary in respect of any matter administrated by the IRS and for which the practitioner is employed as agent, attorney or accountant.

A practitioner is not allowed to levy an unconscionable fee in connection with any matter before the IRS. A practitioner may not charge a contingency fee for service rendered in connection with any matter before the IRS, except for the following cases:

- services rendered in connection with the service examination of or challenge to and original or amended return; or
- services rendered in connection with a claim for credit or refund filed solely in connection with the determination of statutory interests and penalties assessed by the IRS(section 10.27(2) of the Treasury Department Circular 230).

### **3.5 AUSTRALIAN LEGISLATION**

The regulations on the eligibility of registration and other requirements are set out in Part 2 of the Tax Agent Services Act 13 of 2009 (Tax Agent Services Act).

A person who provides tax services for a fee or is engaged in other conduct connected with providing such services is obliged to register in accordance with section 20-1 of the Tax Agent Services Act.

An individual aged 18 years and older is entitled to registration as a registered tax agent or BAS agent if the TPB is satisfied that:

- the individual is a fit and proper person;
- the individual meets the requirements prescribed by the regulations in respect of registration as a registered tax agent or BAS agent;
- an individual in the capacity of the trustee of a trust can also be registered (section 20-5(1) of the Tax Agent Services Act).

A partnership is eligible for registration if the TPB is satisfied that each partner complies with the requirements of an individual wanting to register. A company is allowed to register as a registered tax agent or BAS agent if the TPB is satisfied that:

- the director is a fit and proper person;
- the company is not under external administration; and
- the company has not been convicted of a serious tax offence or an offence involving fraud or dishonesty during the previous five years; and

- the company has a sufficient number of individuals registered as tax agents of BAS agents (section 20-5(2) of the Tax Agent Services Act.)

Section 20-10 of the Tax Agent Services Act provides that “the regulations may provide for a system to allow the TPB to accredit professional associations for the purposes of recognising professional qualifications and experience that are relevant to the registration of individuals as registered tax agents and BAS agents”.

In terms of section 20-15 of the Tax Agent Services Act the TPB must have regard to the following when deciding whether an individual is fit and proper:

- whether the individual is of good reputation, integrity and character;
- the person has been convicted of a serious tax offence;
- the person has been convicted of an offence involving fraud or dishonesty;
- the individual has been penalised for promoting a tax exploitation scheme;
- the individual has been an undischarged bankrupt or has gone into external administration; or
- the individual has been sentenced to a term of imprisonment.

Section 20-20 of the Tax Agent Services Act states that the application must be in a form approved by the TPB and the application for registration or renewal must be accompanied by any documents required by the TPB, as well as the prescribed application fees. The TPB has to transfer the application fee to the Commissioner of the Australian Taxation Office (ATO), who receives the fee on behalf of the Commonwealth.

The TPB must decide, in terms of section 20-25(2) of the Tax Agent Services Act, on the application within six months of receiving it. According to section 20-25(3) of the Tax Agent Services Act the TPB is taken to have rejected the application if it has not made any decision within six months. However, this decision will not apply if it is an application for renewal of the registration. Section 20-25(4) of the Tax Agent Services Act the TPB will decide on the period in which the registration will be valid on approval of the application. The period must be for at least three years.

In terms of section 20-25(5) of the Tax Agent Services Act the TPB can, if it considers it appropriate, impose certain conditions to which the registration is subject. Section 20-30(1) of the Tax Agent Services Act provides that the TPB must notify in writing, within 30 days, of its decision to grant or reject an application. This notification must include the reasons for rejection or the period of registration and any condition subject to registration, on approval of the application. Section 20-35 of the Tax Agent Services Act state that the registration will commence, if it is a renewal, on the day after the previous registration expires, or, in the case of a new registration, on the day specified in the written notice.

Section 20-50(1) of the Tax Agent Services Act provides that the application for renewal must be submitted to the TPB at least 30 days before the previous registration expires or within such time as the TPB may decide. In terms of section 20-50(2) of the Tax Agent Services Act the existing registration is set to continue until the TPB decides on the renewal of registration.

Section 40-5(1) of the Tax Agent Services Act provides that registration can be terminated if an event affecting the registration occurs, or the practitioner ceases to meet one of the registration requirements, or has breached a condition of registration.

If the TPB terminates the registration, the TPB must, in terms section 40-20(1) of the Tax Agent Services Act notify the tax agent, within 30 days of the decision to terminate, in writing of:

- the decision to terminate and the reason for the termination; and
- any determination of a period during which the practitioner will not be eligible for registration.

Section 40-20(3) of the Tax Agent Services Act provides that the Commissioner of the ATO must also be notified by the TPB of the decision to terminate the registration and their reason for the termination. If the TPB terminates the practitioner's registration, it may also prescribe, in terms of section 40-25(1) of the Tax Agent Services Act, a period, not exceeding five years, during which the practitioner may not apply for registration. However, this will not apply if the registration was terminated because:

- the practitioner surrendered his or her registration; or

- the practitioner becomes an undischarged bankrupt; or
- the practitioner goes into external administration (section 40-25(2) of the Tax Agent Services Act).

### **3.6 CONCLUSION**

From the literature reviewed in this chapter, it is clear that, in all the countries under consideration, any person providing assistance in tax matters, including the submission of any documents in accordance with any act administered by the tax authority, must register as a tax practitioner. According to German legislation, strict qualifications for registration as a tax practitioner are set out. The procedures of registration, the duties of the tax practitioners and the requirements set out by the relevant legislation in the South African model and the international legislation were compared.

In the next chapter, a review will be carried out on the disciplinary matters applicable to tax practitioners as provided for in the regulations.

## CHAPTER 4

### DISCIPLINARY MATTERS APPLICABLE TO TAX PRACTITIONERS

#### 4.1 INTRODUCTION

The previous chapters drew comparisons between the South African model and the international legislation for regulating tax practitioners, in order to establish the duties of the different regulatory boards and the registration requirements and duties of the tax practitioners. These chapters explained who could be regarded as a tax practitioner and who qualified as a member of the different regulatory boards of each country. It was important for these subjects to be discussed prior to the current chapter, as the relevant regulatory board enforce and uphold the regulations and oversees the investigative and disciplinary procedures.

This chapter will present an overview of the various disciplinary actions that can be taken against tax practitioners.

#### 4.2 SOUTH AFRICAN REVISED DRAFT BILL

If it is found in the course of a court proceeding that there is any *prima facie* case of improper conduct against a relevant tax practitioner, section 35(1) of the Revised Draft Bill: Regulation of Tax Practitioners Bill (2008) (Revised Draft Bill) provides that the court must direct to the IRB, a copy of the record of the proceedings relating to the particular conduct. Section 35(2) of the revised draft bill provides that whenever any official in a body charged with the regulation or supervision of any entity or profession sees that there is *prima facie* evidence of improper conduct by a registered tax practitioner, the official must report such conduct to the IRB, regardless of the provisions of any other law.

A matter brought against a registered tax practitioner must be:

- referred to the appropriate statutory body of the appropriate body or person contemplated in section 7(2) of the Admission of Advocates Act for investigation; or

- to the investigating committee established in terms of the regulations (section 36(c) of the revised draft bill).

Section 36 of the revised draft bill states that if the IRB:

- suspects, on reasonable grounds, that a tax practitioner has committed an act which may render him or her guilty of improper conduct;
- is of the opinion that any complaint or allegation of improper conduct made against a registered tax practitioner appears to be justified; or
- receives a report, as discussed above, of any improper conduct,

The investigating committee must, in terms of section 37 of the revised draft bill, at the request of the IRB, investigate the matter and obtain evidence as to whether, in the committee's opinion, the registered tax practitioner should be charged. The investigating committee must also indicate to the IRB the charge or charges that may be brought against the tax practitioner.

The investigating committee may not question the registered tax practitioner concerned unless the investigating committee informs the registered tax practitioner that he or she:

- has the right to be assisted or represented by another person; and
- is not obliged to make any statement, and that any statement made may be used in evidence against the tax practitioner (section 37(2) of the revised draft bill.)

In investigating a charge of improper conduct, the investigating committee may:

- subject to the Promotion of Access to Information Act 2 of 2000 or any other law, require the tax practitioner to produce to the committee any information, including but not limited to, any working papers, statements, correspondence, books or other documents that are under the control or supervision of the tax practitioner or other person, if they relate to the specific matter;
- inspect, and if the investigating committee considers it appropriate, retain such information;
- make copies of and take extracts from such information (section 37(3) of the revised draft bill).

Section 37(4) of the revised draft bill states that the investigating committee is entitled to the information, even if the tax practitioner is of the opinion that such information contains confidential information about the client. In terms of section 37(4) of the revised draft bill the investigating committee must, after the conclusion of the investigation, submit a report to the IRB containing their recommendations on the matter.

Once the investigating committee confirms that sufficient grounds exist to charge the tax practitioner, section 38(1) of the revised draft bill provides that the IRB must furnish a charge sheet to the tax practitioner by hand or registered mail.

The charge sheet must inform the tax practitioner charged:

- of the details and nature of the charge;
- that the tax practitioner must admit or deny the charges in writing;
- that the tax practitioner must submit, together with the admission or denial, an explanation of the improper conduct;
- of a reasonable period not exceeding 60 days within which that tax practitioner's plea must be submitted (section 38(3) of the revised draft bill).

Section 38(5) of the revised draft bill provides that the IRB must, on the abovementioned date, refer the charge and all relevant documents to the disciplinary committee to be dealt with.

Under this proposed act, the acquittal or conviction on a criminal charge of a tax practitioner by a court of law will not influence proceedings under a charge of improper conduct against the tax practitioner (section 38(6) of the revised draft bill).

In terms of section 39(2) of the revised draft bill the disciplinary committee must appoint a person to present the charge to the disciplinary committee. However, the committee may, at any time prior to the disciplinary hearing, terminate the appointment and replace the person if they are of the opinion that the person is not fulfilling his or her obligations.

This person may, during the hearing:

- lead evidence, cross-examine witnesses and advance arguments;
- question any person who has been subpoenaed; or
- call anyone to give evidence or to produce any information or documents in their possession which the person believes will have a bearing on the hearing (section 39(7) of the revised draft bill).

The disciplinary committee may, at any time during the hearing but prior to the conclusion of the hearing, amend the charge sheet on the grounds that an error exists in its formulation or because the charge was not properly articulated in the original charge sheet. The hearing may be attended only by persons who, in the opinion of the chairperson of the disciplinary committee, are necessary to the proper consideration of the complaint. (Section 39(3) of the revised draft bill.)

The disciplinary committee may *subpoena* any person who may be able to supply documents or information relating to the subject of the hearing, or any person who is in control of documents that have any bearing on the hearing (section 39(5)(a) of the revised draft bill).

In terms of section 39(6) of the revised draft bill these documents may be retained by the disciplinary committee for the duration of the hearing. These persons will have to appear before the committee at the time and place as specified in the subpoena. In terms of section 39(5)(b) of the revised draft bill the *subpoena* issued must:

- be in the prescribed form;
- be signed by the chairperson of the disciplinary committee; and
- be served on the person personally or by registered mail.

A witness who has been subpoenaed may not:

- without sufficient reasons fail to attend the hearing, at the time and place specified;
- refuse to be sworn in or to be affirmed as a witness;

- fail to answer all lawful questions fully and satisfactorily to the best of his or her knowledge and ability; or
- fail to produce any information or other documents in their possession or under their control which they have been required to produce (section 39(10)(a) of the revised draft bill).

Section 39(8) of the revised draft bill provides that during the hearing the tax practitioner charged:

- may be assisted or represented by another person in conducting the proceedings;
- has the right to be heard during the hearing;
- may call witnesses in support of the charge;
- may cross examine any person called as witness in support of the charge;
- may have access to any document produced in evidence; and
- may acknowledge, before the winding up of the investigation, that he or she is guilty of the charge.

In terms of section 40(1) of the revised draft bill the disciplinary committee will have 30 days after the hearing to decide whether or not the tax practitioner is guilty of improper conduct as charged. Section 40(2) of the revised draft bill provides that the disciplinary committee must take cognisance of any aggravating or mitigating circumstances and inform the tax practitioner and the IRB if they find the tax practitioner guilty of improper conduct.

The tax practitioner found guilty of improper conduct may:

- address the disciplinary committee in mitigation of sentence; and
- call witnesses to give evidence on his or her behalf in mitigation of the sentence. (section 40(3) of the revised draft bill).

If the tax practitioner admits guilt or is found guilty by the disciplinary committee, the disciplinary committee must either:

- caution or reprimand the tax practitioner;

- suspend the right to practise as a tax practitioner for a specific period; or
- cancel the registration as tax practitioner concerned and remove his or her name from the register(section 40(3)(a) of the revised draft bill).

The disciplinary committee may also, in terms of section 40 (3)(b) of the revised draft bill, impose more than one of the above sanctions on the tax practitioner. Section 40(4) of the revised draft bill provides that the disciplinary committee may order a person who admits guilt or has been found guilty of the improper conduct to pay all reasonable costs incurred by the investigating and disciplinary committees in connection with the hearing. The IRB may also, if it deems fit, publish the finding and sanction imposed on the tax practitioner (section 40(5) of the revised draft bill).

Section 40(6) of the revised draft bill provides that the IRB must give effect to the decision of the disciplinary committee. Where an order for cost had been made, the amount is recoverable by the IRB and must be paid into its funds. In terms of section 41 of the revised draft bill no regulations in this proposed act will influence the right of any professional body to take disciplinary action against the tax practitioner or any of their members in accordance with their constitution and regulations.

Section 3(2) of the revised draft bill provides that the provisions on the investigation of allegation of improper conduct, disciplinary proceedings and disclosure of information relating to the disciplinary matters, would not apply to a registered tax practitioner who:

- is a person who is registered, in terms of section 3 of the Auditing Professions Act 26 of 2005, with the Independent Regulatory Board for Auditors;
- is a person who is admitted and enrolled as an attorney, notary or conveyance by the court in terms of section 15, 17 or 18 of the Attorneys Act 53 of 1979;
- is a person admitted and authorised to practise as an advocate on the roll of advocates as provided for in Admissions of Advocates Act 74 of 1964; or
- is a person whose profession is regulated by law through a statutory body approved by the Minister and the details thereof are published in the *Government Gazette*.

### 4.3 GERMAN LEGISLATION

Any person who, without authorization, uses the term “tax consultant” or a similar term will be punishable up to €5000 (five thousand euro) in terms of section 160 of the *Steuerberatungsgesetz (1961)*(German Tax Consultancy Service Act).

Section 89 of the German Tax Consultancy Service Act provides that an accountant or tax agent who breaches his or her duties, at fault, will have *Berufsgerichtliche* (judicial) measures imposed. These *Berufsgerichtliche* measures are as follows:

- first, a warning;
- second, a reference;
- third, a fine of up to €50,000 (fifty thousand euro);
- fourth, suspension for a period of one to five years; and
- fifth, exclusion from the profession (section 90 of the German Tax Consultancy Service Act).

Section 93(1) of the German Tax Consultancy Service Act provides that where there is an investigation into breach of duty by the tax agent or accountant that does not justify exclusion from the profession, a limitation period of up to five years can be imposed.

The administration of justice appoints a judge selected from a proposed list of volunteer judges, submitted to the board of the State Tax Administration judges (section 99 of the German Tax Consultancy Service Act).

Section 106 of the German Tax Consultancy Service Act provides that at the start of the judicial proceedings, the accountant or tax agent may not be arrested or detained. In terms of section 108 of the German Tax Consultancy Service Act the board of the chamber of tax advisors and the accountant for the tax agent will be entitled to all the documents, evidence and written allegations applicable to the case.

Section 112 of the German Tax Consultancy Service Act provides that the local jurisdiction of the District Court, determined according to the location of the chamber of tax advisors of

which the accountant or tax agent is a member, heads the proceedings. The proceedings are initiated when the prosecutor files a written accusation with the district court (section 114 of the German Tax Consultancy Service Act).

In terms of section 115(1) of the German Tax Consultancy Service Act if the prosecution decides that no further action is required, they have to notify the board of the chamber of tax advisors of their decision and reasons. The Board of the Chamber of Tax Advisors can then appeal, in terms of section 115(2) of the German Tax Consultancy Service Act, the decision by filing a request with the public prosecutor within one month of receiving the notice.

Section 125(2) of the German Tax Consultancy Service Act provides that the court's verdict can be acquittal, conviction or termination. In terms of section 127(2) of the German Tax Consultancy Service Act the accountant or tax agent can appeal the verdict within one week of the delivery of the verdict. The appeal must be made in writing.

#### **4.4 UNITED STATES OF AMERICA LEGISLATION**

Paragraph 10.60(a) of the Treasury Department Circular 230 (4/2008) provides that if the director of the Office of Professional Responsibility becomes aware of the fact that an practitioner are in breach of any provisions of any law administered by the IRS, he or she may commence with proceeding to sanction the practitioner or reprimand the practitioner. These proceedings are instituted by the filing of a complaint against the relevant practitioner.

Paragraph 10.60(b) of the Treasury Department Circular 230 provides that if the director of the Office of Professional Responsibility becomes aware of a penalty that has been raised against an appraiser, under section 6701(a) of the Internal Revenue Code, the director may reprimand the appraiser or introduce a proceeding for debarment of the appraiser.

The practitioner may offer, in lieu of a proceeding, consent to be sanctioned in terms of section 10.61(1) of the Treasury Department Circular 230. The director of the Office of Professional Responsibility may, in his or her discretion, accept or decline the offer by the

practitioner to be sanctioned. In declining the offer, the director of the Office of Professional Responsibility may accept another offer if it contains different terms. The director of the Office of Professional Responsibility may accept or reject any offer submitted in response to the declination (section 10.61(2) of the Treasury Department Circular 230).

According to section 10.62(a) of the Treasury Department Circular 230 a complaint must name the respondent, provide a clear and concise description of the facts and law that constitute the basis of the complaint and must be signed by the director of the Office of Professional Responsibility. The complaint will be sufficient if it fairly informs the respondent of the charges so that the respondent can prepare a defence.

The complaint must also include the sanction sought by the director of the Office of Professional Responsibility against the practitioner. The duration of a suspension must also be stated, if this is the sanction considered by the director of the Office of Professional Responsibility (section 10.62(b) of the Treasury Department Circular 230).

The director of the Office of Professional Responsibility must, in terms of section 10.62(c) of the Treasury Department Circular 230 notify the respondent, together with the complaint, of the time for reply on the complaint, which must not be less than 30 days from the date when the complaint was served. Together with this notice, the name and address of the Administrative Law Judge with whom the reply must be filed, the name and address of the person representing the director of the Office of Professional Responsibility, to whom a copy of the reply must be filed, and a statement that a decision by default may be rendered against the respondent in the event that a reply is not filed by the respondent.

In terms of section 10.63(1) of the Treasury Department Circular 230 the complaint may be served on the respondent by way of registered mail or by way of a private delivery service. If registered mail was used, the returned post office receipt, signed by the respondent, will be proof of the complaint served.

Section 10.63(2)(ii) of the Treasury Department Circular 230 provides that if the registered mail is unclaimed or returned by the post office, the complaint can then be served on the

respondent by first class mail. In terms of section 10.63(3)(ii) of the Treasury Department Circular 230 if the complaint is served by way of a private delivery service, it can be made in person or by delivering the complaint at the respondent's business address. Proof of the complaint served on the respondent will be in the form of a written statement by the person delivering the complaint. The complaint can also be served in any other way as confirmed by the respondent. Section 10.63(d) of the Treasury Department Circular 230 states that "copies of the evidence in support of the complaint must be served upon the respondent within 10 days of serving the complaint".

The answer to the complaint against the respondent must be written and must contain a statement of the facts that constitute the respondent's grounds of defence. The respondent must specifically admit or deny each allegation set forth in the complaint. Each allegation not denied in the answer of the respondent will be deemed as admitted and will be considered proven. (Section 10.64(b) of the Treasury Department Circular 230.) The respondent is not permitted general denials in his response. Section 10.64(a) of the Treasury Department Circular 230 provides that the answer or response of the respondent must be filed, within the timeframe specified in the complaint, to the Administrative Law Judge. A copy must also be served on the director of the Office of Professional Responsibility.

Failure to submit an answer within the time prescribed will constitute an admission of the allegations of the complaint. The Administrative Law Judge will then make a decision by default without a hearing or further procedures (section 10.64(d) of the Treasury Department Circular 230).

Section 10.65 of the Treasury Department Circular 230 states that additional charged may be added, by the director of the Office of Professional Responsibility, providing that permission was given by the Administrative Law Judge, if:

- a material allegation of fact in the complaint is misleadingly denied in bad faith; or
- it becomes evident that the respondent as knowingly provided a false testimony during the proceedings.

According to section 10.65(b) of the Treasury Department Circular 230, the additional charges may be heard with the other charges, provided that the respondent is given due notice of the charges and is afforded reasonable time to prepare his or her defence against the charges.

The party filing a motion for extension of time, postponement of the hearing or any other dispositive or procedural motion must, in terms of section 10.68(a)(3) of the Treasury Department Circular 230, first contact the other party, inquiring whether they have any objection to the motion being filed. The other party is not obliged to submit a response to a motion unless they are ordered to do so. If the other party does not file a response it will be deemed that the party wishes to dispose of the motion (section 10.68(b) of the Treasury Department Circular 230).

Section 10.69(a)(2) of the Treasury Department Circular 230 provides that “the respondent may appear in person, be represented by a practitioner or be represented by an attorney who has not filed a declaration with the IRS”. According to section 10.69(a)(1) of the Treasury Department Circular 230, the director of the Office of Professional Responsibility may be represented in proceedings by an attorney or employee of the IRS.

In terms of section 10.70(a) of the Treasury Department Circular 230 the proceedings in the complaint for the sanction of a practitioner will be conducted by an Administrative Law Judge. The Administrative Law Judge will, in addition to his other powers, as discussed, also have authority to:

- administer oaths and affirmations;
- make rulings on motions and requests, which rulings may not be appealed prior to the close of a hearing;
- determine the time and place of the hearing and regulate its course and conduct; adopt and modify the rules of procedure;
- rule on offers of proof, receive relevant evidence and examine witnesses;
- take or authorise the taking of depositions or answers to request of admission;
- receive or consider oral or written arguments on facts and law;

- hold or provide for the holding of meetings for the settlement or simplification of the issues with consent of the parties;
- perform and take the necessary actions which are necessary or appropriate for an efficient conducting of the proceedings; and
- make decisions (section 10.70(b) of the Treasury Department Circular 230).

Section 10.72(a)(1) of the Treasury Department Circular 230 provides that an Administrative Law Judge will preside at the hearing on a complaint filed. The hearing must take place within 180 days after the answer has been submitted by the respondent. The Administrative Law Judge may, in the interest of justice, determine a later time when the hearing must be held (section 10.72(a)(2) of the Treasury Department Circular 230). The hearing will be recorded and transcribed and the testimony by witnesses will be taken under oath or verification. An evidentiary hearing must be held in all proceedings prior to the issuance of a decision by the Administrative Law Judge unless:

- the complaint is withdrawn by the director of the Office of Professional Responsibility;
- a decision is issued by default;
- a decision is issued because the respondent fails to be present at a conference;
- the respondent requests a decision on the written record without a hearing; or
- the Administrative Law Judge issues a decision disposing of a motion or rules on another motion that disposes of the case prior to the hearing (section 10.72(a)(3) of the Treasury Department Circular 230).

According to section 10.72(b) of the Treasury Department Circular 230 a party is allowed to present his or her case by oral or documentary evidence, to submit rebuttal evidence and to conduct cross-examination in the presence of the Administrative Law Judge. Each party shall file and serve upon the opposing party, prior to the hearing, a pre-hearing memo consisting of:

- a list of all proposed exhibits to be used;
- a list of proposed witnesses, including a synopsis of their expected testimony, or a statement that no witnesses will be called;

- identification of any proposed expert witnesses, a copy of any report prepared by the expert, including a synopsis of their expected testimony; and
- a list of undisputed facts (section 10.72(c) of the Treasury Department Circular 230).

Section 10.72(d)(1) of the Treasury Department Circular 230 provides that all reports and decisions of the Secretary of Treasury, or a delegate, including any report by the Administrative Law Judge, are available for examination within 30 days after the verdict becomes final. The Secretary of the Treasury may in terms of section 10.72(d)(3)(i) of the Treasury Department Circular 230, disclose any relevant returns and return information to any practitioner, appraiser or authorised representative for use solely in the proceedings. The use of such returns or information may be used only for the purpose of the proceedings, in respect of which the disclosure was made.

Section 10.72(3)(iv) of the Treasury Department Circular 230 states that “[w]hen providing returns or information the practitioner, appraiser or Secretary of Treasury will:

- redact identifying information of any third party and replace it with a code;
- provide a key to the coded information; and
- notify the practitioner, appraiser or authorised representative of the restrictions on the use of the information.”

If redaction of names, addresses and other identifying information of third party information may still permit indirect identification of any third party taxpayer, the Administrative Law Judge will issue a protective order to ensure that the information is available only to the relevant parties and not to the public. (Section 10.72(4)(i) of the Treasury Department Circular 230.)

If any party to the proceedings fails to attend the hearing, the party will be deemed to have relinquished the right to a hearing and the Administrative Law Judge is entitled to make his or her decision against the absent party by default (section 10.72(f) of the Treasury Department Circular 230).

The Administrative Law Judge should, in terms of section 10.76(a)(1) of the Treasury Department Circular 230, within 180 days after the conclusion of the hearing and the receipt of any proposed findings and conclusion timely submitted by the parties, enter a decision in the case. The decision must include a statement of findings and conclusions, as well as the reason or basis for making such findings, as well as an order of censure, suspension, disbarment, monetary penalty, disqualification or dismissal of the complaint.

Section 10.76(b) of the Treasury Department Circular 230 provides that if the verdict is suspension or censure for a period of less than six months, the Administrative Law Judge, in rendering findings and conclusions, will have considered if the allegation was proven by the evidence provided. Convincing and clear evidence and testimony that confirm the statement of facts, is a requirement if the sanction is a monetary penalty, disbarment or suspension of six months or longer

Section 10.76(c) of the Treasury Department Circular 230 provides that the Administrative Law Judge must present the decision to the director of the Office of Professional Responsibility, along with a copy to the respondent and both parties' authorised representatives, if applicable. In the absence of appeal, the decision will become the decision of the agency 30 days after the Administrative Law Judge's decision.

According to section 10.77(a) of the Treasury Department Circular 230 any party to the proceedings may file with the Secretary of the Treasury for an appeal of the decision by the Administrative Law Judge. The appeal must include a brief that states exceptions to the decision of the Administrative Law Judge, together with supporting reasons. The appeal must be filed in duplicate within 30 days of the decision by the Administrative Law Judge. The director of the Office of Professional Responsibility will supply a copy of the appeal to the relevant department at the Secretary of Treasury. A copy of the appeal must also be sent to the other relevant parties. If the director of the Office of Professional Responsibility files an appeal, he or she will provide a copy of the appeal and assure the respondent that an appeal has been filed. (Section 10.77(b) of the Treasury Department Circular 230.)

Section 10.79(a) of the Treasury Department Circular 230 provides that the respondent will not be able to practise before the IRS, until he or she is granted permission to do so by the director of the Office of Responsibility, if the final decision in the case against the practitioner is one of expulsion.

Section 10.79(b) of the Treasury Department Circular 230 provides that the practitioner will not be allowed to practise before the IRS if the verdict is one of suspension. The period of suspension will be mentioned in the verdict. The verdict may also state, that for a period after suspension any representations by the practitioner may be subject to conditions as prescribed by the director of the Office of Responsibility.

According to section 10.79(c) of the Treasury Department Circular 230, when the final decision in a case against the respondent is for censure, the respondent will be permitted to practise before the IRS, but the respondent's future representation may be subject to conditions.

The conditions which can be imposed, as mentioned above, are prescribed by the director of the Office of Professional Responsibility. These conditions will be imposed for a reasonable time, taking into consideration the gravity of the practitioner's violations. (Section 10.79(c) of the Treasury Department Circular 230.)

The director of the Office of Professional Responsibility may entertain a petition for reinstatement from any person disbarred from practice before the IRS or any other disqualified appraiser, after five years following the disbarment or disqualification. The practitioner may be reinstated only if the director of the Office of Professional Responsibility is satisfied that the practitioner's reinstatement will not be contrary to the public interest and that the practitioner is not likely to conduct himself contrary to the regulations. (Section 10.81 of the Treasury Department Circular 230.)

#### **4.5 AUSTRALIAN LEGISLATION**

In terms of Part 3 of the Tax Agent Services Act 13 of 2009 (Tax Agent Services Act), the code of professional conduct applies to any registered tax agent or BAS agent. The Code

of Professional Conduct regulates the personal and professional conduct of the tax agent and the TPB will take the necessary action if the Code of Professional Conduct is not adhered to.

If the TPB is satisfied that the tax agent has not complied with the Code of Professional Conduct, they may take one of the following steps:

- furnish the tax agent with a written warning;
- give the tax agent a specific order;
- suspend the tax agent;
- terminate the registration of the tax agent (section 30-15 of the Tax Agent Services Act).

Section 30-20 of the Tax Agent Services Act provides that the order the TPB can serve upon the tax agent can be one or more of the following actions:

- complete a training or education course;
- provide tax agent services under the supervision of a another tax agent, as specified by the order; or
- only provide tax agent services as specified by the order.

The TPB must in terms of section 30-20(2) of the Tax Agent Services Act notify the tax agent of the abovementioned orders through a written document which specifies the period of time within which the tax agent must complete the requirements of the order, as well as the period of time during which the order applies. If the tax agent fails to comply with the Code of Professional Conduct, the TPB may decide to suspend the tax agent. In terms of section 30-25(1) of the Tax Agent Services Act the TPB must inform the tax agent of the suspension by written notice.

Section 40-20 of the Tax Agent Services Act provides that if the TPB decides to terminate the tax agent's registration, they must notify the agent within 30 days of their decision. The notification must be in writing and the reasons for their decision as well as the period of the termination must also be specified in the notification. Section 40-20(2) of the Tax Agent Services Act provides that the effective date of termination will be specified in the notice,

which must be at least 28 days after the date of the notice. In terms of section 40-20(3) of the Tax Agent Services Act the TPB must also notify the Commissioner of the Australian Taxation Office (ATO) of their decision and the reasons for their decision. According to section 40-25(1) of the Tax Agent Services Act the TPB may decide on a period not exceeding five years, during which the tax agent is prohibited from reapplying for registration.

In terms of section 60-95(1) of the Tax Agent Services Act, the TPB may investigate:

- the practitioner's application for registration; or
- behaviour that may contravene the provisions of the act; or
- other matters that may be prescribed by the regulations.

Section 60-95(2) of the Tax Agent Services Act provides that the TPB must give two weeks' written notice of its decision to investigate the practitioner. The investigation will commence from the date of notice. In terms of section 60-95(4) of the Tax Agent Services Act the TPB is not bound by rules of evidence and will have full discretion as to the procedures of investigation. The TPB may, in terms of section 60-100(1) of the Tax Agent Services Act request the practitioner to give information that may be helpful in the investigation process, or to produce documents or anything else referred to in the notice. This request must be in writing. The practitioner must be given a period of at least 14 days, after the date of request in which to respond. (Section 60-100(2) of the Tax Agent Services Act.)

Section 60-105(1) of the Tax Agent Services Act states that a person may be requested to appear before the TPB for the purpose of the investigation or to produce the requested documents. In terms of section 60-125(3)(a) of the Tax Agent Services Act the TPB must make a decision on the outcome of the investigation within six months following the day on which the investigation commenced. A longer period can be determined by the TPB. Section 60-125(5) of the Tax Agent Services Act provides that the decision to postpone the decision must be done not later than two weeks prior to the six-month period. If no decision is made within this period, it will be taken that the TPB has decided to take no further action in relation to the investigation (section 60-125(7) of the Tax Agent Services Act).

If the TPB makes a decision regarding their investigation, it must notify in writing the following persons within 30 days of making the decision:

- the entity affected by the decision; and
- the complainant; and
- the Commissioner of the ATO if the finding is relevant to taxation laws (section 60-125(8) of the Tax Agent Services Act).

Section 60-125(9) of the Tax Agent Services Act provide that the reasons for the decision must be communicated in writing to the entity affected by the decision and, if the decision is applicable to the administration of the taxation laws, to the Commissioner.

If a person who provides a service that can be seen as a tax agent service for a fee or other reward and is not registered as a tax agent or BAS agent under the Tax Agent Services Act, he or she will be liable for a civil penalty, and a civil penalty order can be issued against that person. This civil penalty will be:

- for an individual, 250 penalty units; and
- for a corporate body, 1250 penalty units (section 50-5(1) of the Tax Agent Services Act).

A person who advertises that he or she provides tax agent services or BAS services but is not a registered in terms of the Tax Agent Services Act will also be liable for a civil penalty. This civil penalty will be:

- for an individual, 50 penalty units; and
- for a corporate body, 250 penalty units. (Section 50-10(1) of the Tax Agent Services Act.)

A person who falsely represents him- or herself as a registered tax agent or BAS agent will be liable for a civil penalty. This civil penalty will be:

- for an individual, 50 penalty units; and
- for a corporate body, 250 penalty units (section 50-15(1) of the Tax Agent Services Act.)

Section 50-20 of the Tax Agent Services Act provides that the tax agent will be in contravention of the act, if a false or misleading statement is made, by the tax agent or the tax agent prepare a statement that he or she know or should have known is likely to be made to the Commissioner, by a entity. The tax agent will be liable for civil penalties.

A tax agent will contravene the act and be liable to civil penalties if he or she knowingly employs or uses the services of an entity that is not a registered tax agent, but was previously registered, and the entity's registration was terminated within a year before the entity was first employed to provide tax agent services. This civil penalty will be:

- for an individual, 250 penalty units; and
- for a corporate body, 1250 penalty units (section 50-25 of the Tax Agent Services Act).

Section 50-25(2) of the Tax Agent Services Act provides that the civil penalties will not apply if the entity's registration was terminated or the entity became an undischarged bankrupt or went into external administration, or because of reasons prescribed by the regulations.

Section 50-30 of the Tax Agent Services Act states that a civil penalty of 250 penalty units will be obtained if registered tax agent signs a statement or document of a tax payer that is required by taxation laws and the document or statement was not prepared by:

- the tax agent;
- another registered tax agent; or
- an employee of the tax agent or another individual working under the supervision of another registered tax agent.

If the tax agent is a partnership or company the civil penalty will be 1250 penalty units.

The TPB may, in terms of section 50-35(1) of the Tax Agent Services Act, apply on behalf of the Commonwealth, within four years to the Federal Court for an order against the tax agent, if he or she contravened a civil penalty provision, to pay to the Commonwealth a pecuniary penalty. Section 50-35(2) of the Tax Agent Services Act provides that if the Federal Court is satisfied that a civil penalty provision has been contravened, the Federal

court may order the tax agent to pay to the Commonwealth, for each contravention, the pecuniary penalty that the Federal Court deems appropriate. Proceedings, in terms of section 50-35(3) of the Tax Agent Services Act, may be instituted against the tax agent in relation to the contravention of any one or more of the provisions. The tax agent will, however, not be liable for more than one pecuniary penalty in respect of the same conduct.

If a partnership contravenes a civil penalty provision, each partner at the time of the conduct constituting the contravention will be taken to have contravened the civil penalty provisions. The partner will not be held liable if he or she can prove, on the balance of probabilities, that he or she:

- did not engage in the conduct; and
- did not aid, abet, counsel or procure the conduct; and
- was not in any way knowingly concerned in, or party to, the conduct (section 50-40 of the Tax Agent Services Act).

The penalty payable, by order of the Federal Court, will be payable to the Commissioner of the ATO, who will receive the payment on behalf of the Commonwealth. The Commissioner of the ATO may, on behalf of the Commonwealth, enforce the order as if it were a judgement by the Federal Court. (Section 50-40 of the Tax Agent Services Act.)

#### **4.6 CONCLUSION**

In this chapter, the disciplinary matters applicable to the tax practitioners were compared between the South African model and international legislation and investigated. It was found that there had to be an act of improper conduct or violation of any act administered by the tax authority.

According to the South African Revised Draft Bill and the Australian legislation, an investigating committee and a disciplinary committee were specifically provided for. These committees will head the investigation and disciplinary actions, and will thereafter report back to the relevant regulatory board. The United States of America legislation provides for

a hearing to take place, which will be headed by an Administrative Law Judge. According to the German Tax Consultancy Service Act, the local jurisdiction of the District Court will conduct the proceedings.

The disciplinary actions which can be taken range from cautioning and reprimanding the tax practitioner to exclusion of the practitioner from the profession.

In the next chapter a summary of the literature reviewed and compared will be discussed.

The summary of findings will again be divided into the three categories:

- implementing of a regulatory board for tax practitioners;
- registration requirements for tax practitioners; and
- disciplinary matters applicable to tax practitioners.

## CHAPTER 5

### SUMMARY OF FINDINGS

#### 5.1 INTRODUCTION

The main purpose of the study was to compare various international models for regulating tax practitioners with the proposed SA model. The strategy used in comparing the different models was that of a non-empirical study, as legislation was the main literary source and was analysed for different trends in regulating tax practitioners. The regulation models were divided into three categories:

- the regulatory board for tax practitioners;
- registration requirements for tax practitioners; and
- disciplinary matters applicable to tax practitioners.

As a conclusion to the literature review conducted above, the main differences between the regulation of tax practitioners in South Africa, Germany, the United States of America and Australia are highlighted.

#### 5.2 REGULATORY BOARDS FOR TAX PRACTITIONERS

According to the South African Revised Draft Bill: Regulation of Tax Practitioners Bill (2008) and the Australian Tax Agent Services Act 13 of 2009, a board independent of the tax authority must be formed, namely the Independent Regulatory Board (IRB) in South Africa and the Tax Practitioners Board (TPB) in Australia. The IRB must consist of seven principal members appointed by the Minister. The South African Revised Draft Bill also provides for a representative of SARS to be on the IRB, but without voting rights. The main objectives of the IRB are to:

- guarantee that reasonable requirements are in place with which a person must comply in order to register as a tax practitioner;
- ensure continuance of competence on the part of the tax practitioner by establishing continuing professional development requirements;
- ensure that the integrity of the profession is upheld; and

- establish and manage permanent committees in the field of investigation, discipline, education and ethics (section 5 of the revised draft bill).

According to section 73 of the German Tax Consultancy Service Act, tax practitioners who act in a chief financial district or state government have their own establishment, known as a tax chamber. A board of the chamber of tax advisors must be selected from the members of the tax chamber. A Federal Chamber of Tax Accountants must also be formed, consisting of members of the tax chamber. The Federal Chamber is a corporation under public law, and will be elected by the different tax chambers. A statutory assembly will be compiled and will include the President of the Federal Chamber of Tax Accountants, the President of Tax Appeal and other delegates.

Although not specified in the South African revised draft bill, the establishment of a regional, a provincial and a national board will help in the administration of the day-to-day activities of the IRB.

According to United States of America legislation, the Treasury Department Circular 230 provides that an Office of Professional Responsibility must be established in the IRS. The director of the Office of Professional Responsibility will be appointed by the Secretary of the Treasury. The director will have to form advisory committees in order to improve and maintain public confidence in the industry, decide on applications for enrolment to practise before the IRS, and institute and provide disciplinary proceedings. According to the United States of America model, a board must be established inside the tax authority. It can therefore not be directly compared with the South African proposed model because that provides exclusively for an Independent Regulatory Board.

In the Australian legislation, Part 6 of the Tax Agent Services Act provides for a Tax Practitioners' Board (TPB), consisting of six members and a chairman. The TPB members and the Chairman will be appointed by the Minister and may not be persons who hold any office under the law of the Commonwealth or a person appointed or engaged under the Public Service Act. The Australian regulations also provide for an Australian public services employee, whose services will be made available by the Commissioner of the ATO, to the TPB, to assist the TPB. The duties of the TPB are mainly to:

- administer the registration structure;
- consider applications for misconduct and registration;
- impose sanctions, if the agent is in breach of the code of professional conduct; and
- issue legislative instruments in achieving the above (section 60-15 of the Tax Agent Services Act).

When it comes to the above, many similarities can be found between the proposed South African legislation and the Australian legislation. Although the proposed South African legislation provides that at least three members of the IRB must be registered tax practitioners, it does not state, as the Australian legislation does, that no bearer of office in the Commonwealth or person engaged in public service may serve on the TPB. The main concern for the tax practitioner is that a representative of the tax authority must also serve on the regulatory board. The role of the tax practitioner, however, differs from that of the tax authority, because the tax practitioner's loyalty will be to his client and not to the tax authority (Thuronyi & Vanistendael, 1996:1). This provision places a question mark over the independence of the relevant regulatory board, as its main aim must be to serve its members and not the tax authority.

### **5.3 REGISTRATION REQUIREMENTS AND DUTIES OF TAX PRACTITIONERS**

The registration requirements and duties of the tax practitioner were also researched. According to the South African revised draft bill, any natural person who provides advice completes or assists in completing documents for a fee, in application of the act administered by the Commissioner, must register as a tax practitioner. However, certain exclusions do exist relating to the requirements to register. No provisions are made for the registration of partnerships or companies, as in the Australian legislation.

According to section 25(1)(a) of the revised draft bill the IRB must approve an application if they are satisfied that the applicant complies with the appropriate qualifications, standards and experience. The IRB also have the power to relax the qualification and experience as a transitional rule during the registration period. Although the qualification standards and experience requirements have not been announced, the relaxation of standards could

affect the standards and levels of competence in the industry. The current professional bodies, such as SAICA, SAIPA and SAIT, are also not mentioned when it comes to relaxation during the initial registration period. These qualifications and experience criteria will probably be determined only once the revised draft bill has been promulgated by Government and the Minister has appointed the IRB.

The German legislation provides that a person assisting in tax matters will have to register as a tax practitioner. Tax practitioners may only be appointed once they have passed an examination or are exempt from examination. The examination may only be completed twice and admission to the examination will be administered by the particular tax chamber. One of the requirements for participation in the examination is a university degree with at least three years' experience, similar to requirements by accounting and auditing professional bodies in South Africa. A tax official of the high civil service with at least seven years' experience will also be allowed to register as a tax practitioner in Germany.

The main requirement, according to the United States of America legislation, is that the accountant, attorney, enrolled agent and enrolled actuaries are not currently under suspension or disbarment from practising before the IRS.

In Australia, the Tax Agent Services Act provides that a person who provides tax services for a fee or is engaged in other conduct connected with providing such services is obliged to register. Section 20(10) of the Tax Agent Services Act provides that the regulations may provide for a system to recognise the qualifications and experience of persons registered with other professional bodies.

According to the Australian legislation a period of registration will also be decided by the TPB after which the tax practitioner will have to reapply for registration. This could be important for the practitioner in maintaining the necessary knowledge and standards. The requirement is provided for in the South African revised draft bill as an obligation of the IRB to determine timelines within which a tax practitioner's accreditation to the IRB must be renewed.

## 5.4 DISCIPLINARY MATTERS APPLICABLE TO TAX PRACTITIONERS

The disciplinary matters applicable to tax practitioners were also researched.

According to the South African revised draft bill if the IRB suspects, on reasonable grounds, that a tax practitioner has committed an act which may render him guilty of improper conduct, or is of the opinion that any complaint or allegation against a tax practitioner is justified, they may investigate the tax practitioner (section 36 of the revised draft bill). The investigating committee may not question the tax practitioner unless they inform him or her of the right to be assisted or represented by another person and that he or she is not obliged to make any statement, as this statement could be used in evidence against him or her. The investigating committee may require the tax practitioner to produce any information they regard as necessary, even if the tax practitioner is of the opinion that the information contains confidential information about the client (section 37 of the revised draft bill).

Once the investigating committee confirms that there are sufficient grounds for the charge against the tax practitioner, they must furnish a charge sheet to the tax practitioner by hand or registered mail. The acquittal or conviction on a criminal charge of the tax practitioner by a court of law will not influence proceedings against the practitioner under the proposed act. (Section 38 of the revised draft bill.)

The IRB must then refer the charge sheet and all relevant documents to the disciplinary committee to be dealt with in terms section 39 of the revised draft bill. The disciplinary committee may, at any time during the hearing, but prior to conclusion of the hearing, amend the charge sheet. According to section 39(5)(a) of the revised draft bill the disciplinary committee may *subpoena* any person who may be able to give documents of information regarding the subject or any person in control of documents which have any bearing on the hearing.

According to section 40(1) of the revised draft bill the disciplinary committee will have 30 days after the hearing to decide whether or not the tax practitioner is guilty as charged. If

the tax practitioner is found guilty he may address and call witnesses to give evidence on his or her behalf, in mitigation of the sentence.

If the tax practitioner is found guilty of improper conduct the disciplinary committee must:

- caution or reprimand the tax practitioner;
- suspend the right to practise for a specific period; or
- cancel the tax practitioner's registration (section 40(3)(a) of the revised draft bill.)

According to the German Tax Consultancy Services Act, an accountant or tax agent who breaches his duties at fault will have judicial measures imposed. Any person who, without authority, uses the term "tax consultants", or any similar designation, will be punishable up to €5000 (five thousand euro) (section 160 of the German Tax Consultancy Services Act). In the case of an investigation into breach of duty by the tax agent or accountant which does not justify the exclusion from the profession, a limitation of five years could apply.

The local jurisdiction of the District Court determined by the seat of the tax chamber to which the accountant or tax agent belongs will conduct the proceedings (section 112 of the German Tax Consultancy Service Act). The Administration of Justice will appoint a judge from a proposed list of volunteer judges. The proceedings will be initiated by the prosecutor filing a written accusation with the district court (section 114 of the German Tax Consultancy Service Act).

If the prosecution decides that no further action is required, they have to notify the Board of Tax Appeal of their decision. In terms of section 125 of the German Tax Consultancy Service Act the verdict by the court could be one of acquittal, conviction or termination. The tax agent or accountant can appeal the verdict, in terms of section 127 of the German Tax Consultancy Service Act, within one week of the delivery of the verdict.

According to the Treasury Department Circular 230 of the United States of America, the director of the Office of Professional Responsibility can institute sanctions proceedings against the tax practitioner, if the director becomes aware of any violation of any provisions of the law governing practice before the IRS.

In terms of section 10.62(a) of the Treasury Department Circular 230, the complaint must name the respondent, provide a clear and concise description of the facts and the law that constitutes the basis of the complaint and must be signed by the director of the Office of Professional Responsibility. The complaint must also include the sanction sought by the director of the Office of Professional Responsibility as well as the period of sanction.

The director of the Office of Professional Responsibility must, in terms of section 10.62(c) of the Treasury Department Circular 230, notify the respondent, together with the complaint, of the time for reply on the complaint, which must not be less than 30 days from the date when the complaint was served. The answer must contain the fact that constitutes the grounds of defence. The respondent must specifically admit or deny each allegation set forth in the complaint. This answer or response must be filed with the Administrative Law Judge and served upon the director of the Office of Professional Responsibility. Failure to submit an answer in time will constitute admission of the allegations. The director of the Office of Professional Responsibility may file additional charges by amending the complaint with the permission of the Administrative Law Judge.

According to section 10.70(a) of the Treasury Department Circular 230 an Administrative Law Judge will preside at the hearing. The hearing must take place within 180 days after the answer has been submitted by the respondent. The Administrative Law Judge should, within 180 days after the conclusion of the hearing and the receipt of any proposed findings and conclusion timely submitted by the parties, enter a decision in the case. The decision must include a statement of findings and conclusions, as well as the reason or basis for making such findings, as well as an order of censure, suspension, disbarment, monetary penalty, disqualification or dismissal of the complaint.

The Administrative Law Judge should, within 180 days after the conclusion of the hearing and the receipt of any proposed findings and conclusion timely submitted by the parties, enter a decision in the case. The decision must include a statement of findings and conclusions, as well as the reason or basis for making such findings, as well as an order of censure, suspension, disbarment, monetary penalty, disqualification or dismissal of the complaint. Any party may file an appeal to the Administrative Law Judge within 30 days of the decision.

In terms of Part 3 of the Tax Agent Services Act of Australia, the code of professional conduct, will apply to any registered tax agent or BAS agent. The TPB can take one of the following steps if they are satisfied that the agent has not complied with the Code of Professional Conduct:

- furnish the tax agent with a written warning;
- give the tax agent a specific order;
- suspend the tax agent; or
- terminate the tax agent's registration (section 30-15 of the Tax Agent Services Act.)

Section 30-20 of the Tax Agent Service Act provides that the TPB can give the following specific orders if the tax practitioner has not complied with the Code of Professional Conduct:

- complete a course of education or training;
- provide tax agent services for which the agent is registered under the supervision of a specific agent; or
- provide only those tax agent services as are specified by the order of the TPB.

If the TPB decides to investigate a tax agent they must give two weeks' notice of their decision to investigate and the investigation will commence from the date of the notice (section 60-95(2) of the Tax Agent Services Act). In terms of section 60-125(3)(a) of the Tax Agent Services Act the TPB must make a decision on the outcome of the investigation within six months after the day the investigation commenced. If no decision is made within that period it will be taken that the TPB decided to take no further action in relation to the investigation. The TPB must notify the entity affected by the decision and the complaint within 30 days of making the decision. The reasons for the decision must be communicated to the entity affected as well as to the Commissioner of the ATO.

Civil penalties and a civil penalty order can be issued against a person in the following circumstances:

- if a person who is not registered under the Tax Agent Services Act provides services that can be seen as a tax agent services for a fee or other reward;

- if a person not registered under the Tax Agent Services Act advertises that he or she provides tax agent services;
- a person who represents that he or she is a registered tax agent and the representation is untruthful;
- if a registered agent makes a false or misleading statement; or
- makes a misleading or false statement to the Commissioner or makes a statement which will contravene the Tax Agent Services Act.

Section 50-40 of the Tax Agent Services Act provide that if a partnership contravenes a civil penalty provision, each partner, at the time of the conduct, will be taken to have contravened the civil penalties provision. In terms of section 50-45 of the Tax Agent Services Act these penalties will be payable to the Commissioner of the ATO, who will receive the payment on behalf of the Commonwealth.

A retired judge or advocate will head the disciplinary committee, according to section 19(4) of the revised draft bill, while a judge selected from a proposed list of volunteer judges will head the proceedings according to section 99 of the German Tax Consultancy Service Act. An Administrative Law Judge will preside over the hearing according to the United States of America legislation in terms of section 10.70(a) of the Treasury Department Circular 230. The Australian legislation does not specifically mention who should head the committees involved in investigation and discipline. Looking at above, it is normal practise that a judge or senior advocate with the necessary experience in law and the procedures of hearings by in charge of the hearings and disciplinary actions against tax practitioners.

According to the German legislation, the disciplinary or hearing procedures will be lead by the local jurisdiction of the district court (section 112 of the German Tax Consultancy Service Act). Taking into consideration the amount of pressure and the work load the South African Court is already experiencing, this model would only delay the outcome of the hearings.

The Australian legislation sets out a Code of Professional Conduct with which the tax practitioner must be compliant to at all time (section 30-10 of the Tax Agent Services Act). The South African revised draft bill does not specify what will be seen as improper

conduct. One of the first tasks of the Independent Regulatory Board, once established, will be to set out rules and codes of conduct to which the tax practitioners will have to adhere.

The Australian legislation also provides for civil penalties to be charged against a person for non-compliance with the Tax Agent Service Act. No other country has any provisions of the same nature. This could be a useful tool if introduced into the South African model. In the case of minor contraventions of the South African act on the regulation of tax practitioner, once promulgated by Government, a fixed set of penalty provisions and fines would eliminate hearings and investigations. This would go towards freeing up resources for investigating more important contraventions of the act.

## **5.5 CONCLUSION**

In this chapter, a summary of the comparisons between the different countries' legislation was made. The summary was divided into three categories.

In the first category on the regulatory boards for tax practitioners, it was found that there were many similarities between the South African model and the Australian model. South Africa proposes an Independent Regulatory Board (IRB) and the Australian model a Tax Practitioners Board (TPB). The German and United States of America model do not specifically provide for a regulatory board. Nevertheless, the German model provided for regional, provincial and national boards which could be useful in the South African context.

In the second category, registration requirements and the duties of tax practitioners, it was found that, according to the South African and Australian models, the regulatory board must approve the application by the person who applied for registration as a tax practitioner. According to the German model, the applicant will be accepted once he or she has passed a qualification examination. In the United States of America model, the only requirement is that the accountant, attorney, enrolled agent or enrolled actuary is not under suspension or disbarment from practising before the IRS.

In the third category, disciplinary matters applicable to tax practitioners, it was found that an investigating committee will head the investigation in the charge against the tax

practitioner, after which the disciplinary committee will be in charge of the hearing against the tax practitioner. This method is provided for in both the South African revised draft bill and the Australian legislation. According to the German Tax Consultancy Service Act, the disciplinary or hearing procedures will be lead by the local jurisdiction of the district court. According to the United States of America legislation, the disciplinary action against the tax practitioner will be decided upon by an Administrative Law Judge.

The next chapter will present the conclusion to this study, including any of its limitations and recommendations for future research on the topic.

## CHAPTER 6

### CONCLUSION

#### 6.1 INTRODUCTION

In November 2002, in response to the budget speech, SARS issued a discussion paper proposing the model for regulating the tax industry and, in particular, tax practitioners. This process would be implemented in two phases. In the first phase, all practitioners would register with SARS by 30 June 2005. In the second phase an IRB would be established.

A Revised Draft Bill: Regulation of Tax Practitioners Bill (2008) was issued in June 2008, comments on which should have been submitted by July 2008. Almost three years have passed since the Revised Draft Bill was issued, and Government has, as yet, passed no legislation because no consensus could be reached among stakeholders. This study therefore set out to compare and critically analyse various international models for the regulation of tax practitioners with reference to the South African Revised Draft Bill. This would be to provide relevant stakeholders with a guideline on international models and enable them to formulate a regulation model acceptable to all relevant parties.

#### 6.2 PROBLEM STATEMENT

The main purpose of this study was to critically compare various international models regulating tax practitioners with the proposed South African model. Three categories in the proposed South African model were identified and compared, namely:

- the regulatory board for tax practitioners;
- registration requirements for tax practitioners; and
- disciplinary matters applicable to tax practitioners.

In comparing the abovementioned categories a better guideline can be established to resolve the issues namely:

- the procedure for creating an regulatory board as well as the duties of the regulatory board;

- the position and function of the tax authority in the regulatory board;
- academic qualification and practical experience required to qualify for membership.

## **6.3 CONCLUSION**

### **6.3.1 Regulatory board for tax practitioners**

First, a comparison of the requirements for a regulatory board was conducted, referring to South Africa, Germany, the United States of America and Australia. Similarities between the South African and Australian legislation are prominent in the analysis. Both the South African and the Australian legislation provide for a regulatory board to be formed which must consist of members appointed by the Minister. In the case of South Africa an Independent Regulatory Board (IRS) is proposed while Australia has a Tax Practitioners Board (TPB).

The German legislation provides for different financial districts to establish a tax chamber, from which a board of the chamber of tax advisors must be formed. A Federal Chamber of Tax Advisors must also be formed out of the consisting members of the tax chamber. The United States of America legislation provides that an Office of Professional Responsibility must be established in the IRS.

Looking at above the United States of America legislation does not provide for an independent board as it is formed inside the IRS. The German legislation is independent as it is formed of members in the financial district. The Australian and South African legislation can also be seen as independent, but the Minister would appoint the board members. The South African legislation, however, provides that a SARS representative must also serve on the IRB but would have no voting rights. The Australian legislation also provides that an Australian Public Service employee services should be made available by the Commissioner of the ATO to assist the TPB.

The provisions for the tax authority's position on the board gave rise to a negative perception on the part of the current practitioners. Although the SARS representative does not have voting rights on the IRB, all the decisions and discussions by the IRB would be

passed on to the tax authority. The general feeling is that sensitive tax matters relating to clients should not be discussed, as confidentiality would not be protected and SARS would have inside information on audit clients. Jones (2007:3) maintains that the IRB would not, as a result, be an association that represented its members but would rather be an oversight body similar to the Independent Auditor's Board, where the members are nominated by the Minister. Jones (2007:3) questions whether the practitioner would still be working for his client or for SARS after the establishment of the IRB.

The representation of other professional bodies on the various regulatory boards is not provided for in any legislation of the countries investigated. It is assumed that most of the current tax practitioners, in South Africa, are members of either the SAICA or the SAIPA. It would therefore be advisable for the legislation to provide for representatives of abovementioned professional bodies to also serve on the IRB.

### **6.3.2 Registration requirements and duties of tax practitioners**

The registration requirements and duties of tax practitioners were compared between South Africa, Germany, United States of America and Australia. The South African revised draft bill provide for any natural person who provides advice or complete documentation or assist to complete any documents, for application of any act administered by the Commissioner for a fee, must register as a tax practitioner. This requirement is similar to that in the Australian legislation.

One of the important differences between the South African legislation and the Australian legislation is that the Australian legislation also provides for the registration in the form of a partnership or company. A partnership or company can register if all the directors or partners are also registered as tax practitioners. This could be an important provision to consider in the South African model, as it is assumed that most of the foremost accounting and legal firms who are practising as tax practitioners are conducting business through partnerships with incorporated companies.

A person providing assistance in tax matters must register as such, according to the German legislation. This provides for an important requirement, in that a practitioner may

be appointed only once he has passed an examination or is exempt from examination. This examination may only be completed twice, and a requirement is a university degree with three years' practical experience. In South Africa the qualification requirements will be decided only once the IRB has been formed and the members have commenced their duties, as prescribed by the legislation. It is of the utmost importance that the qualification requirements set forth are similar to those in the model used in Germany, in order to uphold standards in the industry.

The main requirement in the United States of America legislation is that the accountant, attorney, enrolled agent and enrolled actuaries who are not currently under suspension or disbarment from practising are allowed to practise before the Internal Revenue Services. It is proposed that South Africa should not follow this model, as it would otherwise open the door for persons without the necessary qualifications to practise as tax practitioners.

It is also important for the regulatory board to decide on a period of registration, meaning that, if a practitioner's application for registration is approved, a period of registration is decided on, after which the practitioner must re-apply for registration. It was further proposed that the continuing professional development requirements must play a role in the re-application requirements in order to uphold standards in the profession.

### **6.3.3 Disciplinary matters applicable to tax practitioners**

The different disciplinary proceedings against a tax practitioner in South African, Germany, the United States of America and Australia were also compared.

In the models compared, the proceedings are headed by a judge or an advocate. Proceedings will be initiated by the relevant regulatory board should it become aware of any improper conduct by the tax practitioner.

One of the duties of the Independent Regulatory Board in South Africa will be to establish a code of professional conduct. The Australian legislation sets out a code of professional conduct to which the practitioner must adhere. Disciplinary proceedings can be initiated if the practitioner fails to comply with the code of professional conduct.

The German and United States of America legislation provide for the proceedings to be handled for the most part by a court of law. The Australian legislation provides for civil penalties on certain infringements as an option for action against the practitioner. This is an appropriate method to use for most common infringements, as an action is already determined that minimises the burden for the committees and persons involved in investigating the charges against practitioners.

## **6.4 LIMITATIONS**

The position of the relevant professional bodies, such as those for accounting or legal matters, are not being discussed or provided for in any of the legislation used for comparison in this study. This indicates that a cooperative agreement will have to be reached between the different parties concerned. The study has not specifically looked at the risks concerning a representative of SARS serving on the Independent Regulatory Board.

## **6.5 RECOMMENDATIONS FOR FURTHER RESEARCH**

During the study, problems were identified which could be resolved with further research on the specific topic.

One of the problems identified for further research is the position of the relevant professional bodies in the regulation of tax practitioners. This could be of use in the formulation of a model of cooperation between professional bodies and the Independent Regulatory Board, as provided for in the South African revised draft bill and by SARS.

Another problem area identified for further research is the risk to the tax practitioner of a representative of SARS serving on the Independent Regulatory Board. It would therefore appear practical to do further research on this matter, as it is one of the greatest concerns in the industry.

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