2. Description of the tax control framework

What is tax control? From a South African perspective, tax control can be divided into two main sections, namely: substantive law tax control and procedural tax control.

Substantive law tax control means accurate compliance with the provisions of the tax legislation. This can only take place after careful assessment of all the relevant facts – a prominent shortcoming amongst many taxpayers. The indifference to obtaining complete facts before making the appropriate tax decision is prevalent amongst many taxpayers. This aspect is dealt with later in this chapter.

Procedural tax control by a taxpayer means knowing what procedural rules are applicable to SARS, and how to ensure SARS complies fully with these procedural rules. In this regard and in response to the constitutional obligations imposed on SARS, SARS embarked upon a number of voluntary actions:

To put tax risk into practical context in South Africa, a recent tax risk survey conducted by www.tax-radar.com reflected the following survey results:

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* Adjunct Professor at the Thomas Jefferson School of Law, San Diego, California, United States. He is also founder of EFG Attorneys, and chairman and CEO of www.TaxRiskManagement.com.
– 54% of the participants did not have dedicated tax managers;

– 83% did not think they were fully tax compliant, of which 55% either didn’t know what their tax compliance rating was, or were less than 75% tax compliant;

– 80% did not have a tax strategy;

– up to 58% of the tax compliance officers did not communicate regularly with the heads of various transaction or operations divisions in the business;

– 43% did not think that the information source for completing their tax returns was accurate; and

– only 15% discussed tax strategy and tax planning at board meetings.

[......]

Good corporate governance is crucial to the success of any company and is addressed under the King II Report on Corporate Governance in South Africa, which endorses the primary characteristics of corporate governance. The Code of Corporate Practices and Conduct contained in the initial King Report of 1994, under instruction of the Institute of Directors, was replaced by the code contained in the King II Report with effect from 1 March 2002. The Report covers, amongst others, sections on risk management, internal audits, integrated sustainability reporting, accounting and auditing, and compliance and enforcement. It also covers issues such as ethics, integrity and disclosure.

The King Code and Report on Governance for South Africa ("King III") was released on 1 September 2009, with an effective date of 1 March 2010.¹

[......]

4. Tax control framework in practice

A popular framework that is being established by some taxpayers to achieve their tax control objectives of ensuring full and proper compliance, with full knowledge of potential tax risk areas, can be summarized in the following steps:

(1) Taxpayers in South Africa tend to be reactive to tax problems and tax risks. This usually translates into additional tax exposure through the imposition of tax penalties and interest, and leads to poor relationships with SARS. A proactive tax risk management approach has been proven to eliminate the additional tax exposure, improve SARS relationships, and place control of the tax risk management process back in the hands of the taxpayers, and not SARS. This in turn has led to an opportunity to develop an ongoing tax planning process.

(2) Tax compliance departments of taxpayer businesses in South Africa often try to cover their tax risk without outside professional assistance, except on a reactive basis. By creating a tax team that participates proactively in the tax risk management process, these businesses have been able to expand their tax risk cover considerably.

(3) Most taxpayer businesses in South Africa do not have a road map of how and where they are going with their tax risk management, other than blindly ensuring that they are “fully tax compliant”. With a properly formulated tax risk management strategy in place, the goals and objectives, and the manner of executing a tax risk management process so as to minimize tax risk, are achieved properly, as is proven in many cases where taxpayers have implemented tax risk strategies.

[……]

(7) Lack of communication between tax managers and the rest of the business, and only processing numbers to compile tax returns, is the reason why tax compliance in most businesses does not cover the total tax risk in those businesses. As a result, much of the tax risk is hidden, and can only be exposed through a systematic process of people
to people communication, and not just through processing numbers. The one must verify the other. This calls for new communication systems to be implemented in the business to circumvent and put an end to the bad habit of limited people communication. These procedures are lacking in South Africa, and require systematic development over time.

[…….]

5. **Approach of the tax authorities**

The South African income tax systems are based on voluntary disclosure made by taxpayers to the tax authority, SARS. For this reason, the tax legislation contains administrative, investigative and auditing powers given to SARS in order to double-check that taxpayers have reported the correct amount of taxable income. Most interactions between SARS and taxpayers involve SARS invoking these investigative and auditing powers.

[…….]

It has also become customary in recent times, by virtue of an announcement made by the Minister of Finance, that if taxpayers voluntarily make disclosures to rectify any oversight in the disclosure of taxable income or other indirect taxes, SARS will impose interest but not penalties in respect of these oversights.

7. **Future developments and expected implications related to changed approach to tax risk management**

With the increased rate of audits by SARS, taxpayers perceive SARS to be increasingly aggressive. In the past, settlement of tax disputes was common, but this is proving to be more difficult as SARS is willing to test tax principles in the tax courts. It is not uncommon for large taxpayers to find themselves at the brunt of a tax case that is being tried to prove or disprove a tax principle at the instance of SARS.