



Tax Exemption Guide for Public Benefit Organisations in South Africa

Income Tax



South African Revenue Service

Tax Exemption Guide for Public Benefit Organisations in South Africa

Preface

This guide provides general guidance on –

- the approval as a public benefit organisation under section 30;
- the partial taxation of public benefit organisations under section 10(1)(cN); and
- approval of public benefit organisations under section 18A to issue section 18A receipts for donations, which potentially entitles the donor to an income tax deduction for *bona fide* donations made.

The guide deals with the following taxes and duties that may affect organisations approved as public benefit organisations:

- Capital gains tax
- Dividends tax
- Donations tax
- Employees' tax
- Estate duty
- Income tax
- Securities transfer tax
- Skills development levy
- Transfer duty
- Unemployment insurance contributions
- Value-added tax

This guide is not an “official publication” as defined in section 1 of the Tax Administration Act 28 of 2011 and accordingly does not create a practice generally prevailing under section 5 of that Act.

It is also not a binding general ruling under section 89 of the Tax Administration Act. Should an advance tax ruling be required, visit the SARS website for details of the relevant application procedure.

This guide is based on the legislation as at time of issue. Information relating to taxes, duties, levies and contributions reflect the rates applicable as at the date of issue of this guide.

All guides, interpretation notes, binding general rulings, *Government Gazettes*, forms, returns, tables and calculators referred to in this guide are available on the SARS website at www.sars.gov.za.

This guide does not consider the following:

- The tax relief provided for COVID-19 disaster relief organisations under section 7 of the Disaster Management Tax Relief Act 13 of 2020 during the COVID-19 pandemic.
- The deduction of donations to COVID-19 disaster relief organisations under section 8 of the Disaster Management Tax Relief Act, 2020.
- The deduction of donations to the Solidarity Fund under section 5 of the Disaster Management Tax Relief Administration Act 14 of 2020 and the increase in the annual deduction limit for donations to that Fund under section 8 of the Disaster Management Tax Relief Act, 2020.

The principles and requirements of sections 30 and 18A to the extent that it relates to COVID-19 disaster relief organisations and the Solidarity Fund must be applied in accordance with those Acts.

For more information, assistance and guidance you may –

- visit the **SARS website**;
- contact your nearest SARS branch office; preferably after making an appointment via the **SARS website**;
- have a virtual consultation with a SARS consultant by making an appointment via the **SARS website**;
- contact the SARS National Contact Centre –
 - if calling locally, on 0800 00 7277; or
 - if calling from abroad, on +27 11 602 2093 (only between 8h00 and 16h30 South African time); or
- contact your own tax advisor or tax practitioner.

Comments on this guide may be e-mailed to **policycomments@sars.gov.za**.

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Glossary

In this guide unless the context indicates otherwise –

- “**branch of a foreign tax-exempt organisation**” means any branch established in South Africa by any company, association or trust incorporated, formed or established in a country outside South Africa and itself exempt from income tax in that other country;
- “**Commissioner**” means the Commissioner for the South African Revenue Service appointed under section 6 of the South African Revenue Service Act 34 of 1997, or the Acting Commissioner designated under section 7 of that Act;
- “**CGT**” means capital gains tax, being the portion of income tax payable by a taxpayer on a taxable capital gain arising from the disposal of assets determined under the Eighth Schedule;
- “**Companies Act**” means the Companies Act 71 of 2008;
- “**co-ordinating body**” means the regulating or controlling body of a group of related organisations sharing a common purpose, carrying on the same PBAs under the supervision and direction of that regulating or controlling body contemplated in section 30(3A);
- “**fiduciary**” means a person who holds a position of trust or responsibility including decision-making powers over the affairs of an organisation;
- “**founding document**” means the written instrument such as the constitution, memorandum of incorporation, trust deed or will under which an organisation is established and governed;
- “**Minister**” means the Minister of Finance;
- “**NPC**” means a “non-profit company” as defined in section 1 of the Companies Act;
- “**NPO Act**” means the Nonprofit Organisations Act 71 of 1997;
- “**NPO**” means a “nonprofit organisation” as defined in section 1 of the NPO Act;
- “**Part I**” and “**Part II**” mean Part I and Part II of the Ninth Schedule;
- “**partial taxation**” means the method of taxing the receipts and accruals derived from business undertakings or trading activities falling outside the permissible business undertaking or trading activity categories including the basic exemption set out in section 10(1)(cN)(ii);
- “**PBA**” means a public benefit activity;
- “**PBO**” means a “public benefit organisation” approved by the Commissioner under section 30(3);
- “**poor and needy**” means impoverished, having little means and few possessions and therefore in need of basic necessities and assistance;
- “**prescribed requirements**” mean the formal conditions and requirements set out in section 30(3)(b), which an organisation must comply with to qualify for approval as a PBO;
- “**Schedule**” means a Schedule to the Act;

- “**section 10(1)(cN)**” means the section, which provides for the exemption from income tax of certain receipts and accruals of PBOs and the taxation of receipts and accruals falling outside the permissible business undertaking or trading activity categories provided in that section;
- “**section 18A receipt**” means a special prescribed receipt issued under section 18A(2) by a section 18A-approved PBO or section 18A-approved conduit PBO potentially entitling the donor to an income tax deduction for donations made;
- “**section 18A**” means the section providing for the tax-deductibility of donations made to section 18A-approved PBOs and section 18A-approved conduit PBOs;
- “**section 18A-approved conduit PBO**” means any PBO contemplated in paragraph (a)(i) of the definition of “public benefit organisation” in section 30(1), approved by the Commissioner under sections 30(3) and 18A(1)(b), providing funds or assets to any PBO, institution, board or body approved by the Commissioner under section 18A(1)(a);
- “**section 18A-approved PBO**” means any PBO contemplated in paragraph (a)(i) of the definition of “public benefit organisation” in section 30(1), approved by the Commissioner under section 30(3) and 18A(1)(a)(i), carrying on in South Africa any PBA listed in Part II;
- “**section 30**” means the section setting out the prescribed requirements an organisation must comply with to qualify for and retain approval as a PBO;
- “**section**” means a section of the Act;
- “**South Africa**” means the “Republic” as defined in section 1(1);
- “**STT**” means securities transfer tax;
- “**STT Act**” means the Securities Transfer Tax Act 25 of 2007;
- “**TA Act**” means the Tax Administration Act 28 of 2011;
- “**testamentary trust**” means a trust established under the will of a deceased person;
- “**the Act**” means the Income Tax Act 58 of 1962;
- “**Trust Property Control Act**” means the Trust Property Control Act 57 of 1988;
- “**VAT Act**” means the Value-Added Tax Act 89 of 1991;
- “**VAT**” means value-added tax; and
- any other word or expression bears the meaning ascribed to it in the Act.

Chapter 1

Introduction

Nonprofit organisations play a significant role in society by undertaking shared responsibility for the social and developmental needs of the country, thus relieving the financial burden that would otherwise fall on the state.

Internationally, NPOs are granted some degree of preferential tax treatment including donor incentives, although the eligibility criteria and available benefits vary from country to country.

Tax benefits are designed to assist NPOs by augmenting their financial resources and providing them with an enabling environment in, which to achieve their objectives.

An organisation having a non-profit motive, or established or registered as an NPO under the NPO Act, or incorporated as an NPC does not automatically qualify for preferential tax treatment or approval as a PBO. Registration as an NPO is not a condition for approval as a PBO, since it is a voluntary registration lodged with the Director of NPOs.¹ The Director of NPOs may, however, request the Commissioner to withdraw the approval of any PBO convicted of an offence under the NPO Act.²

The terms “public benefit activity” (see **Chapter 2**) and “public benefit organisation” (see **Chapter 3**) are defined in section 30(1) and form the basis for the preferential tax treatment of a PBO. An organisation will enjoy preferential tax treatment only after it has been granted approval as a PBO by the Commissioner and continues to comply with the relevant prescribed requirements set out in the Act (see **4.4**). Preferential tax treatment includes the benefit of being exempt from the payment of income tax (see **Chapter 7**) on certain receipts and accruals and the benefit of being exempt from certain other taxes and duties (see **14.1**).

Government has recognised that organisations are dependent on the generosity of the public, and, to encourage that generosity, has provided a tax deduction (see **Chapter 11**) for certain donations (see **Chapter 9**) made by taxpayers. The eligibility to issue section 18A receipts is, however, restricted to PBOs approved by the Commissioner (see **Chapter 8**) that use the donations for which they issue section 18A receipts to carry on or fund specific PBAs (see **Chapter 2**) listed in Part II in South Africa.

The *Basic Guide to Income Tax Exemption for Public Benefit Organisations* provides a basic understanding of the requirements to obtain and retain approval as a PBO and the *Basic Guide to Section 18A Approval* provides a basic understanding of the requirements to obtain and retain approval under section 18A.

¹ Information on such registration can be obtained from the Department: Social Development’s website at www.dsd.gov.za.

² Section 30(3C).

Chapter 2

Public benefit activities

2.1 Definition of “public benefit activity”

The term “public benefit activity” is defined and means any –³

- activity listed in Part I; and
- any other activity determined by the Minister from time to time by notice in the *Government Gazette* to be of a benevolent nature, having regard to the needs, interests and well-being of the general public.

2.2 The Ninth Schedule

The PBAs are listed in the Ninth Schedule, which is divided into –

- Part I comprising a number of PBAs approved by the Minister for purposes of the approval as a PBO under section 30 (see **Annexure D**); and
- Part II comprising a limited number of PBAs⁴ approved by the Minister for purposes of the approval under section 18A (see **Annexure E**).

The PBAs listed in Part I for purposes of section 30 are categorised as follows:

- Welfare and Humanitarian (paragraph 1)
- Health Care (paragraph 2)
- Land and Housing (paragraph 3)
- Education and Development (paragraph 4)
- Religion, Belief or Philosophy (paragraph 5)
- Cultural (paragraph 6)
- Conservation, Environment and Animal Welfare (paragraph 7)
- Research and Consumer Rights (paragraph 8)
- Sport (paragraph 9)
- Providing of Funds, Assets and Other Resources (paragraph 10)
- General (paragraph 11)

The PBAs listed in Part II for purposes of section 18A are categorised as follows:

- Welfare and Humanitarian (paragraph 1)
- Health Care (paragraph 2)
- Education and Development (paragraph 3)
- Conservation, Environment and Animal Welfare (paragraph 4)⁵
- Land and Housing (paragraph 5)⁶

³ Section 30(1).

⁴ Not all PBAs listed in Part I are included in Part II.

⁵ Limited PBAs in Part I are included in this category in Part II.

⁶ Limited PBAs in Part I are included in this category in Part II.

For a complete list of PBAs in Part I and Part II falling under each of the above categories, see **Annexures D and E**.

A PBO may itself conduct the PBAs or it may provide funds, assets or other resources to enable other approved PBOs, institutions, boards or bodies exempt under section 10(1)(cA)(i),⁷ associations of persons (see **4.8**) or the national, provincial or local sphere of government contemplated in section 10(1)(a) to carry on these activities.

An organisation may conduct a combination of PBAs in Part I and PBAs in Part II. In this situation, section 18A receipts (see **Chapter 10**) can be issued by a PBO approved by the Commissioner for purposes of section 18A (see **Chapter 8**) only for donations that will be exclusively used for purposes of carrying on PBAs in Part II.

2.3 Additional public benefit activities

The Minister may determine additional PBAs from time to time for purposes of section 30⁸ and 18A⁹ by notice in the *Government Gazette*, provided such activities are considered to be of a benevolent nature taking into account the needs, interests and well-being of the general public.

Any additional PBAs prescribed by the Minister must be approved by Parliament and formally incorporated into the Ninth Schedule or the Act within 12 months after the date of publication by the Minister of that activity in the *Government Gazette*.¹⁰

2.4 Additional requirements by regulation

The Minister may by regulation prescribe –

- conditions to ensure that the activities and resources of an organisation are directed in the furtherance of its object;¹¹ and
- additional requirements that a PBO carrying on any specific PBA identified by the Minister in the regulations, must comply with before any donation made to that PBO will be allowed as a tax deduction (see **2.4.2**).¹²

Any conditions or additional requirements prescribed by the Minister must be approved by Parliament and formally incorporated into the Ninth Schedule or the Act, within 12 months after the date of publication by the Minister of those conditions or additional requirements in the *Government Gazette*.¹³

⁷ See the draft *Tax Exemption Guide for Institutions, Boards or Bodies* for commentary on the exemption from income tax of qualifying institutions, boards or bodies under section 10(1)(cA)(i).

⁸ Paragraph (b) of the definition of “public benefit activity” in section 30(1).

⁹ Section 18A(1)(a)(aa).

¹⁰ Sections 30(2) and 18A(1B).

¹¹ Section 30(3)(a).

¹² Section 18A(1A).

¹³ Sections 30(2) and 18A(1B).

The following PBAs are subject to conditions that may be prescribed by the Minister by regulation:

- The granting of loans to emerging micro enterprises to improve capacity to start and manage businesses contemplated in PBA 1(p)(iii) in Part 1.
- The granting of loans for the development, construction, upgrading, conversion or procurement of housing units for the benefit of persons whose monthly household income is equal to or less than R15 000,¹⁴ or the granting of loans for the development, servicing, upgrading or procurement of stands or the provision of building materials,¹⁵ and the provision of security or guarantees of such loans contemplated in PBA 3(f) in Part I;
- The provision of scholarships, bursaries, awards and loans for study, research and teaching contemplated in PBA 4(o)¹⁶ in Part I.

The Minister has, as yet, not prescribed conditions by regulation for PBAs 1(p)(iii) and 3(f) in Part I.

The Minister has prescribed conditions for PBA 4(o) in Part I and its equivalent, PBA 3(o) in Part II. See the relevant conditions below.

2.4.1 The provision of scholarships, bursaries, awards and loans

The Minister has published conditions in Government Notice Regulation 302 in *Government Gazette* 24941 of 28 February 2003, which an organisation carrying on PBA 4(o) in Part I must comply with.¹⁷ The Minister declared in Government Notice Regulation 333 in *Government Gazette* 27455 of 8 April 2005 that those regulations will also apply to PBA 3(o) in Part II (see **Annexure F**).

After the regulations were issued, PBA 4(o) in Part I was amended by the Minister to allow a PBO carrying on that activity to also provide loans in addition to scholarships, bursaries or awards for study, research and teaching. The Minister has, however, not yet issued or amended those regulations to prescribe conditions relating specifically to the provision of loans.

To ensure the activities and resources of a PBO carrying on PBA 4(o) in Part I are directed in the furtherance of that object, the founding document must expressly provide for the following conditions to the extent that they relate to the provision of scholarships, bursaries and awards:

- All scholarships, bursaries or awards¹⁸ granted must be *bona fide* and be granted to an individual on grounds of objective merit or need.
- No scholarship, bursary or award granted may be revocable, otherwise than for reasons of a material failure to conform to the designated purposes and conditions of that scholarship, bursary or award.

¹⁴ See PBA 3(a) in Part I.

¹⁵ See PBA 3(b) in Part I.

¹⁶ See PBA 3(o) in Part II.

¹⁷ These conditions prescribed by the Minister by way of regulation have, as yet, not been incorporated in the Ninth Schedule or the Act.

¹⁸ See Interpretation Note 66 "Scholarships or Bursaries" for the tax implications of any *bona fide* scholarship or award granted to enable or assist any person to study at a recognised educational or research institution.

- No scholarship, bursary or award granted may be subject to conditions that would enable the donor of the funds of that scholarship, bursary or award or any connected person¹⁹ in relation to that donor, to derive some direct benefit from the application of that scholarship, bursary or award.
- No scholarship, bursary or award may be granted to any person who is or will become an employee of the donor of the funds of that scholarship, bursary or award or that organisation (or any associated institution²⁰ in relation to that donor or organisation) or any relative of that person, unless circumstances indicate that the scholarship, bursary or award would have been granted to that person or his or her relative, even if that person had not been an employee of that donor, organisation or associated institution.
- A duly constituted committee consisting of at least three persons who are not connected persons in relation to the donors or the person to whom the scholarship, bursary or award is granted must make all decisions regarding the granting of scholarships, bursaries and awards.
- All scholarships, bursaries and awards granted for overseas study, research or teaching will be subject to an undertaking by the person to whom the scholarship, bursary or award is granted –
 - to apply the knowledge obtained from the study, research or teaching immediately after completion overseas in South Africa for a period of at least the period that the study, research or training was funded by the organisation; or
 - to refund the full amount of the scholarship, bursary or award if the person decides not to apply the knowledge obtained overseas in South Africa.

The conditions prescribed by the Minister by way of regulation have, as yet, not been incorporated in the Ninth Schedule or the Act.

2.4.2 The establishment and management of a transfrontier area

The Minister issued conditions and requirements that an organisation carrying on the establishment and management of a transfrontier area contemplated in PBA 4(d) in Part II must comply with before any donation made to such organisation will be allowed as a tax deduction (see **Chapter 11**).²¹ The founding document of a PBO carrying on PBA 4(d) in Part II must expressly provide that the PBO –

- may not issue a section 18A receipt for any donation made by a person to that PBO unless –
 - that donation is made by that person on or after 1 August 2002; and
 - that person (in the case of a company, together with any other company in the same group of companies²² as that company) has during the relevant year of assessment of that person donated an amount of at least R1 million to that PBO.

¹⁹ The term “connected person” is defined in section 1(1). For commentary on the definition of “connected person”, see Interpretation Note 67 “Connected Persons”.

²⁰ The term “associated institution” is defined in section 8C(7) for purposes of the taxation of directors and employees on vesting of equity instruments. It is also defined in section 12H(1) for purposes of learnership agreements. Both these definitions derive their meaning from the definition of “associated institution” in paragraph 1 of the Seventh Schedule.

²¹ Section 18A(1C).

²² Definition of “group of companies” in section 1(1).

- must ensure that every donation contemplated above for which a section 18A receipt has been issued, will be matched by a donation to that PBO of the same amount made by a person who is not a resident and made from funds generated and held outside South Africa;
- must use –
 - all donations received for which a section 18A receipt is issued, and all income derived from those donations, in carrying on PBA 4(d) in Part II in South Africa; and
 - all donations received from persons who are not residents, either in carrying on PBA 4(d) in Part II in South Africa, or for a transfrontier conservation area²³ of which South Africa forms part.

²³ The concept “transfrontier conservation area” is not defined in the Act. It generally refers to relatively large areas extending between two or more countries covering large-scale natural systems including one or more protected areas. See www.environment.gov.za/projectsprogrammes/transfrontier_conservation_areas [Accessed 28 July 2022].

Chapter 3

Public benefit organisations

3.1 Definition of “public benefit organisation”

The term “public benefit organisation” is defined and means any organisation –²⁴

- that has been incorporated, formed or established in South Africa as –²⁵
 - a “non-profit company” as defined in section 1 of the Companies Act (see **3.2.1**);
 - a trust (see **3.2.2**); or
 - an association of persons (see **3.2.3**); or
- that is a branch within South Africa of any company, association or trust incorporated, formed or established in any country other than South Africa and is exempt from tax on income in that other country (see **3.2.4**);²⁶
- that has the sole or principal object of carrying on one or more PBAs (see **3.3**), of which all PBAs are –²⁷
 - carried on in a non-profit manner and with an altruistic or philanthropic intent (see **3.4**);
 - not intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee (see **3.5**); and
- where each such activity carried on by that organisation is for the benefit of, or is widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups) (see **3.6**).²⁸

An organisation must fall within the ambit of the definition of “public benefit organisation” to be considered by the Commissioner for approval under section 30. All the requirements of the definition of “public benefit organisation” must be met to qualify for approval as a PBO.

In addition to meeting the requirements of the definition of “public benefit organisation”, an organisation must also comply with the prescribed requirements (see **4.4**) that must be included in the organisations founding document (see **4.3**). An organisation contravening the prescribed requirements will be subject to non-compliance penalties (see **12.1**).

PBOs approved by the Commissioner under section 30 carrying on²⁹ or funding³⁰ specific organisations carrying on PBAs in Part II in South Africa may potentially qualify for approval under section 18A. The approval under section 18A is subject to additional conditions and requirements that must be met (see **Chapter 8**).

²⁴ Section 30(1).

²⁵ Paragraph (a) of the definition of “public benefit organisation” in section 30(1).

²⁶ Paragraph (a)(ii) of the definition of “public benefit organisation” in section 30(1).

²⁷ Paragraph (b) of the definition of “public benefit organisation” in section 30(1).

²⁸ Paragraph (c)(i) of the definition of “public benefit organisation” in section 30(1).

²⁹ Section 18A(1)(a)(i).

³⁰ Section 18A(1)(b).

3.2 Type of organisation qualifying for approval as a public benefit organisation

An organisation must be constituted in one of the following ways to be approved as a PBO:³¹

- An NPC incorporated in South Africa.³²
- A trust established in South Africa.
- An association of persons formed or established in South Africa.
- A branch of a foreign tax-exempt company, association or trust.

3.2.1 Non-profit company

The term “non-profit company” as defined in the Companies Act means a company –³³

- “(a) incorporated for a public benefit or other object as required by item 1(1) of Schedule 1;³⁴ and
- “(b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3)³⁵ of Schedule 1”.

An NPC does not automatically qualify for exemption from income tax³⁶ and must satisfy the statutory requirements of the Income Tax Act, to qualify for approval as a PBO and for certain of its receipts and accruals to be exempt from income tax. The primary differences between an NPC and a for-profit company is that an NPC does not have shares or shareholders and the members of an NPC are not entitled to receive distributions of profits or gains from the operations of an NPC. Profits and gains generated by an NPC approved as a PBO must be used to carry on its PBAs.

3.2.2 Trust

The term “trust” as defined in the Act means –³⁷

- “any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person”.

³¹ Paragraph (a) of the definition of “public benefit organisation” in section 30(1).

³² Pre-existing companies incorporated or deemed to be incorporated under section 21 of the repealed Companies Act 61 of 1973 continue to exist under the Companies Act, and will qualify for approval as a PBO provided all the prescribed requirements are complied with.

³³ Section 1 of that Act.

³⁴ The reference to an “other object” in item 1(1) of Schedule 1 to the Companies Act, refers an object relating to one or more cultural or social activities or communal or group interests.

³⁵ An NPC under item 1(3) of Schedule 1 to the Companies Act may, for example, pay reasonable remuneration for goods or services rendered, pay or reimburse expenses incurred to advance a stated object of the company, or make payments in accordance with any legal obligation binding on the company.

³⁶ See item 1(6) of Schedule 1 of the Companies Act.

³⁷ Section 1(1).

A trust is created when a founder (also referred to as the donor) transfers property³⁸ to be administered by trustees on behalf of one or more beneficiaries, in accordance with the trust instrument, which could be a trust deed (see 4.3.2) or will (see 4.3.3). The founder can be a natural person or a legal person. There is no limitation on the maximum number of founders needed to create a trust.³⁹

The term “beneficiary” as defined in the Act in relation to a trust means –⁴⁰

“a person who has a vested⁴¹ or contingent⁴² interest in all or a portion of the receipts or accruals or the assets of that trust”.

The following methods of creating a trust are recognised in South Africa:⁴³

- Trusts created in wills, namely, trusts *mortis causa*, also referred to as testamentary trusts are created during the testator’s lifetime, but because they are created in a will, they become effective only on the death of the testator. The reference to this type of trust as *mortis causa* means that although the act of creation, namely, the execution of the will, takes place *inter vivos*, the trust is established and becomes irrevocable only once the testator dies. The testator’s intentions are usually clearly defined and normally concerned with a specific property, such as money, a farm, a building or similar asset, to be administered in trust to provide for the maintenance of the beneficiaries. The testator’s wishes, as reflected in the will, are aimed at specific rather than general orders that must be carried out.
- An *inter vivos* trust is established during the founder’s lifetime. The general view in South African law is that it emanates from a contract. The contract on which such a trust is based is usually a contract contained in an antenuptial contract, or a contract between the founder and trustee.
- Trusts can also be created by way of legislation, treaties and orders of court.

3.2.3 Association of persons

The words “association of persons”⁴⁴ are not defined in the Act and should therefore be interpreted according to their ordinary meaning as applied to the subject matter with regard to which they are used.⁴⁵

³⁸ May consist of movable or immovable, corporeal or incorporeal property, such as, assets of a business, claims against another, copyright, a dwelling, a farm, furniture, money, or shares. In general, anything that can be held in ownership and can be converted into money if liquidated can be deemed trust property.

³⁹ For commentary on trusts under South African law, see the *Guide to the Taxation of Special Trusts* and the *Comprehensive Guide to Capital Gains Tax*.

⁴⁰ Section 1(1).

⁴¹ A vesting trust is one in which the trust beneficiaries have unconditional entitlement to the income or capital of the trust.

⁴² A discretionary trust is one in which the trust beneficiaries have only contingent rights to the income or capital of the trust. Typically, the trustees are given the discretion over how much of the trust income or capital to distribute to the beneficiaries.

⁴³ PA Olivier, S Strydom and GPJ van den Berg *Trust Law and Practice* [online] (My LexisNexis: August 2018) in paragraph 2.4.

⁴⁴ Also known colloquially as a voluntary association.

⁴⁵ EA Kellaway *Principles of Legal Interpretation of Statutes, Contracts and Wills* (1995) Butterworths, South Africa Series. See also LC Steyn *Die Uitleg van Wette* 5 ed (1981) Juta and Company (Pty)Ltd at pages 4 to 7.

LAWSA describes an “association” as follows:⁴⁶

“It is today accepted that an association is founded on a basis of mutual agreement. This entails that it will come into being if the individuals who propose forming it have the serious intention to associate and are in agreement on the essential characteristics and objectives of the *universitas* or unincorporated association. The latter aspect is usually manifested by the approval and adoption of a constitution.”

(Footnotes omitted)

3.2.4 Branch of a foreign tax-exempt company, association or trust

The definition of “public benefit organisation” includes any organisation that is –⁴⁷

“any branch within the Republic of any company, association or trust incorporated, formed or established in any country other than the Republic that is exempt from tax on income in that other country”.

A branch of a foreign tax-exempt organisation must be constituted in any country other than South Africa in one of the following ways to be approved as a PBO:

- A company⁴⁸
- An association
- A trust

A company, association or trust incorporated, formed or established in any country other than South Africa establishing a branch in South Africa for purposes of conducting PBAs may qualify for approval as a PBO provided the foreign organisation is exempt from income tax in its country of origin. The branch will be required to submit confirmation of the exemption from foreign income tax of the foreign organisation together with a copy of its founding document when the application is submitted to the Commissioner (see **Chapter 13**).

A branch governed by the founding document of the foreign tax-exempt organisation must submit a written undertaking to confirm compliance with the prescribed requirements, insofar as the governance, funding and activities of the branch are concerned (see **Chapter 6**).

A branch will not qualify for approval under section 18A(1)(a)(i). A branch approved by the Commissioner as a PBO under section 30 may not issue section 18A receipts for donations received, even if it carries on PBAs in Part II in South Africa.⁴⁹

⁴⁶ GJ Pienaar “Association” 2 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in paragraph 155.

⁴⁷ Paragraph (a)(ii) of the definition of “public benefit organisation” in section 30(1).

⁴⁸ The term “company” is defined in section 1(1) and has a wider meaning than only companies to which the approval under section 30 applies. A company incorporated in a country other than South Africa will fall within the ambit of paragraph (b) of the definition of “company” which includes any association, corporation or company incorporated under the law of any country other than the Republic or any body corporate formed or established under such law but does not include a foreign partnership.

⁴⁹ PBOs qualifying for approval under section 18A(1)(a)(i) are limited to PBOs incorporated, formed or established in South Africa contemplated in paragraph (a)(i) of the definition of “public benefit organisation” in section 30(1).

3.3 Sole or principal object

A PBO must have as its sole or principal object the carrying on of one or more PBAs.⁵⁰ The sole or principal object of a PBO set out in its founding document should be determined by interpreting its founding document in accordance with the ordinary rules of construction of a document.⁵¹

The words “sole”, “principal” and “object” are not defined in the Act. They are described in the *Dictionary.com* as follows:

- “Sole” as “being the only one; only.”⁵²
- “Principal” as “first or highest in rank, importance, value, chief.”⁵³
- “Objective” as “something that one’s efforts or actions are intended to attain, accomplish, purpose, goal, target.”⁵⁴

In ITC 1569⁵⁵ the judge referred to the following two meanings of “principal” in the *Oxford English Dictionary*:

1. First or highest in rank or importance; that is at the head of all the rest; of the greatest account or value; foremost.
2. Less definitely: belonging to the first or highest group in rank or importance; of the first order; main, prominent, leading.”

The word “principal” is used in conjunction with “sole” and this concept therefore implies that the PBO must have as the only, or predominant, or foremost aim to carry on one or more PBAs. The word “sole” equates to 100%. The word “principal” as a percentage within this context is interpreted and concluded to mean not less than 90%, having regard to the expression “substantially the whole”⁵⁶ which in the strict sense is interpreted by SARS as 90% but not less than 85% (see **7.3.1**).⁵⁷

The “object” of a PBO is not the subjective goals of its controllers but the activities that it is mandated by its founding document (see **4.3**) to perform and is the aim, intention, purpose, or thing sought to be accomplished and the goal to be obtained.

The sole or principal object of a PBO must equate to the activities it physically and actively carries on, which must be to carry on one or more PBAs. It is therefore insufficient to make a general statement in the founding document that the object of the organisation is to carry on one or more PBAs, or to simply list the PBAs as they appear in the Ninth Schedule. Specific activities including projects and programmes carried on by the organisation must be set out in its founding document.

⁵⁰ Paragraph (b) of the definition of “public benefit organisation” in section 30(1).

⁵¹ See *Mitchells Plain Town Centre Merchants Association v McLeod & another* 1996 (4) SA 159 (A), [1996] 3 All SA 297.

⁵² www.dictionary.com/browse/sole [Accessed 28 July 2022].

⁵³ www.dictionary.com/browse/principal?s=t [Accessed 28 July 2022].

⁵⁴ www.dictionary.com/browse/objective [Accessed 28 July 2022].

⁵⁵ (1993) 56 SATC 86 (C) at 90.

⁵⁶ The expression “substantially the whole” was introduced in the revised tax system for PBOs in 2000 to achieve a more supportive fiscal environment and to give effect to the proposals and recommendations of the Katz Commission set out in the *Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa* at pages 9 and 18.

⁵⁷ See Binding General Ruling (Income Tax) 20 “Interpretation of the Expression ‘Substantially the Whole’ ”.

The sole or principal object of a PBO must not be to conduct a commercial business undertaking or trading activity to use profits derived from the business undertaking or trading activity to fund a PBA (see 7.3).⁵⁸

Since a PBO approved by the Commissioner under section 30 receives tax privileges, the expression “sole or principal” must be considered strictly, having regard to the facts of each case.⁵⁹

Example 1 – Sole or principal object

Facts:

A supermarket sells a wide variety of food, beverages and household products seven days a week but uses some of the stock-in-trade to provide free meals to homeless people near the supermarket on a regular basis.

Result:

The supermarket’s sole or principal object is to undertake a commercial trading activity and is not to provide meals to homeless people.

3.4 Manner in which public benefit activities must be carried on

All PBAs carried on by a PBO must be carried on in a non-profit manner and with an altruistic or philanthropic intent.⁶⁰ The words “non-profit”, “manner”, “altruistic”, “philanthropic” and “intent” are not defined in the Act.

The word “non-profit” is described in the *Cambridge English Dictionary* as –⁶¹

“not intended to make a profit, but to make money for a social or political purpose or to provide a service that people need”.

Investopedia describes “not for profit” as –⁶²

“a type of organization that does not earn profits for its owners. All of the money earned by or donated to a not-for-profit organization is used in pursuing the organization's objectives and keeping it running”.

The word “manner” is described in the *Dictionary.com* as –⁶³

“a way of doing, being done, or happening; mode of action, occurrence, etc.”.

The intent of an organisation carrying on any PBA must not be to generate a profit or financial return. A PBO must not conduct activities for purposes of making a distributable profit. It will be unacceptable for a PBO to conduct profit-making activities as its sole or principal object to fund the cost of running the PBO. The activities carried on by a PBO should not be to maximise profits but rather to recover direct and reasonable indirect costs (see 7.3.1). An organisation carrying on a PBA as part of a profit-making venture will not qualify for approval as a PBO.

⁵⁸ Depending on the facts applicable there may be additional considerations that need to be taken into account in determining whether a commercial business undertaking or trading activity is being conducted. All relevant facts and circumstances must be examined on a case-by-case basis. For commentary, see Interpretation Note 24 “Income Tax: Public Benefit Organisations: Trading Rules – Partial Taxation of Trading Receipts”.

⁵⁹ *CIR v D & N Promotions (Pty) Ltd* 1995 (2) SA 296 (A), 57 SATC 178 at 182.

⁶⁰ Paragraph (b)(i) of the definition of “public benefit organisation” in section 30(1).

⁶¹ <https://dictionary.cambridge.org/dictionary/english/non-profit> [Accessed 28 July 2022].

⁶² www.investopedia.com/terms/n/not-for-profit.asp [Accessed 28 July 2022].

⁶³ www.dictionary.com/browse/manner [Accessed 28 July 2022].

However, an organisation carrying on a business undertaking or trading activity as part of a PBA may qualify as a PBO provided it meets all the business or trading requirements in 7.3.

The word “altruistic” is described in the *CollinsDictionary.com* as –⁶⁴

“concern for the happiness and welfare of other people rather than for yourself”.

Altruism generally means a concern for the well-being of others with no thought about oneself. Altruism is the opposite of self-interest. The intention of an organisation must not be to carry on any PBA for the personal profit, benefit or advantage of the organisation to the exclusion or regard of the well-being of the general public.

In *Ex Parte Henderson & another*, NNO Miller J provided the following explanation of philanthropy:⁶⁵

“The word ‘philanthropy’ is generally used to convey the idea of ‘practical benevolence towards men in general; the disposition or active effort to promote the happiness and well-being of one’s fellow-men’ (*Oxford English Dictionary*). Not every philanthropic purpose will necessarily also be a charitable purpose, for philanthropic energy may be expended for the benefit of selected individuals, rather than for the general public benefit. But it is true to say that many a philanthropist is also a public benefactor and a philanthropic purpose is very often synonymous with a charitable purpose or so closely akin to it that the distinction is not significant.”

The words “philanthropic” and “charitable” are used to describe goodwill towards men in general and the active effort to promote the happiness and well-being of one’s fellow men.

The *Dictionary.com* describes “intent” as –⁶⁶

“something that is intended, purpose, design, the act or fact or intending, as to do something, the state of a person’s mind that directs his or her actions toward a specific object”.

The intent of an organisation is a subjective test and it is not always an easy task to establish. The court will in the first instance give due consideration to the organisation’s purpose, that is, what the organisation states its intent to be in its founding document. An objective review of an organisation’s activities considered together with the relevant facts and circumstances may provide an indication of an organisations stated intent.

Altruistic or philanthropic intent can therefore be described as the purpose or object of a charitable gift or bequest. The intent of such a charitable gift or bequest is often expressed in restrictions, terms or conditions between the donor and donee but may also be expressed in the words, actions, beliefs and giving practices of a donor. Thus, there must be no *quid pro quo*, reciprocal obligations and no direct or indirect personal benefit or return resulting from the PBAs carried on by the PBO.

⁶⁴ www.collinsdictionary.com/dictionary/english/altruistic [Accessed 28 July 2022].

⁶⁵ 1971 (4) SA 549 (D) at 556.

⁶⁶ www.dictionary.com/browse/intent [Accessed 28 July 2022].

3.5 No self-interest of any fiduciary or employee

The intent of the PBO in carrying on one or more PBAs may not be to directly or indirectly promote the economic self-interest of any fiduciary (see 4.4.1) or employee.⁶⁷ The payment of reasonable remuneration to fiduciaries or employees conducting the affairs of a PBO to enable it to achieve its objectives is permitted (see 4.6).⁶⁸

The words “directly”, “indirectly”, “economic” and “self-interest” are not defined in the Act.

The following words are described in the *Cambridge English Dictionary*:

- “Directly” is “without anything else being involved or in between.”⁶⁹
- “Indirectly” is “in a way that is not direct or not connected in a simple way.”⁷⁰

The word “economic” is described in the *Dictionary.com* as –⁷¹

1. pertaining to the production, distribution, and use of income, wealth, and commodities.
4. involving or pertaining to one's personal resources of money”.

The word “self-interest” is described in the *BusinessDictionary.com* as –⁷²

“actions or activities focused on creating a personal or private advantage for an individual rather than for the benefit of an entity at large”.

An organisation may not carry on any PBAs with the intent of directly or indirectly advancing or creating a personal or private advantage for any fiduciary or employee of that organisation. Fiduciaries or employees are required at all times to put the interests of the organisation ahead of their own economic self-interest and are prohibited from profiting when dealing on behalf of the organisation. Organisations operating for the financial gain of any fiduciary, office bearer, employee or any other person will not qualify for approval as a PBO.

This requirement, however, does not restrict an organisation from entering into transactions with any fiduciary or employee of that organisation in the course of undertaking any PBAs, provided such transactions are concluded at arm's length. The determination of "dealing at arm's length" will be a factual inquiry and must be decided on the facts and circumstances of each case. To determine whether the transactions are conducted at "arm's length", the relationship between the parties, the substance and nature of the transactions and the surrounding circumstances should be examined.⁷³

LAWSA provides the following on transactions not conducted at arm's-length:⁷⁴

⁶⁷ The term “employee” is defined in paragraph 1 of the Fourth Schedule.

⁶⁸ Paragraph (b)(ii) of the definition of “public benefit organisation” in section 30(1).

⁶⁹ <https://dictionary.cambridge.org/dictionary/english/directly> [Accessed 28 July 2022].

⁷⁰ <https://dictionary.cambridge.org/dictionary/english/indirectly> [Accessed 28 July 2022].

⁷¹ www.dictionary.com/browse/economic [Accessed 28 July 2022].

⁷² www.businessdictionary.com/definition/self-interest.html [Accessed 28 July 2022].

⁷³ *Philip Claasen t/a Mostly Media v Andre Delpont t/a AD Industrial Chemicals* [2009] JOL 23885 (WCC) in [4].

⁷⁴ A Gildenhuys “Valuations, Valuers and Appraisers” 30 (Second Edition Volume) *LAWSA* [online] (My LexisNexis: 31 May 2011) in paragraph 217.

“A transaction is not an arm’s length, voluntary sale if either of the parties has acted under compulsion, or if the transaction was entered into on extraordinary terms and conditions, or if both parties have not realised the existing advantages and potentialities of the property, or where any abnormal circumstances pertain to the transaction. Simulated transactions are not at arm’s length, and should be disregarded. The same applies to family transactions, unless they were concluded under open market conditions. Forced sales are not comparable. In a forced sale the seller’s financial circumstances are such that he or she is not in a position to give the property sufficient market exposure, and is forced to accept an offer which he or she would have refused under normal circumstances. Sales by the government on subsidised terms are not open market sales and are not indicative of market value.”

(Footnotes omitted)

The “arm’s-length principle” requires that the amount charged and the terms and conditions for a given transaction must be the same as if the parties were not related.⁷⁵

3.6 Benefit of the general public

The PBAs carried on by a PBO must be for the benefit of, or be widely accessible to, the general public at large. This may include a specific sector of the general public but may not be for the benefit of a small and exclusive group.⁷⁶

The expressions “general public at large” or “general public” are not defined in the Act. The *CollinsDictionary.com* describes “general public” as –⁷⁷

“you can refer to the people in a society as the general public, especially when you are contrasting people in general with a small group”.

The words “general public” usually refer to the general population as a whole, which may include all the people in a geographic area or the country, rather than people who belong to a small and exclusive group. The words may also refer to a particular part of a community or population, but this will depend on the context and wording used, for example, the provision of legal services for poor and needy persons,⁷⁸ the training or education of persons with a severe physical or mental disability,⁷⁹ and the provision of youth leadership or development programmes.⁸⁰

The words “general public” are not new to the Act, and have previously been used in context of the repealed section 10(1)(f), which provided for the tax exemption of religious, charitable and educational institutions of a public character. With the introduction of section 30, the words “public character” were replaced with “general public at large”. There is no case law on the meaning of “general public at large” and therefore reliance is placed on case law relating to “public character”, which has been commented on in many decisions.

⁷⁵ www.ustransferpricing.com/arms_length_principle.html [Accessed 28 July 2022].

⁷⁶ Paragraph (c)(i) of the definition of “public benefit organisation” in section 30(1).

⁷⁷ www.collinsdictionary.com/dictionary/english/general-public [Accessed 28 July 2022].

⁷⁸ PBA 1(m) in Part I.

⁷⁹ PBA 4(f) in Part I.

⁸⁰ PBA 6(c) in Part I.

In ITC 69⁸¹ the following was concluded based on examples of cases in which the meaning of “public nature” or “character” was commented on:

“The word ‘public’ does not necessarily mean the general community; it includes sections of the public where the benefit to that section is universal, and not individual to certain members of that section. In this case the testator had pointed out no particular individuals; his charity was directed to a class or section of the community, to wit, aged European ladies and gentlemen who could not provide for themselves.

Accordingly, the necessary public character may be found to exist where the benefit is not a mere private or family benefaction, but belongs to the public at large, or a sufficiently substantial section of the public, or an appreciably important section or class of the community, and provided the benefit is universal and not individual to certain members of that section or class.”

In *CIR v Plascon Holdings Ltd* the court held that –⁸²

“... the words ‘general public’, in their ordinary connotation, mean the members of the community at large, in the sense of natural persons”.

In *The Endeavour Foundation and UDC Ltd v COT*⁸³ the court had to decide whether the Foundation was a trust of a public character. The court held that –⁸⁴

“a first enquiry must be whether it is public – whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals or a fluctuating body of private individuals, cannot”.

Whether an organisation complies with this requirement must firstly be determined from the wording in the founding document that establishes and governs such an organisation seeking approval as a PBO. Secondly, from the manner in which its income is derived and expended.

This requirement does not preclude certain individuals from benefitting from any activity carried on by a PBO if it does not exclude the general public at large. If any benefit is provided on grounds of a personal or employment relationship it potentially excludes the general public at large, for example, a select group, such as an organisation providing bursaries to family members and employees employed at a specific business.

The critical issue is therefore that the beneficial interest of the activities carried on by an organisation must not vest in any private person but must belong inalienably to the public. The benefit of the activities must be bestowed in a public manner and not for the private benefaction of individuals from a select qualifying group that is dependent on a relationship to a particular individual or organisation. There must be an element of embracing the public or community, including any sector, other than small and exclusive groups. The majority of the Lordship’s judgement in *Oppenheim v Tobacco Securities Trust Co Ltd & others*⁸⁵ was quoted in *The Endeavour Foundation and UDC Ltd v COT* in, which it was held that –⁸⁶

“... in order to constitute a section of the public the possible beneficiaries must not be numerically negligible, and the quality that distinguishes them from other members of the public, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It must be essentially impersonal and not personal”.

⁸¹ (1927) 2 SATC 264 (U) at 269.

⁸² 1964 (2) SA 464 (A), 26 SATC 101 at 109.

⁸³ (1995) 57 SATC 297 (ZS).

⁸⁴ At 304.

⁸⁵ [1951] 1 All ER 31 (HL).

⁸⁶ (1995) 57 SATC 297 at 304.

The following examples of sections of the general public were provided in the above court case:⁸⁷

“Accordingly, the necessary public character may be found to exist where the benefit is not a mere private or family benefaction, but belongs to the public at large, or a sufficiently substantial section of the public, or an appreciably important section or class of the community, and provided the benefit is universal and not individual to certain members of that section or class. Examples of such sections of the community that have been held broad enough to benefit are: whites in certain categories (see *In re Denton’s Estate* 1951(4) SA 582(NPD)); boys of the Jewish faith under twenty-five years (see *Standard Bank of SA Ltd NO v Betts Brown and Ors* 1958(3) SA 713(NPD)); aged ladies and gentlemen of white descent (see ITC 69 supra); South African soldiers who have been incapacitated during the Second World War (see *Ex parte Marriott NO* 1960(1) SA 814(D)); destitute children of British parentage (see *Ex parte Rattray* 1963(1) SA 556(D)); descendants of the Mohammedan community resident in South Africa (see ITC 59 supra).”

Example 2 – PBAs carried on for the benefit of a section of the general public

An organisation engaging in a PBA for the benefit of the following sections of the general public will qualify as a PBO:

- A certain sector of the general public, such as a school established for persons of the Hindu, Muslim, Judaism or Christian faith.
- A broad spectrum of the community, such as providing home-based care to HIV/AIDS sufferers in a particular community.

The carrying on of any PBA by an organisation must be for the benefit or accessible for all people within South Africa, regardless of their nationality or legal status.⁸⁸ The benefit or accessibility of the carrying on of any PBA by an organisation is therefore not limited to persons who are South African citizens⁸⁹ but may, for example, include foreigners,⁹⁰ refugees⁹¹ and asylum seekers.⁹²

Example 3 – PBAs carried on for the benefit of the general public of South Africa

Facts:

An organisation incorporated as an NPC in South Africa has been established with the sole object to perform open-heart surgery, particularly on children. The recipients of such surgery may include foreign nationals. The surgeries are performed in South Africa by South African surgeons.

⁸⁷ At 304.

⁸⁸ See PBA 1(o) in Part I, which provides for the promotion or protection of the rights and interests of, and the care of, asylum seekers and refugees.

⁸⁹ South African citizenship may be obtained by birth, descent or naturalisation. See sections 2, 3 and 4 of the South African Citizenship Act 88 of 1995, respectively.

⁹⁰ The term “foreigner” is defined in section 1 of the South African Citizenship Act and means a person who is not a South African citizen.

⁹¹ The term “refugee” is defined in section 1 of the Refugee Act 130 of 1998 and means any person who has been granted asylum under that Act. Under section 27 of that Act, a refugee enjoys the rights set out in Chapter 2 of the Constitution of the Republic of South Africa, 1996.

⁹² The term “asylum seeker” is defined in section 1 of the Refugee Act, 1998, and means a person who is seeking recognition as a refugee in South Africa.

Result:

The NPC meets the requirement of paragraph (c)(i) of the definition of “public benefit organisation”, since the activity is carried on for the benefit of, and is widely accessible to the general public at large in South Africa, particularly children who are in need of open-heart surgery.

Chapter 4

Section 30 approval

4.1 Approval as a public benefit organisation

The Commissioner will approve an organisation as a PBO only if –⁹³

- it complies with such conditions as the Minister may prescribe by way of regulation to ensure that the activities and resources of such organisation are directed in the furtherance of its object (see **4.2**);
- it has submitted a copy of its founding document (see **4.3**) under which it is established and complies with all the prescribed requirements (see **4.4**);
- satisfied that the organisation did not knowingly participate in any tax-avoidance scheme (see **4.5**);
- it pays reasonable remuneration and does not unduly benefit any person (see **4.6**);
- it complies with reporting requirements (see **4.7**);
- satisfied, in the case of any PBO providing funds to any association of persons contemplated in PBA 10(iii) in Part I, that it has taken reasonable steps to ensure the correct usage of those funds (see **4.8**); and
- it does not use its resources for the benefit of any political party (see **4.9**).

4.2 Conditions prescribed by the Minister by way of regulation

A requirement for the Commissioner to approve an organisation as a PBO is that it must meet, if applicable, any conditions the Minister may prescribe by way of regulation to ensure the activities and resources of that PBO are directed in the furtherance of its object.⁹⁴ For an examination of conditions the Minister has to date prescribed by way of regulation, see **2.4**.

4.3 Founding document

An organisation applying for approval as a PBO must have a founding document. The founding document will depend on the type of organisation incorporated, formed or established:

- An NPC (see **3.2.1**) will have a memorandum of incorporation.
- A trust (see **3.2.2**) will have a trust deed.
- A testamentary trust (see **3.2.2**) will have a will of a deceased person.
- An association of persons (see **3.2.3**) will have a constitution adopted by its members.
- A branch of a foreign tax-exempt organisation (see **3.2.4**) will have the founding document of the foreign tax-exempt organisation.

The founding document must be submitted to the Commissioner as part of the application for approval as a PBO (see **Chapter 13**).⁹⁵

⁹³ Section 30(3).

⁹⁴ Section 30(3)(a).

⁹⁵ Section 30(3)(b).

4.3.1 Memorandum of incorporation

The memorandum of incorporation is the document by which an NPC is incorporated and sets out the rights, duties and responsibilities of members, directors and others within and in relation to a company. The Companies Act provides for the simplest possible form of incorporation by the use of a standard form of the memorandum of incorporation. Under the Companies Act, after the completed and signed memorandum of incorporation⁹⁶ and the filing of a notice of incorporation⁹⁷ the registration of the company is confirmed by the Companies and Intellectual Property Commission⁹⁸ through the issuing and delivery to the company of a registration certificate.⁹⁹

LAWSA provides the following on the registration of a company:¹⁰⁰

“From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company is a juristic person which exists continuously until its name is removed from the companies register in accordance with the Companies Act. A duly issued registration certificate is conclusive evidence that all the requirements for the incorporation of the company have been complied with and that the company is incorporated under the Act as from the date, and the time, if any, stated in the certificate.”

(Footnotes omitted)

4.3.2 Trust deed

The term “trust instrument” is defined in the Trust Property Control Act and means –¹⁰¹

“a written agreement or a testamentary writing or a court order according to which a trust was created”.

LAWSA provides the following on the formation requirement of trusts:¹⁰²

“The founder must intend to create a trust and his or her intention must be concluded in a form which obliges him or her or his or her executor to effect transfer of the prospective trust assets to the trustee, or which obliges the trustee to administer the property for the trust object. An oral trust is valid, though it is not governed by the Trust Property Control Act. The founder must define the prospective trust assets and the object with reasonable certainty and the trust object must be lawful. The Act provides that, if a document represents the reduction to writing of an oral agreement by which a trust was created or varied, such document is for the purposes of the Act deemed to be a “trust instrument” as defined in the Act. A trustee whose appointment comes into force after the commencement of the Act must (except where the master is already in possession of the trust instrument in question or an amendment thereof), before he or she assumes control of trust property, lodge the trust instrument with the master. Where a trust instrument which has been lodged with the master is varied, the trustee must lodge the amendment or a copy thereof, certified by a notary or other approved person, with the master. Where a person who was appointed outside the Republic as trustee has to administer or dispose of trust property in the Republic, the provisions of the Act apply to such trustee in

⁹⁶ See section 13(1)(a) of the Companies Act and Regulation 15 in Government Notice Regulation 351 in *Government Gazette* 34239 of 26 April 2011 and Form CoR 15.1C.

⁹⁷ Section 13(1)(b) and 13(2) of the Companies Act, read with the Regulations in Government Notice Regulation 351 in *Government Gazette* 34239 of 26 April 2011. See also Form CoR 14.1, Notice of Incorporation, included in the Regulations.

⁹⁸ Section 14(1) of the Companies Act.

⁹⁹ Section 14(1)(b)(iii) and (4) of the Companies Act. See also Form CoR 14.3, Registration Certificate, included in the Regulations.

¹⁰⁰ RC Williams “Companies Part 1” 4(1) (Second Edition Volume) *LAWSA* [online] (My LexisNexis: 30 November 2012) in paragraph 108.

¹⁰¹ Section 1 of that Act.

¹⁰² HJ Erasmus and MJ de Waal “Wills and Succession” 31 (Second Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2011) in paragraph 533.

respect of such trust property and the master may authorise such trustee to act as trustee in respect of that property.”

(Footnotes omitted)

The registration of a trust deed¹⁰³ with the Master of the High Court does not influence the legality of the trust deed, although the Trust Property Control Act provides that no person may act as trustee without proper authorisation from the Master. There is no statutory or other requirement that a trust deed has to be notarially executed.¹⁰⁴

4.3.3 Will

The word “will” is not defined in the Act, although included in the definition of “trust”.¹⁰⁵ The Wills Act 7 of 1953 (the Wills Act) defines “will” to include a codicil and any other testamentary writing.¹⁰⁶

The meaning of a will is described in *Wills and Trusts* as –¹⁰⁷

“[t]he *Cambridge English Dictionary* defines a will as ‘Your written instructions about what should happen to your body and the things that you own after your death’. The *Collins Dictionary of Law* defines a will as a legal document in which a person (the testator) directs how his property is to be distributed after his death. Such documents must be executed in due form and in the UK (and RSA) must be duly witnessed. (*Collins Dictionary of Law* © W.J. Stewart, 2006) In the *Free Legal Dictionary* by Farlex a will is defined as a document in which a person specifies the method to be applied in the management and distribution of his estate after his death. This dictionary goes on to also explain the expression “last will and testament” as follows: A will is the legal instrument that permits a person, the testator, to make decisions on how his estate will be managed and distributed after his death. At common law, an instrument disposing of personal property was called a ‘testament’, whereas a will disposed of real property. Over time, the distinction has disappeared so that a will, sometimes called a ‘last will and testament’, disposes of both real and personal property.

A will can be defined as a written document in which a testator voluntarily sets out his instructions as to how his assets are to devolve following his death”.

There is no particular form prescribed by law for a will. However, to be valid it must comply with the formalities of the Wills Act, which, among other things, requires it to be in writing, and signed by the testator and witnesses.¹⁰⁸ A court can under certain circumstances declare an unsigned will to be acceptable.¹⁰⁹

¹⁰³ The term “trust deed” is not defined in the Act. However, see the definition of “trust instrument” in the Trust Property Control Act.

¹⁰⁴ RP Pace “Trusts and Trustees” [online] (My LexisNexis: August 2015) in paragraph 4.1.1.

¹⁰⁵ Section 1(1).

¹⁰⁶ Section 1 of that Act.

¹⁰⁷ RP Pace “Trusts and Trustees” [online] (My LexisNexis: August 2015) in paragraph A1.1.

¹⁰⁸ Section 2 of that Act.

¹⁰⁹ Section 2(3) of the Wills Act 7 of 1953.

4.3.4 Constitution

LAWSA provides the following on the constitution of an association:¹¹⁰

“The constitution of an association together with all its rules or regulations collectively constitute the agreement which is entered into by its members. This agreement is the crucial factor in the existence of an association. It not only determines the nature and scope of the association’s existence and activities but also, where necessary, prescribes and demarcates the powers of, *inter alia*, the executive committee, the secretary and the members of the association in general meeting. In addition, it expresses and regulates the rights of members and provides for certain procedural aspects.”

(Footnotes omitted)

4.4 Prescribed requirements

The prescribed requirements must be included in the founding document,¹¹¹ except in the case of a branch of a foreign tax-exempt organisation or a testamentary trust (see **Chapter 6**).

The founding document as a whole will be examined to ensure that the prescribed requirements are included.

4.4.1 Fiduciary responsibility

An organisation, except a testamentary trust,¹¹² is required to have at least three persons who are not connected persons in relation to one another to accept fiduciary responsibility.¹¹³

The words “fiduciary responsibility” are not defined in the Act. The *BusinessDictionary.com* describes “fiduciary duty” as follows:¹¹⁴

“A legal obligation of one party to act in the best interest of another. The obligated party is typically a fiduciary, that is, someone entrusted with the care of money or property. Also called fiduciary obligation.”

The *Estate Planning and Fiduciary Services Guide* provides the following explanation on “fiduciary”:¹¹⁵

“The term ‘fiduciary’ has its origins in the Latin word ‘*fiducia*’, which means confidence, trust, reliance, assurance. The term, therefore, implies acting with the utmost good faith when delivering services in order to build a relationship of confidence and trust between client and fiduciary. At its root also lies a fiduciary duty, namely, the duty to always act in the best interests of the person to whom the service is being rendered.”

The persons accepting fiduciary responsibility for a PBO are therefore required at all times to put the interests of the PBO ahead of their own self-interest and are prohibited from profiting when dealing on behalf of the PBO.

¹¹⁰ GJ Pienaar “Association” 2 (Third Edition Volume) LAWSA [online] (My LexisNexis: 28 February 2015) in paragraph 156.

¹¹¹ Section 30(3)(b).

¹¹² Proviso to section 30(3)(b)(i).

¹¹³ Section 30(3)(b)(i).

¹¹⁴ www.businessdictionary.com/definition/fiduciary-duty.html [Accessed 28 July 2022].

¹¹⁵ R King, B Victor and L van Vuren *et al Estate Planning and Fiduciary Services Guide* [online] (My LexisNexis: 2016 Edition) in paragraph 1.1.

The founding document under which a PBO is established is required to provide that at least three “persons” must accept fiduciary responsibility for that PBO.¹¹⁶ The term “person” is defined in the Act, and includes –¹¹⁷

- “(a) an insolvent estate;
 - (b) the estate of a deceased person;
 - (c) any trust; and
 - (d) any portfolio of a collective investment scheme,
- but does not include a foreign partnership”.

Section 1(1) provides definitions of certain terms or words used in the Act. Generally, these definitions control the meaning of terms used throughout the Act, in the absence of a contrary intention. The introduction to section 1(1) confirms this principle as follows:

“In this Act, unless the context otherwise indicates”.

The method of attributing meaning to the words used in legislation involves, as a point of departure, examining the language of the provision at issue, the language and design of the statute as a whole and its statutory purpose.¹¹⁸

In *C: SARS v Dunblane (Transkei) (Pty) Ltd*¹¹⁹ the court held that words in a section of an Act of Parliament must not be looked at in isolation but in the context in which they are found, both in the immediate context of the sub-section in which they occur and in the general context of the Act. Furthermore, in *C: SARS v Terraplas South Africa (Pty) Ltd*¹²⁰ the court confirmed that a dictionary meaning of a word cannot govern the interpretation. It can only be used as a guide. The question is, therefore, what is the meaning applicable to the words in the context of the specific document, or section under consideration.

The ordinary dictionary meaning of “person” should therefore also be consulted to establish the meaning of the word in this context.

The *Cambridge Dictionary* defines “person” as –¹²¹

“a human, man, woman or child”.

The *Collins Dictionary* defines “person” as –¹²²

“an individual human being.”

From the above analysis it can be seen that a person for purposes of the Act, includes natural persons, companies, other incorporated entities, associations of persons and statutory bodies. Foreign partnerships are, however, specifically excluded. A South African partnership is not a legal entity¹²³ and a partnership is not a person at common law.¹²⁴ A partnership is not a person for income tax purposes. Rather, the individual partners are persons for income tax purposes.

¹¹⁶ Section 30(3)(b)(i).

¹¹⁷ Section 1(1).

¹¹⁸ See *Chetty t/a Nationwide Electrical v Hart NO & another* 2015 (6) SA 424 (SCA), 4 All SA 401.

¹¹⁹ 2002 (1) SA 38 (SCA), 64 SATC 51 at 57.

¹²⁰ [2014] 3 All SA 11 (SCA), 76 SATC 377.

¹²¹ <https://dictionary.cambridge.org/dictionary/english/person> [Accessed 28 July 2022].

¹²² www.collinsdictionary.com/dictionary/english/person [Accessed 28 July 2022].

¹²³ *Michalow, NO v Premier Milling Co Ltd* 1960 (2) SA 59 (W) at 61.

¹²⁴ *Chipkin (Natal) (Pty) Ltd v C: SARS* 2005 (5) SA 566 (SCA), 67 SATC 243 at 246.

The term “person” should not be read in isolation but must be considered in the context and purpose of section 30, since it is a requirement that the person must –

- not be a connected person in relation to the other persons accepting fiduciary responsibility;
- accept fiduciary responsibility of the PBO;
- not have the ability or authority, either directly or indirectly, to control the decision-making powers of the PBO (see **4.4.2**); and
- in the case of a branch of a foreign tax-exempt organisation and a testamentary trust, submit to the Commissioner a written undertaking (see **Chapter 6**) if the founding document does not provide for the prescribed requirements (see **4.4**).

Although persons other than natural persons may accept fiduciary responsibility it is, however, having regard to the context and purpose of section 30 submitted that the three persons, who are not connected persons in relation to each, who accept fiduciary responsibility for a PBO must be natural persons and do not include a juristic person such as a company or close corporation. Furthermore, legally only a natural person can be imprisoned (see **12.3**). If the legislature did not intend to limit persons accepting fiduciary responsibility for a PBO to natural persons the reference to imprisonment would be superfluous.

It is a further requirement that the three natural persons accepting fiduciary responsibility for the PBO may not be not connected persons in relation to each other. The term “connected person” in relation to a natural person is defined as –¹²⁵

“any relative; and any trust (other than a portfolio of a collective investment scheme) of which such natural person or such relative is a beneficiary”.

The term “relative” in relation to any person is defined as –¹²⁶

“the spouse of that person or anybody related to that person or that person’s spouse within the third degree of consanguinity, or any spouse of anybody so related, and for the purpose of determining the relationship between any child referred to in the definition of ‘child’ in this section and any other person, that child shall be deemed to be related to the adoptive parent of that child within the first degree of consanguinity”.

Natural persons are therefore connected persons in relation to one another if they are relatives in relation to one another. A relative includes a person’s spouse and anyone related to the person or the person’s spouse within the third degree of consanguinity.¹²⁷

Natural persons are also connected persons in relation to one another if, for example, they are beneficiaries of the same trust or members of a partnership.¹²⁸

There are adverse consequences, which may include a fine or imprisonment, for persons in a fiduciary capacity responsible for the management or control of the income and assets of a PBO who intentionally fail to comply with the prescribed requirements (see **12.3**).

¹²⁵ Section 1(1).

¹²⁶ Section 1(1).

¹²⁷ For more commentary on the definition of “connected person”, see Interpretation Note 67 “Connected Persons”.

¹²⁸ Paragraphs (bA) and (c)(i) of the definition of “connected person” in section 1(1).

(a) Persons accepting fiduciary responsibility for a non-profit company

A PBO incorporated, as an NPC is required under the Companies Act, to have a minimum of three persons to incorporate the NPC¹²⁹ and to appoint at least three directors.¹³⁰ The duties of the directors include both a fiduciary duty and a duty of reasonable care. A director's fiduciary responsibilities are incorporated into legislation and provide that all powers and functions arising from the capacity of a director must be exercised –¹³¹

- in good faith, which generally requires the fiduciary at all times to treat any persons in relation to the company fairly and equally;
- for a proper purpose;
- in the best interest of the company; and
- with a reasonable degree of care, skill and diligence expected of a person in the position of a director (the reasonable person test).

The *Essential Guide for South African Companies* explains the concept of a fiduciary of a company as follows:¹³²

“A director stands individually, from the date of his appointment or from the time he begins to act as a director, in a fiduciary relationship to the company.

Each member of the board owns his fiduciary duty individually and directly to the company as a separate legal entity, and may be held personally liable for a breach of these duties. The board of directors as a group, however, cannot owe a fiduciary duty as the board is not incorporated as a legal entity and has no independent legal persona – it remains a collective of individual directors. Therefore, whilst directors act as a group, their fiduciary duties are incumbent upon them and vest in them as individuals. The directors of a company can never divest themselves of their fiduciary duties to the company, nor can they be relieved of their obligations to comply with their fiduciary duties by provisions in the company's memorandum of incorporation.”

(b) Persons accepting fiduciary responsibility for a trust

The Act defines “trustee” as follows:¹³³

“‘[T]rustee’ in addition to every person appointed or constituted as such by act of parties, by will, by order or declaration of court or by operation of law, includes an executor or administrator, tutor or curator, and any person having the administration or control of any property subject to a trust, usufruct, fideicommissum or other limited interest or acting in any fiduciary capacity or having, either in a private or in an official capacity, the possession, direction, control or management of any property of any person under legal disability”.

Trust Law and Practice provides as follows on trustees accepting fiduciary responsibility for a trust:¹³⁴

“The source from which the trustee's duties are derived is connected to his trusteeship. The duties attach legally to the office of trustee. In addition, Act 57 of 1988¹³⁵ makes provision for a number of duties, so that it can be said that these duties are based on legislation.”

¹²⁹ Section 13(1) read together with item 3 of Schedule 1 to the Companies Act.

¹³⁰ Section 66(2)(b) of the Companies Act.

¹³¹ Section 76 of the Companies Act.

¹³² R Naidoo (Third Edition Volume) [online] (My LexisNexis: 2016).

¹³³ Section 1(1).

¹³⁴ PA Olivier, S Strydom and GPJ van den Berg *Trust Law and Practice* [online] (My LexisNexis: August 2018) in paragraph 3.4.

¹³⁵ Trust Property Control Act.

In view of the above, any person who is a trustee of a trust may accept fiduciary responsibility for a PBO.

(c) Persons accepting fiduciary responsibility for an association of persons

The following explanation is provided by *LAWSA* on the fiduciaries of an association:¹³⁶

“Members of an association can be elected to office. The word ‘office’ ordinarily has a fairly wide connotation, meaning a position or post to which prescribed duties are attached. Where an association’s constitution prescribes the duties of the president, vice-president, treasurer, trustees and secretary, these posts are all ‘offices’. Certain persons holding office may be required to fulfil managerial functions.

The proper functioning of an association requires the appointment of a group of persons with executive powers. The constitution of the association usually regulates the matter by entrusting the management of the association’s affairs to a management (executive) committee. The election of persons to serve on the management committee takes place in accordance with the constitutional provisions. When a person is elected to serve on a management committee, he or she obtains certain rights and undertakes certain obligations in relation to the conduct of the affairs of the association. Members of the management committee may resign or be removed from office in conformity with the terms of the constitution. A duly elected management committee holds office until it is dismissed or retires of its own accord.”

(Footnotes omitted)

In view of the above, any person elected to office in an association of persons, such as the chairperson, vice-chairperson, treasurer, secretary, or any person appointed to the management or executive committee may accept fiduciary responsibility for a PBO.

(d) Persons accepting fiduciary responsibility for a branch of a foreign tax-exempt organisation

The persons accepting fiduciary responsibility for a branch of a foreign tax-exempt organisation will, depending on how such a branch is constituted (see **3.2.4**), either be its directors, any persons elected to office or any persons appointed to the management or executive committee of an association, or its trustees.

4.4.2 Decision-making powers

No single person may have the ability or authority, either directly or indirectly, to control the decision-making powers of the organisation.¹³⁷

The expression “decision-making powers” is not defined in the Act. The words are described separately in the *BusinessDictionary.com* as follows:

- “Decision-making” as “the thought process of selecting a logical choice from the available options. When trying to make a good decision, a person must weigh the positives and negatives of each option, and consider all the alternatives. For effective decision making, a person must be able to forecast the outcome of each option as well, and based on all these items, determine which option is the best for that particular situation.”¹³⁸

¹³⁶ GJ Pienaar “Association” 2 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in paragraphs 166 and 178.

¹³⁷ Section 30(3)(b)(i).

¹³⁸ www.businessdictionary.com/definition/decision-making.html [Accessed 28 July 2022].

- “Power” as “the ability to cause or prevent an action, make things happen; the discretion to act or not act”.¹³⁹

The organisational and managerial activities of a PBO are determined by decisions taken by persons given such authority in accordance with the founding document. No individual person, however, is permitted to directly or indirectly control the decision-making powers of a PBO.

4.4.3 Prohibition on distributions

A PBO may not distribute any of its funds directly or indirectly (see 3.5) to any person, unless this occurs in the course of undertaking a PBA. It must use its funds solely for the sole or principal object for which it was established, which must be to carry on one or more PBAs, as set out in its founding document.¹⁴⁰

The words “distribute” and “funding” are not defined in the Act. The words are described in the *Dictionary.com* as follows:

- “Distribute” as “to divide and give out in shares; deal out; allot.”¹⁴¹
- “Funding” as “funds, money immediately available; pecuniary resources.”¹⁴²

The word “funds” is described in the *BusinessDictionary.com* as follows:¹⁴³

“All the financial resources of a firm, such as cash in hand, bank balance, accounts receivable. Any change in these resources is reflected in the firm’s financial position.”

Having regard to the above, “funds” refer to the financial resources, namely, money available to a business for spending in the form of cash, liquid securities and credit lines.¹⁴⁴

The prohibition on distributions is an absolute prohibition. Thus, the requirement is not subject to the discretion of the Commissioner and cannot in general or in a particular instance be waived, deferred or reduced. Even if a minimal amount is distributed or a distribution occurs as an isolated or once-off event, the PBO may be subject to the transgression penalties (see 12.1).

A PBO must use its funds to carry on its sole or principal object. Any funds not used for this purpose, however, may not be distributed in any way to any person unless this happens because of carrying on a PBA. A person for purposes of this prohibition requirement is not limited to only a natural person, since the definition of “person” does not exclude companies, other incorporated entities, associations of persons, or statutory bodies.¹⁴⁵

It will be acceptable for a PBO to accumulate or invest surplus funds for future use in carrying on its sole or principal object. Any surplus funds may be invested as chosen provided such investment does not amount to an indirect distribution of profits or the award of an impermissible benefit. It is expected that the fiduciaries should act with prudence, integrity and reasonable care.

¹³⁹ www.businessdictionary.com/definition/power.html [Accessed 28 July 2022].

¹⁴⁰ Section 30(3)(b)(ii).

¹⁴¹ www.dictionary.com/browse/distribute [Accessed 28 July 2022].

¹⁴² www.dictionary.com/browse/funding [Accessed 28 July 2022].

¹⁴³ www.businessdictionary.com/definition/funds.html [Accessed 28 July 2022].

¹⁴⁴ See the meaning of “financial resources” in *BusinessDictionary.com* available online at www.businessdictionary.com/definition/financial-resources.html [Accessed 28 July 2022].

¹⁴⁵ See definition of “person” in section 2 of the Interpretation Act 33 of 1957.

4.4.4 Dissolution

On dissolution, a PBO must transfer its remaining assets to –¹⁴⁶

- another PBO;
- any institution, board or body whose sole or principal object is the carrying on of any PBA;¹⁴⁷
- the government of South Africa in the national,¹⁴⁸ provincial¹⁴⁹ or local¹⁵⁰ sphere contemplated in section 10(1)(a); or
- the National Finance Housing Corporation¹⁵¹ contemplated in section 10(1)(t)(xvii).¹⁵²

Any of the above organisations benefitting from the dissolution of a PBO are required to use those assets solely for purposes of carrying on one or more PBAs. A PBO may choose to whom it will distribute its remaining assets on dissolution, without prior approval from the Commissioner, provided the recipient meets the dissolution requirement. A PBO may not, on dissolution, distribute any of its funds to individuals or other tax-paying entities and in so doing enable the recipients to share in the tax concession it has enjoyed.

A similar requirement to the dissolution requirement will apply to a branch of a foreign tax-exempt company, association or trust terminating its activities in South Africa. Such a branch of a foreign PBO is required on termination to transfer the assets of the branch to any PBO, institution, board or body, department or administration only if during the three years preceding the termination of its activities in South Africa more than 15% of its receipts and accruals were derived from a source within South Africa.¹⁵³

4.4.5 Non-revocable donations

A PBO may not accept any donation (see **Chapter 9**) that may be revoked by the donor for reasons other than the PBO failing to abide by the designated purposes and conditions of the donation. A donation may be revoked if the PBO misrepresents the tax-deductibility of the donation under section 18A and such tax deduction (see **Chapter 11**) was a condition of the donation. In addition, a donor may also not impose conditions that will entitle the donor or a connected person in relation to the donor to obtain some direct or indirect benefit from the application of the donation. If the donor is another PBO, this prohibition on the derivation of a benefit does not apply.¹⁵⁴

To determine whether a donation is revocable or non-revocable will depend on the facts and circumstances of each case.

¹⁴⁶ Section 30(3)(b)(iii).

¹⁴⁷ The receipts and accruals of qualifying institutions, boards or bodies are exempt under section 10(1)(cA)(i).

¹⁴⁸ National departments are listed in Schedule 1 to the Public Service Act 103 of 1994.

¹⁴⁹ Provincial departments are listed in Schedule 2 to the Public Service Act, 1994.

¹⁵⁰ The local sphere of government consists of municipalities. See definition of “municipality” in section 1(1).

¹⁵¹ The National Housing Finance Corporation is established by the National Department of Human Settlements.

¹⁵² Section 30(3)(b)(iii) was amended by section 51(a) of the Taxation Laws Amendment Act 15 of 2016 and deemed to have come into operation on 1 April 2016 and applicable to years of assessment commencing on or after that date.

¹⁵³ Section 30(3)(b)(iiiA).

¹⁵⁴ Section 30(3)(b)(v).

Example 4 – Revocable and non-revocable donations

The following is a list of non-exhaustive examples of donations that are revocable and non-revocable:

- A PBO may not accept a donation made subject to the condition that it may be revoked should the donor require funds to cover future private expenses.
- A donation given to a school approved as a PBO on condition that the funds are to be used for purposes of building an extra classroom may be revoked by the donor if the school is not able to build the additional classroom.
- A donation to a PBO given on the pretext that a section 18A receipt will be issued for the donation and it subsequently transpires that the PBO does not have the necessary approval to issue such receipts, may be revoked by the donor.
- A PBO may not accept a donation made on condition that the donation is to be used to cover the cost of additional tuition fees for the donor's child.

4.4.6 Amendments to the founding document

A PBO must submit a copy of any amendment to its founding document to the Commissioner as soon as it has been affected.¹⁵⁵ This requirement will enable the Commissioner to ensure that any amendment is not contrary to the prescribed requirements.

It will be unacceptable for an organisation to submit a founding document complying with the Act at the time of applying for approval and then, after obtaining such approval, to amend the founding document to include non-qualifying provisions.

4.5 Participation in tax avoidance schemes

A PBO may not be a party to or permit itself to be used for any transaction, operation or scheme, the sole or main purpose of which is or was to reduce, postpone, or avoid any tax, duty or levy¹⁵⁶ that would otherwise have been or would have become payable by any person under the Act, or under any other Act administered by the Commissioner.¹⁵⁷ This rule will apply irrespective of whether the PBO itself or any other person benefitted from the reduction, postponement or avoidance of any applicable tax, duty or levy.

In *Smith v CIR* the court noted that the ordinary meaning of avoiding a liability for a tax is –¹⁵⁸ “to get out of the way of, escape or prevent an anticipated liability”.

The Act contains anti-avoidance provisions¹⁵⁹ that the Commissioner may use when taxpayers and their advisers enter into schemes with the sole purpose of avoiding tax.¹⁶⁰ In these circumstances, the Commissioner is entitled to determine the taxpayer's liability for any tax, duty or levy imposed by the Act, as if the transaction, operation, or scheme had not been entered into.

¹⁵⁵ Section 30(3)(b)(vi).

¹⁵⁶ These taxes, duties or levies may, amongst other things, include income tax (including CGT), VAT, transfer duty, or employees' tax.

¹⁵⁷ Section 30(3)(c).

¹⁵⁸ 1964 (1) SA 324 (A), 26 SATC 1 at 12.

¹⁵⁹ Sections 80A to 80L and 103.

¹⁶⁰ M Kolitz “Tax Avoidance” [online] (My LexisNexis: October 1999).

4.6 Remuneration

Employees, office bearers, members or other persons may receive remuneration from a PBO for services actually rendered to that PBO provided the remuneration –¹⁶¹

- is not excessive taking into account the particular service rendered and what is considered to be reasonable in the particular sector; and
- does not economically benefit any person in a manner inconsistent with the object of the PBO.

The term “remuneration”¹⁶² for purposes of employees’ tax is defined widely to include any amount of income paid or payable to any person whether in cash or otherwise, for example, a fringe benefit, and whether or not for services rendered. Remuneration may, amongst other things, include amounts of income paid or payable by way of any salary, fee, bonus, wage, gratuity, pension, leave encashment, emolument, voluntary award, commission, annuity, stipend, overtime, superannuation allowance, retirement allowance, lump sum benefit payment, or director's remuneration. The normal employees’ tax rules will apply to any remuneration received by or accrued to any employees of a PBO (see **14.2.3**).

There must be a causal connection between the remuneration paid, in relation to the service rendered by that person and the amount generally charged for such a service in that sector. The determination whether remuneration paid to any person is excessive will be a question of fact, and, since the facts and circumstances, pertaining to each PBO may differ, each case will be considered on its own merits. The ultimate test remains whether the remuneration is reasonable in the sector in relation to the service rendered and the burden is on the PBO to motivate that the remuneration is not excessive.

4.7 Reporting

A PBO must comply with any reporting requirements determined by the Commissioner.¹⁶³ The Commissioner annually gives public notice in the *Government Gazette* of the persons that must furnish an income tax return.¹⁶⁴ The persons required to submit returns, amongst others, include –

- every company and trust, which are a resident during that particular year of assessment, subject to specific conditions and requirements set out the relevant public notice; and
- every company, trust or other juristic person, which was not a resident during that particular year of assessment, but derived income from a source in South Africa.

¹⁶¹ Section 30(3)(d).

¹⁶² Paragraph 1 of the Fourth Schedule.

¹⁶³ Section 30(3)(e).

¹⁶⁴ Section 25 of the TA Act read with section 66(1).

The term “company” is defined and, amongst other things, includes –

- any association, corporation or company incorporated or deemed to be incorporated by or under any law in force or previously in force in South Africa or in any part thereof, or any body corporate formed or established or deemed to be formed or established by or under any such law;¹⁶⁵ or
- any association formed in the Republic to serve a specified purpose, beneficial to the public or a section of the public.¹⁶⁶

A PBO constituted as an NPC or an association of persons falls within the definition of “company”.

A PBO must submit income tax returns (see **15.5**) even if its approval or exemption results in no tax liability. The income tax return enables the Commissioner to annually assess whether the PBO is operating within the prescribed limits of its approval and to determine whether the partial taxation principles have been applied to receipts and accruals derived from a business undertaking or trading activity that does not qualify for exemption (see **Chapter 7**).

4.8 Funds provided to an association of persons

A PBO providing funds to an association of persons referred to in PBA 10(iii) in Part I is responsible to satisfy the Commissioner that reasonable steps have been taken to ensure that the funds have been used for the purposes for which they have been given, which must be to carry on any PBAs, and are not used to economically benefit any individual person.¹⁶⁷

The association of persons referred to in this PBA is a voluntary informal association or group of persons typically at grassroots or community level collectively carrying on one or more PBA but do not have a founding document and cannot be approved as a PBO by the Commissioner.¹⁶⁸ The reference to “association of persons” in this PBA does not relate to an association of persons as referred to in the definition of “public benefit organisation”,¹⁶⁹ since the latter is a formal association of persons established by adopting a legal founding document, which may qualify for approval as a PBO, provided its founding document and objects comply with the prescribed requirements.¹⁷⁰

Example 5 – Funds provided to an association of persons

Facts:

A rural community in a remote area does not have running water available in its village. The leaders in the community have formed an informal association committed to embark on a project to provide their community members with running water. The informal association does not have a constitution and cannot be approved as a PBO.

A PBO, Water 4 All, has undertaken to provide assistance by overseeing the project at no cost and also to provide funds for the cost of the installation of pipes and a water pump to ensure that water is accessible to all members of the community.

¹⁶⁵ Paragraph (a) of the definition of “company” in section 1(1).

¹⁶⁶ Paragraph (d) of the definition of “company” in section 1(1).

¹⁶⁷ Section 30(3)(f).

¹⁶⁸ The association of persons must carry on any PBAs except the provision of funds, assets or other resources contemplated in PBA 10.

¹⁶⁹ See paragraph (a)(i) of the definition of “public benefit organisation” in section 30(1).

¹⁷⁰ For further information, see Interpretation Note 98 “Public Benefit Organisations: The Provision of Funds, Assets or Other Resources to Any Association of Persons”.

Result:

The community leaders are regarded as an association of persons for purposes of PBA 10(iii), who are carrying on PBA 1(p).

The PBO, Water 4 All, is regarded as carrying on PBA 10(iii) in Part I and must take reasonable steps to ensure that the community leaders use the funds for the purpose for which they were provided.

4.9 Payments to political parties

A PBO may not use its resources directly or indirectly to support, advance or oppose any political party.¹⁷¹

¹⁷¹ Section 30(3)(h).

Chapter 5

Group registration

The Commissioner may grant approval as a PBO to a group of organisations falling directly under the direction and supervision of a co-ordinating body provided certain conditions and requirements are complied with.¹⁷² The co-ordinating body must submit a list of the names and addresses of all the PBOs within the group when submitting its application for approval to the Commissioner.

The conditions and requirements that a co-ordinating body of a group of PBOs must comply with are as follows:

- All the PBOs within the group must share a common purpose and carry on the same PBAs.
- The group of PBOs must all fall directly under the direction and supervision of a co-ordinating body.
- The founding document of the co-ordinating body and the PBOs within the group must be common or similar and, must be amended to comply with the relevant prescribed requirements, if applicable.
- The Commissioner must be informed of all amendments effected to the founding document of the co-ordinating body and of the PBOs within the group.
- The co-ordinating body must take responsibility to ensure that all the PBOs within the group comply with section 30.
- The co-ordinating body must report any PBO within the group acting contrary to section 30.
- Consolidated annual financial statements must be prepared for all the PBOs within the group and must contain a certified report that all the PBOs within the group complied with section 30.

Non-compliance by the co-ordinating body in taking the steps set out above or failing to notify the Commissioner when it becomes aware of any material failure to comply with section 30 may, after due notice, result in the withdrawal of the approval.

The Commissioner may withdraw the approval as a PBO of the group if the co-ordinating body –¹⁷³

- intentionally or negligently fails to exercise the required control over any PBO in the group; or
- fails to notify the Commissioner of any material failure of any PBO within the group to comply with section 30.

¹⁷² Section 30(3A).

¹⁷³ Section 30(5A).

The words “intentionally” and “negligently” are not defined in the Act. They are described in the *Merriam-Webster Dictionary* as follows:

- “Intentionally” as “in an intentional manner: with awareness of what one is doing: purposely.”¹⁷⁴
- “Negligently” as “marked by or given to neglect especially habitually or culpably” and “failing to exercise the care expected of a reasonably prudent person in like circumstances.”¹⁷⁵

Claassen’s Dictionary of Legal Words and Phrases describes “negligence” as follows:¹⁷⁶

“The term *negligence* as used in our courts, simply means a failure to exercise that degree of diligence which the law requires under the circumstances of each case. “*Negligence* is the failure or the omission to take proper care, and proper care is the care with which, according to our law, a *diligens paterfamilias* or, as it is expressed in the English law, a prudent and reasonable man, would take under the circumstances of such a case. The law presumes that a person who exercises any calling or who does any particular act, will exercise that calling or do that act with skill, with knowledge, and with the requisite experience; and if there are any dangers connected with that calling or act, that he will take all reasonable precautions to guard others against danger’ (per DE VILLIERS, JP in *Hammerstrand v Pretoria Municipality* 1913 TPD 377). See also *Farmer v Robinson GM Co Ltd* 1917 AD 521; *Cape Town Municipality v Paine* 1923 AD 207; *Herschel v Mrupe* 1954 3 SA 464 (A); *Silver’s Fishing Corp’n (Pty) Ltd v Maweza* 1957 2 SA 263–264 (A)”.

The Commissioner will give notice to the co-ordinating body of the intention to withdraw the approval as a PBO of the group and specify a period within which corrective steps must be taken. If the co-ordinating body takes no corrective steps within the period stated in the notice, the approval will be withdrawn from the beginning of the year of assessment in which the non-compliance or failure by the co-ordinating body occurred. See **12.1** for the consequences of the withdrawal of the approval as a PBO of the group.

¹⁷⁴ www.merriam-webster.com/dictionary/intentionally [Accessed 28 July 2022].

¹⁷⁵ www.merriam-webster.com/dictionary/negligently [Accessed 28 July 2022].

¹⁷⁶ RD Claassen [online] (My LexisNexis: June 2021).

Chapter 6

Written undertaking

A branch of a foreign tax-exempt organisation governed by the founding document of that foreign tax-exempt organisation and a testamentary trust, which comes into existence after the death of the testator, must submit a written undertaking to the Commissioner,¹⁷⁷ since their founding documents are legally incapable of being amended to comply with the prescribed requirements for approval as a PBO.

The written undertaking must be submitted by the persons responsible in a fiduciary capacity for the funds and assets of such a branch or testamentary trust (see **4.4.1**), as part of the application for approval as a PBO (see **Chapter 13**), to confirm that the branch or testamentary trust will be administered in accordance with the prescribed requirements (see **4.4**).

In such instances, the founding documents will be deemed to comply with the prescribed requirements. The written undertaking will be a permanent measure and binding on the branch of a foreign tax-exempt organisation or testamentary trust. Non-compliance with its terms will result in the same penalties and actions as if the prescribed requirements are contained in the founding document (see **12.1**).

The following written undertakings are available to assist persons accepting fiduciary responsibility to administer a branch of a foreign tax-exempt organisation or testamentary trust in accordance with the prescribed requirements:

- Form EI 2 a specimen written undertaking for testamentary trusts.
- Form EI 2B a specimen written undertaking for branches of a foreign tax-exempt organisation.

All other organisations, namely, an NPC (see **3.2.1**), a trust (see **3.2.2**) and an association of persons (see **3.2.3**) must provide for the prescribed requirements (see **4.4**) in their founding documents (see **4.3.1**, **4.3.2** and **4.3.4**) before the Commissioner can grant approval as a PBO.¹⁷⁸

¹⁷⁷ Section 30(4).

¹⁷⁸ For commentary, see clause 48 of the *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2014*.

Chapter 7

Exemption from income tax

7.1 Partial taxation

A PBO is allowed to carry on a business undertaking or trading activity provided its sole or principal object (see 3.3) remains the carrying on of PBAs (see Chapter 2).

Receipts and accruals from a business undertaking or trading activity will be exempt from income tax only if they fall within one of the four categories of exemption included in section 10(1)(cN). These four categories are dealt with in 7.3.1, 7.3.2, 7.3.3 and 7.4. Each category has its own conditions and requirements and are applied separately.¹⁷⁹

There is no limit on the amount of receipts and accruals qualifying as exempt from income tax under the categories in 7.3.1, 7.3.2 and 7.3.3. There, however, is a limitation on the amount of the exemption of the basic exemption in 7.4.

7.2 Exemption of receipts and accruals

Section 10(1)(cN) exempts from income tax the “receipts and accruals” of a PBO to the extent that they are derived in the manner specified (see 7.3). The type of receipt or accrual envisaged is one that is included in the definition of “gross income”.¹⁸⁰

An amount will be “received” by a person as envisaged in the Act, only if the person receives it on his or her own behalf and for his or her own benefit.¹⁸¹ An amount “accrues” to a person when the person is entitled to it and when the person’s right to the amount is unconditional.¹⁸² An amount is included in a person’s gross income in the year of assessment in which that person receives it or the year of assessment in which it accrues to that person, whichever comes first.¹⁸³

Receipts or accruals of a capital nature are taken into account in determining a taxable capital gain, which is included directly in paragraph (b) of the definition of “taxable income” in section 1(1).¹⁸⁴ While a taxable capital gain is potentially subject to income tax, the exemptions in section 10 do not apply to it because a taxable capital gain is included directly in taxable income and does not comprise “income” (gross income less exempt income). Paragraph 63A of the Eighth Schedule contains the rules for disregarding capital gains and losses of a PBO (see 14.1.7).

¹⁷⁹ For further commentary on the interpretation and application of section 10(1)(cN) as well as a step-by-step guide to calculating the taxable income of PBOs, see Interpretation Note 24 “Income Tax: Public Benefit Organisations: Trading Rules – Partial Taxation of Trading Receipts”.

¹⁸⁰ The term “gross income” is defined in section 1(1).

¹⁸¹ *Geldenhuis v CIR* 1974 (3) SA 256 (C), 14 SATC 419.

¹⁸² *Lategan v CIR* 1926 CPD 203, 2 SATC 16; *Ochberg v CIR* 1933 CPD 256, 6 SATC 1.

¹⁸³ *SIR v Silverglen Investments (Pty) Ltd* 1969 (1) SA 365 (A), 30 SATC 199.

¹⁸⁴ See section 26A.

Example 6 – Non-exhaustive examples of “total receipts and accruals” of a PBO

- Donations and bequests
- Subsidies
- School fees
- Rent
- Income from fundraising activities
- Investment income
- Sale of movable and immovable assets

7.3 Categories of permissible business undertakings or trading activities

The terms “business”, “carrying on business” and “business undertaking” are not defined in the Act.

Claassen’s Dictionary of Legal Words and Phrases defines “business” as follows:¹⁸⁵

“Business is anything which occupies the time and attention of a man for the purpose of profit.... Generally, the word business is capable of a very wide meaning. It may be a charitable business Even a single, isolated activity enterprise or pursuit may constitute a business.”

On the issue of what constitutes “carrying on business”, Beadle CJ, in *Estate G v COT* said the following:¹⁸⁶

“The sensible approach, I think, is to look at the activities concerned as a whole, and then to ask the question: Are these the sort of activities which, in commercial life, would be regarded as ‘carrying on business’? The principal features of the activities which might be examined in order to determine this are their nature, their scope and magnitude, their object (whether to make a profit or not), the continuity of the activities concerned, if the acquisition of property is involved, the intention with which the property was acquired. This list of features does not purport to be exhaustive, nor are any one of these features necessarily decisive, nor is it possible to generalize and state which feature should carry most weight in determining the problem. Each case must depend on its own particular circumstances.”

Based on case law, “business” is therefore generally accepted to include anything that occupies the time, attention and labour of a person for profit.¹⁸⁷ There are no set rules to determine what constitutes “business” and as a result, the answer to the question of whether a person is carrying on “business” requires an inference from facts, taking into account certain factors such as intention, motive, frequency and nature of the activity.¹⁸⁸

¹⁸⁵ RD Claassen [online] (My LexisNexis: June 2021).

¹⁸⁶ 1964 (2) SA 701 (SR), 26 SATC 168 at 173 and 174.

¹⁸⁷ *Smith v Anderson* (15 Ch.D. 258).

¹⁸⁸ *Estate G v COT* (above). See also *CIR v Stott* 1928 AD 252, 3 SATC 253 at 257 and ITC 1283 (1978) 41 SATC 36 (SW) at 43.

The words “trading activity” are not defined in the Act. The term “trade” is defined as including –¹⁸⁹

“every profession, trade, business, employment, calling, occupation or venture, including the letting of property and the use of or the grant of permission to use any patent as defined in the Patents Act¹⁹⁰ or any design as defined in the Designs Act¹⁹¹ or trade mark as defined in the Trade Marks Act¹⁹² or any copyright as defined in the Copyright Act¹⁹³ or any other property which is of a similar nature”.

Claassen’s Dictionary of Legal Words and Phrases defines “trade” as follows:¹⁹⁴

“A handicraft, occupation or a business carried on by a person for profit.”

The courts have also interpreted trade to be neither exhaustive nor restrictive and will include any activity involving risking something with the object of making a profit, including the continuous turnover of floating capital.¹⁹⁵ The absence of profit will, however, not preclude a taxpayer’s activities from being classified as a trade.¹⁹⁶ Each case will be considered on its own merits to determine whether a trading activity¹⁹⁷ is being carried on.¹⁹⁸

The carrying on of a “trade” is not the same thing as the conducting of a “business”. However, the word “business” is included in the definition of “trade”. The conducting of a “business undertaking” will, therefore, also constitute “trade”.

Example 7 – Non-exhaustive examples of trading activities

- Letting of immovable property
- Conducting farming activities
- Providing of professional services
- The granting of permission to use a copyright or patent

The passive investment of surplus funds in shares or an investment in a financial institution is not normally regarded as a business undertaking or trading activity. However, if it is undertaken in an active manner, such as the advancing of interest-bearing loans at market-related rates it could be regarded as a business undertaking. The mere holding of shares does not constitute a “business undertaking” or “trading activity”. Continuity is a factor that may be taken into consideration in determining whether a person is conducting a business. However, the main criterion applied in determining whether a business is conducted, is that the transaction should be undertaken with the direct and primary object of making a profit and not with a mere hope of ultimately making a profit.¹⁹⁹

¹⁸⁹ Section 1(1).

¹⁹⁰ Act 57 of 1978.

¹⁹¹ Act 195 of 1993.

¹⁹² Act 194 of 1993.

¹⁹³ Act 98 of 1978.

¹⁹⁴ RD Claassen [online] (My LexisNexis: June 2021).

¹⁹⁵ ITC 1675 (1998) 62 SATC 219 (G); *Burgess v CIR* 1993 (4) SA 161 (A), 55 SATC 185 at 196; ITC 770 (1953) 19 SATC 216 (T) at 216 and 7; ITC 615 (1946) 14 SATC 399 (U) at 402 and *Modderfontein Deep Levels Ltd & another v Feinstein* 1920 TPD 288.

¹⁹⁶ *De Beers Holdings (Pty) Ltd v CIR* 1986 (1) SA 8 (A), 47 SATC 229 at 260.

¹⁹⁷ Section 10(1)(cN)(i).

¹⁹⁸ See Interpretation Note 33 “Assessed Losses Companies: The ‘Trade’ and ‘Income from Trade’ Requirements” in paragraph 4

¹⁹⁹ *Platt v CIR* 1922 AD 42, 32 SATC 142.

7.3.1 Integral and directly related trade

To qualify for exemption under this category, the business undertaking or trading activity –

- must be integral and directly related to the sole or principal object for which the PBO is established, namely, to carry on one or more PBAs;²⁰⁰
- must be carried out or conducted on the basis substantially the whole of which is directed towards the recovery of cost;²⁰¹ and
- does not result in unfair competition in relation to taxable entities.²⁰²

The words “integral”, “directly” and “related” are not defined in the Act.

The word “integral” is described in the *Dictionary.com* as –²⁰³

1. of, relating to, or belonging as a part of the whole; constituent or component: integral parts.
2. necessary to the completeness of the whole.
3. consisting or composed of parts that together constitute a whole.
4. entire; complete; whole”.

The *Cambridge English Dictionary* describes “directly” as –²⁰⁴

“without anything else being involved or in between”.

The word “related” is described in the *Dictionary.com* as –²⁰⁵

“associated; connected; allied by nature, origin, kinship, marriage, etc.”.

Example 8 – Integral and directly related trade

Facts:

A PBO conducts a PBA of providing healthcare services at no charge to poor and needy persons. In addition to providing a medical consultation service, the PBO also provides medication at cost.

Result:

The provision of medication at cost is regarded as integral and directly related to the activity of providing healthcare services to poor and needy persons.

²⁰⁰ Section 10(1)(cN)(ii)(aa)(A).

²⁰¹ Section 10(1)(cN)(ii)(aa)(B).

²⁰² Section 10(1)(cN)(ii)(aa)(C).

²⁰³ www.dictionary.com/browse/integral [Accessed 28 July 2022].

²⁰⁴ <https://dictionary.cambridge.org/dictionary/english/directly> [Accessed 28 July 2022].

²⁰⁵ www.dictionary.com/browse/related [Accessed 28 July 2022].

Example 9 – Trade integral and directly related to the sole or principal object of the PBO

Facts:

A PBO engages in the PBA of caring for disabled persons. As a therapeutic and remedial activity the PBO has acquired land on which the residents are taught to grow vegetables and care for a small herd of cattle.

The mechanical labour as well as veterinary services are provided at no cost by a nearby agricultural college. All the manual labour is undertaken by the residents. The produce is primarily used for own consumption and any surplus is sold to a local farmers' market to defray costs. Some of the residents have been taught to knead and bake bread that is supplied to a nearby supermarket. No commercial ovens or baking processes are used. Both the farming and baking activities are regarded as being of therapeutic benefit for the residents.

Result:

The trading activities are integral and directly related to the sole object of the PBO, which is to care for disabled persons. The primary purpose of the activities is to provide for the consumption of the residents and the excess produce is sold only in order to recover costs. Secondly, the activities are regarded as being of therapeutic benefit to the residents who are unable to find employment in the open labour market.

Substantially the whole of the trading activities are conducted on a cost-recovery basis. If it were not for the donated services or if external labour had been hired, a profit would not have been realised.

The activities do not result in unfair competition with other tax-paying entities.

A business undertaking or trading activity will not be regarded as related to a PBOs approved sole or principal object if it does not directly contribute to achieving the sole or principal object of the PBO, which must be to carry on one or more PBA. Whether an activity contributes to achieving the PBOs sole or principal object will depend on the facts of each case. The size and extent of the activities involved must be considered in relation to the nature and extent of the approved function that they intend to serve to determine whether those activities contribute directly to achieve the approved sole or principal object of a PBO.

An unrelated business undertaking or trading activity would be an undertaking or activity conducted by a PBO that is not directly related to the performance of the PBO's approved sole or principal object (see 3.3). Any income derived from activities that are not integral and directly related to the sole or principal object of the PBO is taxable subject to the basic exemption (see 7.4).

The use by a PBO of the profits derived from any unrelated business undertaking or trading activity does not make the activity directly related to the performance by the PBO or its approved sole or principal object.

Example 10 – Non-exhaustive examples of unrelated trade

- The use of assets to generate income. For example, the letting of parking facilities, or a hall to members of the general public.
- A museum during the week uses its theatre auditorium for showing educational films to promote the arts, culture, buildings and collections with historical interest, since its sole or principal object is to carry on PBA 6(b) in Part I. However, the museum operates the theatre as a motion picture theatre for the general public over weekends when the museum is closed.
- A PBO established to prevent cruelty to animals contemplated in PBA 7(b) in Part I receives income from providing pet boarding and grooming services.

It is a requirement that substantially the whole of the integral and directly related business undertaking or trading activity must be conducted on a cost-recovery basis. The expression “substantially the whole” is not defined in the Act and is regarded by SARS to mean 90% or more. However, since PBOs operate in an uncertain environment making proper planning difficult, SARS will accept a percentage of not less than 85%.²⁰⁶ This percentage must be determined using a method appropriate to the circumstances and may be motivated by taking into account time or cost.

Example 11 – Substantially the whole of the activity is undertaken on a cost-recovery basis

Facts:

A PBO provides literacy and numeracy education to adults. To fund the provision of these PBAs, the PBO charges tuition fees. The fees are based on the estimated cost to the PBO in providing the tuition that includes the cost of hiring a hall, tuition material and text books. The tuition is provided on a voluntary basis by teachers after hours. The tuition fee is the principal source of income for the PBO.

Result:

Since the tuition fees are determined on a cost-recovery basis and no charge is made for the donated services of the teachers, substantially the whole of the activities are regarded as being directed towards the recovery of cost.

It is not always possible to base trading activities on a 100% cost-recovery basis and it is for this reason that legislation requires that substantially the whole, not less than 85%, of the business undertaking or trading activity must be based on recovery of cost.²⁰⁷ This requirement will be met when not less than 85% of the business undertaking or trading activity is carried out to recover direct and reasonable indirect costs.

The concept “recovery of cost” means that the business undertaking or trading activity is not conducted at a mark-up to maximise profits, but rather with the intention of recovering direct and reasonable indirect costs relating to the business undertaking or trading activity.

²⁰⁶ For further information, see Binding General Ruling (Income Tax) 20 “Interpretation of the Expression ‘Substantially the Whole’ ”.

²⁰⁷ Section 10(1)(cN)(ii)(aa)(B).

In *C v COT Goldin J* stated the following on the meaning of “cost”:²⁰⁸

“The word ‘cost’, when undefined, may be used in various senses. As Jordan CJ said in the case of *Ex parte Brierley, Re Elvidge* (1947) 47 NSWSR 423 at 427; *Words and Phrases Legally Defined* 2 ed –

‘It may, in the case of manufacture, be used to mean the price paid for the raw material plus the wages paid for turning it into finished articles; and, in the case of trading, the price paid for what is re-sold. Or, in either case, it may include all the other expenses incurred in bringing into existence, or obtaining, and then selling a vendible article – what are generally described as ‘overheads’ ”.

Goldin J stated further that –²⁰⁹

“[t]he word ‘cost’ has to be construed according to its context”.

Trollip JA held in *SIR v Eaton Hall (Pty) Ltd* that –²¹⁰

“in the absence of any definition in the Act of such cost one must look at its ordinary meaning. The *Oxford English Dictionary* defines ‘cost’ as meaning: ‘That which must be given or surrendered in order to acquire, produce, accomplish, or maintain something; the price paid for a thing’ ”.

Example 12 – Recovery of cost

Facts:

A PBO carries on a PBA under the category “Education and Development” and operates a tuck shop serving and selling refreshments to learners for a consideration determined by taking into account the cost of the goods. The cost of the goods sold includes the purchase price, costs such as telephone, electricity, repairs and maintenance, stationery, cleaning materials and an amount for a reserve created for future replacement costs of capital assets such as a refrigerator, microwave and deepfreeze. Assistance in the tuck shop is provided by volunteers and as a result no salaries or wages are incurred and a small profit may result, which is used by the PBO to fund its PBAs.

Result:

The running of the tuck shop is regarded as being carried out or conducted on a cost-recovery basis, since substantially the whole of its business activities are directed towards the recovery of cost.

The business undertaking or trading activity should not result in unfair competition with other taxable entities. A PBO should not be in a more favourable position or have an unfair advantage over a taxable entity conducting the same business undertaking or trading activity.²¹¹ A PBO has an advantage in that it is not required to sacrifice a portion of its profit in the form of tax.

²⁰⁸ 1973 (4) SA 449 (R), 35 SATC 241 at 246 and 247.

²⁰⁹ At 247.

²¹⁰ 1975 (4) SA 953 (A), 37 SATC 343 at 347.

²¹¹ Section 10(1)(cN)(ii)(aa)(C).

The *Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa* provides the following on unfair competition:²¹²

“In granting privileged tax status to particular organisations, the fiscus needs to have regard to the issue of ‘unfair competition’ between bodies which are subject to tax and those which are tax-exempt. The broad issue of fairness or equity within a free-market economy is a fundamental one that warrants some degree of vigilance. However, the Commission is of the view that this value should not be elevated to the status of a ‘*summum bonum*’ and needs to be counter-balanced with other important values in society, including the need for a strong, independent, and viable NPO sector.”

Each case will be considered on its own merits to determine whether a PBO has an unfair advantage. In determining whether a PBO has an unfair advantage, various factors could be taken into account such as –

- whether the PBO engages in active advertising or marketing;
- whether the activity is conducted on a competitive basis with the intention of maximising profits;
- the amount of income received;
- the location and availability of similar activities; or
- whether voluntary assistance is provided by other persons.

Example 13 – Unfair competition

Facts:

An orphanage caring for abandoned children also operates a service station with the intention of earning a profit to augment its income.

Result:

The operation of the service station is a commercial trading activity resulting in unfair competition with other tax-paying entities.

7.3.2 Occasional trade

A business undertaking or trading activity will qualify under this category if it is of an occasional nature and undertaken substantially with assistance on a voluntary basis without compensation.²¹³

The Act does not define “occasional”, “substantially” or “compensation”.

The *Longman Dictionary of Contemporary English* describes “occasional” as –²¹⁴

“sometimes, but not regularly and not often”.

The difference between occasional and frequent is that “occasional” occurs irregularly, from time to time, once in a while, therefore rarely, while “frequent” occurs regularly, very often or many times. Fundraising activities will therefore not be regarded as occasional if there is a frequency and continuity to them, and if such activities are pursued in a manner similar to commercial activities of taxpaying entities.

²¹² At 10.

²¹³ Section 10(1)(cN)(ii)(bb).

²¹⁴ www.ldoceonline.com/dictionary/occasionally [Accessed 28 July 2022].

A business undertaking or trading activity of an occasional nature is one conducted on an irregular, infrequent basis or as a special event, for example, fundraising activities that take place on an annual basis with the assistance of helpers or volunteers who are not compensated for their services.

Example 14 – Non-exhaustive examples of business undertakings or trading activities of an occasional nature

- Annual jumble sales at which donated second-hand clothing is sold.
- Annual fundraising events such as fêtes, cake sales or the sale of raffle tickets involving prizes that have been donated.
- Charity golf days involving donated or sponsored prizes.
- A gala dinner held to raise funds.
- The sale of Christmas cards reconditioned by volunteers.

The word “substantial” is described in the *BusinessDictionary.com* as follows:²¹⁵

“Having substance, large, significant.”

It is therefore a requirement that a large or significant part of the business undertaking or trading activity must be undertaken with assistance from volunteers without compensation.

Example 15 – Substantially with assistance on a voluntary basis

Facts:

At a school fête each of the 20 classes are assigned to run a stall selling donated goods to raise funds. All the stalls are manned by volunteers who include teachers, parents and learners.

Result:

All the assistance given to the school at the fundraising event is provided on a voluntary basis. The requirement that assistance should be provided on a voluntary basis has therefore been met.

The *Dictionary.com* describes “compensation” as –²¹⁶

1. the act or state of compensating, as by rewarding someone for service or by making up for someone's loss, damage, or injury by giving the injured party an appropriate benefit.
3. something given or received as an equivalent for services, debt, loss, injury, suffering, lack, etc.; indemnity”.

The repayment of reasonable and necessary out-of-pocket expenditure to volunteers in assisting in the carrying on of the PBO’s occasional trade activities is allowed.

²¹⁵ www.businessdictionary.com/definition/substantial.html [Accessed 28 July 2022].

²¹⁶ www.dictionary.com/browse/compensation [Accessed 28 July 2022].

7.3.3 Ministerial approval

A business undertaking or trading activity may be approved by the Minister by notice in the *Gazette* by taking into account the –²¹⁷

- scope and benevolent nature of the undertaking or activity;²¹⁸
- direct connection and interrelationship of the undertaking or activity with the sole or principal object of the PBO;²¹⁹
- profitability of the undertaking or activity;²²⁰ and
- level of economic distortion that will be caused by the tax-exempt status of the PBO carrying on the undertaking or activity.²²¹

Any request in this regard must be addressed to the Commissioner and must comprehensively address each of the above bullet points, clearly demonstrate the benefits of the business undertaking or trading activity for the general public and motivate why it will not result in unfair competition with other taxpayers, or erode the tax base. The Commissioner will, if the request has merit, draft a submission based on the information provided for the Minister's consideration and possible approval.

7.4 Basic exemption

The basic exemption is calculated as an amount equal to the greater of 5% of the total receipts and accruals of the PBO derived during the relevant year of assessment²²² or R200 000.²²³

There is a limit on the amount of receipts and accruals derived by a PBO from the carrying on of a business undertaking or trading activity that is exempt from income tax under the basic exemption because the PBO receives the benefit of only the greater of 5% or R200 000.

The basic exemption cannot create a loss, since it is not a deduction but a calculation to determine the threshold amount to be applied to the receipts and accruals from a business undertaking or trading activity falling outside the ambit of the permissible business undertaking or trading activity categories.

The receipts and accruals referred to in the calculation of the threshold amount include amounts of a capital nature.

The receipts and accruals from a business undertaking or trading activity exceeding the basic exemption threshold is subject to income tax (see **7.5**).

The total receipts and accruals of all the individual PBOs forming part of a group registration (see **Chapter 5**) will be taken into account in calculating the threshold of 5% of the total receipts and accruals. The amount of R200 000 is not increased by the number of individual organisations within the group, since this amount applies to a PBO, which in this instance is the co-ordinating body of the group of PBOs.

²¹⁷ Section 10(1)(cN)(ii)(cc).

²¹⁸ Section 10(1)(cN)(ii)(cc)(A).

²¹⁹ Section 10(1)(cN)(ii)(cc)(B).

²²⁰ Section 10(1)(cN)(ii)(cc)(C).

²²¹ Section 10(1)(cN)(ii)(cc)(D).

²²² Section 10(1)(cN)(ii)(dd)(i).

²²³ Section 10(1)(cN)(ii)(dd)(ii).

Example 16 – Basic exemption

Facts:

A PBO conducts PBAs from a property it owns. To augment its income a portion of the property owned by the PBO and not used for carrying on its PBAs is let. The total receipts and accruals of the PBO for the year ended 28 February 2021 is as follows:

	R
Donations	450 000
Rental income	90 000
Interest income	<u>50 000</u>
Total receipts and accruals	<u>590 000</u>

Result:

The basic exemption for the rental income received or accrued from the trading activity is calculated as an amount equal to the greater of 5% of the total receipts and accruals or R200 000.

5% of the total receipts and accruals of R590 000 is R29 500.

The total receipts from letting the property (a trading activity) of R90 000 are exempt, since the PBO receives the benefit of the greater of R29 500 or R200 000.

The other receipts and accruals of R500 000 (donations of R450 000 + interest of R50 000) are also exempt from income tax, since they were not derived from a business undertaking or trading activity.²²⁴

7.5 Rate of tax

A PBO liable to tax on receipts and accruals not qualifying for exemption will pay tax at a rate of 28% on its taxable income, or as prescribed annually in the Rates and Monetary Amounts and Amendment of Revenue Laws Act, irrespective of whether it is established as an NPC, a trust or as an association of persons.²²⁵

²²⁴ Section 10(1)(cN)(i).

²²⁵ For tax rates relating to previous years of assessment, see the *Guide for Tax Rates / Duties / Levies*.

Chapter 8

Section 18A approval

8.1 Introduction

In order to give effect to practice, section 18A(1) was amended to explicitly provide that donations under section 18A are subject to the approval by the Commissioner.²²⁶ The amendment was necessitated by the increasing number of cases relating to the abuse of section 18A. PBOs were issuing section 18A receipts without having the necessary approval by the Commissioner to do so. Organisations claimed they did not need formal approval from the Commissioner to issue section 18A receipts to donors. They held the view that they need the Commissioner's approval only as a PBO, and if they carry on PBAs listed in Part II in South Africa, they can issue section 18A receipts for *bona fide* donations received.

A PBO approved by the Commissioner under section 30 applies to the Commissioner (see **Chapter 13**) for a specific reference number for purposes of section 18A, which must appear on section 18A receipts (see **Chapter 10**) for such receipts to be valid and to enable donors to claim a tax deduction in the determination of their taxable income (see **Chapter 11**).

8.2 Public benefit organisations qualifying for section 18A approval

A PBO may qualify for approval under section 18A(1)(a)(i) if it carries on any PBAs in Part II in South Africa.²²⁷

The PBO must itself physically and actively carry on the PBAs in Part II in South Africa.

A section 18A-approved PBO carrying on a combination of PBAs, some of which are non-section 18A-approved in Part I and some of which are section 18A-approved in Part II (see **2.2**), may be granted approval to issue section 18A receipts for donations received solely for PBAs in Part II.²²⁸ The approval is subject to the section 18A-approved PBO ring-fencing the PBAs in Part II. The concept "ring-fence" in this context generally means to assign donations for which section 18A receipts were issued to a particular purpose, so as to restrict their use to carrying on PBAs in Part II in South Africa. Donations received must be controlled in such a manner that their usage is restricted to only those PBAs in Part II carried on in South Africa. The record-keeping of a section 18A-approved PBO must clearly identify the donations received for PBAs in Part II and the use to which those donations were applied.

Section 18A-approved PBOs carrying on a combination of PBAs listed in Part I and Part II in South Africa are required to obtain and retain an audit certificate²²⁹ to confirm that all donations received or accrued during the year for which the section 18A-approved PBO issued section 18A receipts were used solely in carrying on PBAs in Part II in South Africa.²³⁰ The audit certificate must be retained for record-keeping purposes.

Section 18A-approved PBOs carrying on only PBAs in Part II in South Africa are not required to obtain and retain an audit certificate.

²²⁶ Section 31 of the Taxation Laws Amendment Act 17 of 2017. The amendment is effective from date of promulgation, namely, 18 December 2017.

²²⁷ Section 18A(1)(a)(i).

²²⁸ Section 18A(2A)(a).

²²⁹ For guidance on the audit certificate, see Interpretation Note 112 "Section 18A: Audit Certificate".

²³⁰ Section 18A(2B).

8.3 Conduit public benefit organisations qualifying for section 18A approval

A PBO having as its sole or principal object the provision of funds or assets to a section 18A-approved PBO, institution, board or body approved by the Commissioner under section 18A(1)(a)(ii), or any department approved by the Commissioner under section 18A(1)(c), may qualify for approval under section 18A(1)(b).

Any section 18A-approved PBO, institution, board or body approved under section 18A(1)(a)(i), or department approved under section 18A(1)(c) benefitting from the provision of funds or assets by a section 18A-approved conduit PBO are required to use those funds or assets in carrying on any PBA in Part II in South Africa.

The approval of a conduit PBO for purposes of section 18A is specifically limited to the provision of funds or assets and does not include the provision of services or other resources contemplated in PBA 10 in Part I (see **4.8**).

A section 18A-approved conduit PBO providing funds or assets to other section 18A-approved PBOs, institutions, boards or bodies approved under section 18A(1)(a), or any department approved under section 18A(1)(c), carrying on a combination of non-section 18A-approved PBAs in Part I and section 18A-approved PBAs in Part II, must also comply with the ring-fencing requirement in **8.2**.²³¹

A section 18A-approved conduit PBO must distribute or undertake to distribute at least 50% of all funds received by donation for which section 18A receipts were issued within 12 months after the end of the year of assessment in which the donation was received.²³² The distribution requirement applies only to a section 18A-approved conduit PBO and only to donations for which the section 18A-approved conduit PBO issued section 18A receipts.

Example 17 – Distribution requirement

Facts:

Fury Friends Trust was established to provide funds or assets for the benefit of Fury Friends Shelter, a PBO carrying on PBA 4(b) in Part II. The trust was approved by the Commissioner as a conduit PBO under section 18A(1)(b). The trust received donations for which it issued section 18A receipts during the following years of assessment ending 28 February:

	R
2019	100 000
2020	150 000
2021	200 000

Result:

In order to comply with the distribution requirement, the trust is required to distribute to the shelter at least –

- R50 000 (50% of R100 000) of donations received during the 2019 year of assessment no later than the end of the 2020 year of assessment;
- R75 000 (50% of R150 000) of donations received during the 2020 year of assessment no later than the end of the 2021 year of assessment; and

²³¹ Section 18A(2A)(b)(ii).

²³² Section 18A(2A)(b)(i). Section 29(1)(a) of the Taxation Laws Amendment Act 43 of 2014 reduced the distribution requirement from 75% to 50% of all funds received by donation for which section 18A receipts were issued with effect from 1 March 2015.

- R100 000 (50% of R200 000) of donations received during the 2021 year of assessment no later than the end of the 2022 year of assessment.

The obligation to distribute at least 50% of the funds may be deferred, reduced or waived subject to conditions determined by the Commissioner taking into account the public interest and purpose for which the section 18A-approved conduit PBO wishes to accumulate the funds.²³³

The exercise of this discretion by the Commissioner is considered only if a section 18A-approved conduit PBO is accumulating funds for a specific capital project, which must be a section 18A-approved PBA. A section 18A-approved conduit PBO wishing to accumulate funds to fund specific capital projects may request the Commissioner to postpone, reduce or waive the distribution requirement. A request to have this distribution requirement relaxed may be submitted to the Commissioner together with –

- full details of the capital project or purpose for which the funds are to be accumulated;
- the projected timeframe;
- the estimated costs involved; and
- motivated reasons why the relaxation of the distribution requirement is in the interest of the general public.

Failure to use the funds for a PBA in Part II in South Africa may have harsh consequences for the section 18A-approved conduit PBO (see **12.2**).

Example 18 – Relaxation of the distribution requirement

Facts:

Happy Days Trust was established to provide funds for Happy Days Orphanage caring for abandoned and orphaned children. The orphanage has been approved by the Commissioner under section 18A(1)(a)(i) as a PBO carrying on PBA 1(a) in Part II in South Africa. The trust has been approved by the Commissioner as a conduit PBO under section 18A(1)(b).

A request has been submitted by the trust to have the distribution requirement waived because it wishes to collect sufficient funds to enable the orphanage to build a home for abandoned babies. The orphanage has reached its maximum capacity and additional facilities are required to enable it to carry on its PBA to better serve the community. The trust has submitted that the estimated cost of the project is R1 million and will take at least three years to raise sufficient funds taking into account its annual income budget.

Result:

The Commissioner, having regard to the public interest and purpose for which funds are to be accumulated by the trust, has waived the distribution requirement for the three years as requested by the trust.

²³³ The proviso to section 18A(2A)(b)(i).

To allow section 18A-approved conduit PBOs to build up reserves to ensure some degree of financial sustainability and create an opportunity to earn passive income, any amount not distributed in accordance with the distribution requirement must be invested.²³⁴ A section 18A-approved conduit PBO is permitted to invest any undistributed amount as desired, provided the investment does not amount to an indirect distribution of profits or the award of an impermissible benefit. It is expected that fiduciaries will act with the necessary prudence, integrity and reasonable care.

A section 18A-approved conduit PBO must distribute or incur the obligation to distribute all amounts received from investment assets held by it, other than amounts received on the disposal of those investment assets, to other section 18A-approved PBOs, institutions, boards or bodies approved under section 18A(1)(a)(ii), or any department approved under section 18A(1)(c), no later than six months after every five years from –

- the date on which the Commissioner issued the section 18A-approved conduit PBO with a reference number for purposes of section 18A,²³⁵ if that section 18A-approved conduit PBO was incorporated, formed or established on or after 1 March 2015;²³⁶ or
- 1 March 2015, if that section 18A-approved conduit PBO was incorporated, formed or established and issued with a reference number by the Commissioner for purposes of section 18A before 1 March 2015.²³⁷

If any section 18A-approved conduit PBO has not distributed or has not incurred the obligation to distribute the amounts received from investment assets held by it, those amounts will be deemed to be taxable income of that section 18A-approved conduit PBO in that year of assessment.²³⁸

Example 19 – Conditions for the use of undistributed amounts

Facts:

The Kings Trust was approved as a conduit PBO under section 18A(1)(b) and issued with a reference number for purposes of section 18A by the Commissioner on 6 June 2003. The trust received donations for which it issued section 18A receipts amounting to R500 000 during the year of assessment ending 29 February 2016. The trust beneficiary is Knights Preparatory School, a PBO carrying on PBA 4(a) in Part II, in South Africa.

Result:

The trust was required to distribute or incur the obligation to distribute at least R250 000 (R500 000 × 50%) to its beneficiary within but no later than the end of the 2017 year of assessment in accordance with the distribution requirement.

The remaining R250 000 (or a lesser amount if more than R250 000 was distributed) is required to be invested by the trust.

²³⁴ Section 18A(2D) was introduced by section 29(1)(b) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 March 2015.

²³⁵ Section 18A(2)(a)(i).

²³⁶ Section 18A(2D)(a)

²³⁷ Section 18A(2D)(b).

²³⁸ Section 18A(5C). The Commissioner's discretion was removed from this section by section 34 of the Taxation Laws Amendment Act 25 of 2015 with effect from 8 January 2016.

The trust is required to distribute or incur the obligation to distribute all amounts received from the investment of the undistributed amount no later than six months after every five years from 1 March 2015, namely –

- 29 February 2020 to be distributed no later than 31 August 2020; and
- 28 February 2025 to be distributed no later than 31 August 2025, and so on.

Thus, if the trust derived interest income of R20 000 a year on invested funds of R250 000 between 1 March 2015 and 29 February 2020, it must distribute all those amounts by no later than 31 August 2020 ($R20\,000 \times 5 = R100\,000$). Likewise, all income derived on amounts accumulated during the five-year period ending 28 February 2025 must also be distributed on or before 31 August 2025.

Any section 18A-approved conduit PBO providing funds or assets to section 18A-approved PBOs, institutions, boards or bodies approved under section 18A(1)(a)(ii), or any department approved under section 18A(1)(c), carrying on only PBAs in Part II in South Africa, is not required to obtain and retain an audit certificate.

A section 18A-approved conduit PBO providing funds to section 18A-approved PBOs, institutions, boards or bodies approved under section 18A(1)(a)(ii), or any department approved under section 18A(1)(c), carrying on PBAs in Part II as well as to PBOs, or institutions, boards or bodies not approved for purposes of section 18A (carrying on only PBAs in Part I or other non-approved organisations – see **8.4**) must obtain and retain an audit certificate. The audit certificate must confirm that all donations received or accrued in the year of assessment for which section 18A receipts were issued were used solely to provide funds or assets to –

- section 18A-approved PBOs, which will use those funds or assets solely in carrying on PBAs in Part II in South Africa;
- institutions, boards or bodies approved under section 18A(1)(a)(ii), which will use those funds or assets solely in carrying on PBAs in Part II in South Africa; or
- any department approved under section 18A(1)(c), which will use those funds or assets solely for the purpose of any PBA in Part II in South Africa.

The audit certificate must also confirm that all donations received or accrued during the year of assessment for which section 18A receipts were issued were distributed as required. This confirmation ensures that despite the retention of any donations by the section 18A-approved conduit PBO, it still meets the distribution requirement within the required period.²³⁹

8.4 Organisations not qualifying for section 18A approval

Any section 18A receipts issued by organisations, which have not formally been approved by the Commissioner for purposes of section 18A are not valid receipts and the claims for deductions by donors will be disallowed in determining their taxable income.

8.4.1 Branches of a foreign tax-exempt organisations

A branch of a foreign tax-exempt organisation established in South Africa (see **3.2.4**) does not qualify for section 18A approval and is not allowed to issue section 18A receipts for donations received, even if it carries on PBAs in Part II in South Africa.

²³⁹ Section 18A(2B).

8.4.2 Non-approved organisations

Any PBO not approved by the Commissioner for purposes of section 18A, may not issue section 18A receipts for donations received.

Any organisation, not qualifying for approval under section 18A, irrespective of whether that organisation enjoys approval or exemption from income tax under any other section of the Act, may not issue section 18A receipts (see **Chapter 10**) for donations received (see **Chapter 9**). The following are non-exhaustive examples of organisations not qualifying for approval under section 18A:

- Recreational clubs approved by the Commissioner under section 30A.²⁴⁰
- Associations, which include, amongst other things, trade unions, professional associations and local publicity associations approved by the Commissioner under section 30B.
- Small business funding entities approved by the Commissioner under section 30C.²⁴¹
- Homeowners' associations exempt under section 10(1)(e)(i)(cc).²⁴²
- Companies wholly owned by institutions, boards or bodies exempt under section 10(1)(cA)(ii).²⁴³

PBOs, which have not been formally approved by the Commissioner for purposes of section 18A, recreational clubs approved under section 30A,²⁴⁴ associations approved under section 30B and small business funding entities approved under section 30C do not qualify for approval under section 18A and may therefore not issue section 18A receipts (see **Chapter 10**) for donations (see **Chapter 9**) received.

²⁴⁰ For commentary, see the *Tax Exemption Guide for Recreational Clubs*.

²⁴¹ For commentary, see the *Draft Tax Exemption Guide for Small Business Funding Entities*.

²⁴² For commentary, see the Interpretation Note 64 "Income Tax Exemption: Bodies Corporate, Share Block Companies and Associations of Persons Managing the Collective Interests Common to all Members".

²⁴³ For commentary, see the *Draft Tax Exemption Guide for Companies Wholly Owned by Institutions, Boards or Bodies*.

²⁴⁵ Section 55(1).

Chapter 9

Donations for purposes of section 18A

9.1 Meaning of “donation”

Although the word “donation” is not defined in section 18A it is, however, defined for purposes of donations tax. Since the definition of “donation” for donations tax and the reference to donations for purposes of section 18A traverse the same terrain it is submitted that the definition of “donation” is relevant and applicable as guidance of what is envisaged of a donation for purposes of section 18A.

The term “donation” is defined and means –²⁴⁵

“any gratuitous disposal of property²⁴⁶ including any gratuitous waiver or renunciation of a right”.

The common law meaning of a donation was summarised up by Trollop JA in *Ovenstone v SIR* when he stated the following:²⁴⁷

“In a donation the donor disposes of the property gratuitously out of liberality or generosity, the donee being thereby enriched and the donor correspondingly impoverished, so much so that, if the donee gives any consideration at all therefor, it is not a donation”

In *Welch’s Estate v C: SARS* Marais JA stated the following on the meaning of a donation:²⁴⁸

“The test to be applied at common law to determine whether the disposition of an asset amounts to a donation properly so called (as opposed to a remuneratory donation) is so well-settled that it hardly needs repetition. The test is of course that the disposition must have been motivated by ‘pure liberality’ or ‘disinterested benevolence’.

‘In my opinion the legislature has not eliminated from the statutory definition the element which the common law regards as essential to a donation, namely, that the disposition be motivated by pure liberality or disinterested benevolence and not by self-interest or the expectation of a *quid pro quo* of some kind from whatever source it may come.

‘If one were to scour the dictionaries to find a single word apt to convey that the disposition should be motivated by pure liberality and not in expectation of any *quid pro quo* of whatever kind, one would not find a better or more appropriate word than ‘gratuitous’. The shorter OED gives the following meaning to the word:

- ‘1. Freely bestowed or obtained; granted without claim or merit; costing nothing to the recipient; free.
2. Done, made, adopted or assumed without any good ground or reason; uncalled for; unjustifiable.’ ”

In *Estate Sayle v CIR* the court stated the following:²⁴⁹

“In short, liberality at the expense of another is not a ‘donatio’; to be a ‘donatio’ the gift must be liberality at the expense of the donor, an act whereby the donee is enriched and the donor correspondingly impoverished.”

²⁴⁵ Section 55(1).

²⁴⁶ The term “property” is defined in section 55(1) and means any right in or to property movable or immovable, corporeal or incorporeal, wheresoever situated.

²⁴⁷ 1980 (2) SA 721 (A), 42 SATC 55 at 73.

²⁴⁸ 2005 (4) SA 173 (SCA), 66 SATC 303 at 312 and 314.

²⁴⁹ 1945 AD 388, 13 SATC 170 at 173.

In *The Master v Thompson's Estate* the court confirmed that a transaction will not be a donation when something is received in return or when there is some consideration.²⁵⁰

LAWSA provides the following on the meaning of a donation:²⁵¹

“A donation (*donation mera*) is, in its strict legal sense, an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality whereby the donor without a legal obligation undertakes to give something to the donee with the intention of enriching the donee, and without the donor receiving any consideration in return or the expectation of a future advantage.”

(Footnotes omitted)

A donation is therefore a gratuitous disposal by the donor out of liberality or generosity, under which the donee²⁵² is enriched and the donor impoverished. It is a voluntary gift freely given to the donee. There must be no *quid pro quo*, no reciprocal obligations and no personal benefit for the donor. If the donee gives any consideration in exchange it is not a donation.

A PBO may not accept donations that are subject to conditions enabling the donor or any connected person in relation to the donor to derive some direct or indirect benefit from the application of the donation. The donation may also, subject to limited exceptions, not be revocable by the donor (see 4.4.5).

9.2 Formalities

A donation may be contracted verbally, except when by law it is required that the contract be in writing, for example, when immovable property is donated or in the case of executory donations. Thus no donation takes place until the necessary formalities have been completed.

A donation *inter vivos* and a donation *mortis causa* must comply with all the basic legal requirements for contracts such as contractual capacity, offer and acceptance and consensus and if applicable, compliance with prescribed formalities. In the case of a donation *inter vivos* the provisions of the General Law Amendment Act 50 of 1956²⁵³ or the Alienation of Land Act 68 of 1981²⁵⁴ must be complied with. In the case of a *donatio mortis causa*, the donation must comply with the formalities applicable to wills in accordance with the Wills Act 7 of 1953. In the case of a donation *mortis causa* the donor is entitled to revoke the gift freely before the donor's death. The right to revoke a donation *inter vivos* is, however, restricted.

²⁵⁰ 1961 (2) SA 20 (FC), 24 SATC 157 at 165.

²⁵¹ LTC Harms “Donations” 16 (Third Edition Volume) LAWSA [online] (My LexisNexis: 31 January 2017) in paragraph 19.

²⁵² The term “donee” is defined in section 55(1) and generally means any beneficiary under a donation and includes property that has been disposed of under a donation to any trustee to be administered by the trustee for the benefit of any beneficiary.

²⁵³ Section 5 of that Act which was replaced by section 43 of the General Law Amendment Act 70 of 1968 provides that no donation concluded after the commencement of this Act will be invalid merely by reason of the fact that it is not registered or notarially executed. Provided that no executory contract of donation entered into after the commencement of this Act will be valid unless the terms are embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two witnesses.

²⁵⁴ Section 2(1) of that Act provides that no alienation of land is of any effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

LAWSA provides the following on the offer and acceptance of donations:²⁵⁵

“As with other contracts, a contract of donation requires consensus between the donor and the donee in respect of the intention to donate, the object donated, time of donation, [and] transfer [of] the donor’s rights to the donee in respect of the object.

The offer may be express or tacit but if the donation is executory, the binding offer by necessity will be contained in a written document signed by the donor to comply with section 5 of the General Law Amendment Act.

As with other so-called unilateral contracts (contracts that do not require counter performance such as suretyship and option) some form of acceptance, express or tacit, is required.

Acceptance may be by the donee or someone authorised to accept on his or her behalf.

Until acceptance is signified to the donor there is no contract of donation, unless notification of acceptance has been dispensed with.

An executed donation is generally accepted by accepting delivery of the gift.

Acceptance must take place before the death of the donor, but where the donee predeceases the donor the right to accept the donation may pass to the donee’s estate and may be exercised by the executor of the estate.”

(Footnotes omitted)

9.3 Types of donation

A donation can be in the form of cash or of property in kind for purposes of section 18A.²⁵⁶

9.3.1 Cash donation

A donation may be made in cash (money) that may include payments by electronic fund transfer (EFT), credit or debit card, or postal order.

The following payments or transfers are non-exhaustive examples of payment or transfers that are not donations and do not qualify for a deduction under section 18A:

- Amounts paid for attending a fundraising dinner or dance.
- Memorabilia and other assets donated to be auctioned to raise funds.
- Amounts paid for school fees, school entrance fees or compulsory school levies by parents to enable their children to attend an education institution.
- Amounts paid for raffle or lottery tickets.
- The value of free rent, water and electricity provided by a lessor to the lessee that is a section 18A-approved PBO or conduit PBO.
- Payments of debt owed by a section 18A-approved PBO or conduit PBO. For example, the cost of repairs to a section 18A-approved PBOs or conduit PBOs vehicle paid to the service station on behalf of that PBO or conduit PBO and not paid directly to that section 18A-approved PBO or conduit PBO.
- Prizes and sponsorships donated for a fundraising event such as a charity golf day.
- Tithes and offerings contributed to churches or other faith-based organisations in support of their religious activities.

²⁵⁵ LTC Harms “Donations” 16 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 31 January 2017) in paragraph 24.

²⁵⁶ Section 18A(1).

- Membership fees.
- Promissory notes.
- Pledges.²⁵⁷
- Payments made in future instalments.
- Payments for the purchase of poker chips at a fundraising poker event or the payment for additional poker chips for an amount in excess of the value of the prizes to be won at a poker table.

9.3.2 Donation of property in kind

A donation of property in kind²⁵⁸ is made in a form other than cash and may include the following:²⁵⁹

- A financial instrument held by the taxpayer as trading stock provided it is —²⁶⁰
 - a share in a listed company; or
 - issued by an “eligible financial institution” as defined in section 1 of the Financial Sector Regulation Act 9 of 2017.²⁶¹
- Trading stock forming part of the business or trade conducted by the taxpayer. Such trading stock may include livestock or produce donated by a farmer, goods such as computers, foodstuffs, furniture, medical supplies and motor vehicles.
- An asset used by the taxpayer in conducting the taxpayer’s trade excluding trading stock. Examples of such assets may include cash registers, computers, crockery, delivery vehicles, furniture, garden equipment, kitchen utensils and office equipment.
- An asset that is not trading stock and is also not used in the business of the taxpayer. For example, such assets may include personal assets or assets bought by the taxpayer such as computers, furniture, sport equipment and vehicles.
- Property purchased, manufactured, erected, installed or constructed by or on behalf of the taxpayer. Examples of such property include carpets or cupboards installed, security fencing and buildings such as classrooms erected by or on behalf of the taxpayer for purposes of conducting any PBA in Part II.

A donation of property in kind must be used by a section 18A-approved PBO and conduit PBO in carrying on PBAs in Part II in South Africa.

²⁵⁷ To the extent that such a payment is given as security to guarantee payment of a debt or fulfilment of an obligation.

²⁵⁸ Section 18A(1).

²⁵⁹ Section 18A(3).

²⁶⁰ Section 18A(3B).

²⁶¹ This includes, for example, a financial institution licensed or required to be licensed as a bank under the Banks Act 94 of 1990, a financial institution registered as a long-term insurer under the Long-term Insurance Act 52 of 1998 or a short-term insurer under the Short-term Insurance Act 53 of 1998 or licensed or required to be licensed under the Insurance Act 18 of 2017 and a market infrastructure.

Any deduction claimed by a taxpayer for any donation of immovable property of a capital nature when the lower of market value or municipal value exceeds cost must be determined using the following formula:²⁶²

$$A = B + (C \times D)$$

In which formula –

- “A” represents the amount deductible contemplated in section 18A(1);
- “B” represents the cost of the immovable property being donated;
- “C” represents the amount of capital gain (if any), that would have been determined under the Eighth Schedule had the immovable property been disposed of for an amount equal to the lower of market value or municipal value on the day the donation is made; and
- “D” represents 60% in the case of a natural person or special trust or 20% in any other case.

The amount deductible by any taxpayer for any donation of property in kind, other than immovable property of a capital nature for which the lower of market value or municipal value exceeds cost is deemed to be as follows:²⁶³

- A financial instrument that is trading stock of the taxpayer, the lower of fair market value on the date of the donation or the amount that has been taken into account for that year of assessment for the value of that trading stock under section 22(8)(C).²⁶⁴
- Any other trading stock of the taxpayer (including any livestock or produce of a farmer), the amount that has been taken into account for that year of assessment for the value of that trading stock forming part of trading stock of the taxpayer under section 22(8)(C) or paragraph 11 of the First Schedule, as appropriate.
- An asset used in the taxpayer’s trade, the lower of the fair market value on the date of donation of the property or the cost to the taxpayer of such property less any allowance (other than an investment allowance) deducted from the income of that taxpayer for that asset.
- Property that is not trading stock of the taxpayer and not a business asset, the lower of the fair market value on the date of the donation or the cost to the taxpayer of such asset less depreciation using the 20% reducing balance method in the case of deterioration of movable property.
- Property that is purchased, manufactured, erected, assembled, installed or constructed by or on behalf of the taxpayer to form the subject of the donation, the lower of the fair market value on the date of the donation or the cost to the taxpayer of such property.

²⁶² Section 18A(3A) was inserted by section 52(1)(g) of the Taxation Laws Amendment Act 31 of 2013 with effect from 1 March 2014 and applicable to amounts paid or transferred during years of assessment commencing on or after that date.

²⁶³ Section 18A(3).

²⁶⁴ For commentary on the application and interpretation of section 22(8), see Interpretation Note 65 “Trading Stock – Inclusion in Income when Applied, Distributed or Disposed of Otherwise than in the Ordinary Course of Trade”.

No deduction is allowed for any donation of any property in kind that –²⁶⁵

- constitutes or is subject to any fiduciary right, usufruct or other similar right;²⁶⁶ or
- constitutes an intangible asset or financial instrument, unless the financial instrument meets the requirements set out above.²⁶⁷

The donation of a service such as time, skill or effort to a section 18A-approved PBO or conduit PBO is not a donation of property made in kind. Any professional person, such as an accountant, auditor, artist (who may include a singer, musician or entertainer), electrician, lawyer, medical doctor, or plumber who renders a service free of charge to a section 18A-approved PBO or conduit PBO, is not entitled to a tax deduction for the value of the service.

²⁶⁵ Section 18A(3B).

²⁶⁶ Section 18A(3B)(a).

²⁶⁷ Section 18A(3B)(b).

Chapter 10

Section 18A receipts

Taxpayers receiving section 18A receipts issued by organisations not formally approved by the Commissioner for purposes of section 18A are not entitled to a tax deduction from their taxable income (see **Chapter 11**) for any donations made to that organisation.

A section 18A receipt may be issued only for an eligible donation that is solely and exclusively used for PBAs in Part II in South Africa.

A section 18A receipt will be valid if it contains the following details:²⁶⁸

- The reference number issued to the section 18A-approved PBO or conduit PBO by the Commissioner for purposes of section 18A.
- The date the donation is received.
- The name and address of the section 18A-approved PBO or conduit PBO issuing the section 18A receipt to which enquiries may be directed.
- The name and address of the donor.
- The amount of the donation if in cash.
- The nature and value of the donation if not in cash (see **9.3.2** and the example of section 18A receipt in **Annexure G**).
- A certification to the effect that the receipt is issued for purposes of section 18A and that the donation has been or will be used exclusively for the object of the section 18A-approved PBO or conduit PBO.
- Such further information as the Commissioner may prescribe by public notice.²⁶⁹

SARS does not make section 18A receipts available to section 18A-approved PBOs or conduit PBOs. The section 18A-approved PBOs or conduit PBOs must create their own receipts ensuring that all the above details appear on the receipt. See **Annexure G** for an example of a section 18A receipt.

A section 18A receipt must be issued by the section 18A-approved PBO or conduit PBO in the year of assessment (see **15.5.3**) in which the donation is actually paid or transferred to that section 18A-approved PBO or conduit PBO.²⁷⁰

²⁶⁸ Section 18A(2)(a).

²⁶⁹ Inserted by section 2 of the Tax Administration Laws Amendment Act 21 of 2021. The amendment came into operation on date of promulgation, which is 19 January 2022. According to the *Explanatory Memorandum on the Tax Administration Laws Amendment Bill, 2021*, the Commissioner may prescribe by public notice any further information which must appear on the section 18A receipts to ensure consistency with third party reporting in order to make it easier for donors receiving section 18A receipts and section 18A-approved PBOs and conduit PBOs issuing such receipts to comply with their obligations.

²⁷⁰ Section 18A(1).

A section 18A-approved PBO or conduit must issue a section 18A receipt to an employer operating a payroll-giving programme²⁷¹ for the total amount of donations paid by the employer on behalf of the employees. Section 18A receipts may be issued to the employer on a monthly basis or for a period that either coincides with the interim (1 March to 31 August) or annual (1 March to 28 / 29 February) period for which the employer is required to submit a reconciliation declaration to SARS for employees' tax purposes (see **14.2.3**).

²⁷¹ A payroll-giving programme operated by an employer enables employees to donate from their salaries on a monthly basis to section 18A-approved PBOs or conduit PBOs.

Chapter 11

Allowable deduction in determining the taxable income of a taxpayer

A taxpayer, which may include an individual, trust or company, making a donation in cash or of property in kind is entitled to a deduction in determining a taxpayer's taxable income provided the donation is actually paid or transferred during the year of assessment to a section 18A-approved PBO or conduit PBO.²⁷² Any claim for a deduction in determining the taxable income of a taxpayer will be allowed only if supported by –²⁷³

- a section 18A receipt issued by a section 18A-approved PBO or conduit PBO; or
- an employees' tax certificate (IRP 5 certificate)²⁷⁴ issued by an employer operating a payroll-giving programme.

The deduction of donations made directly to a section 18A-approved PBO or conduit PBO for which such an entity has issued section 18A receipts is claimed by the taxpayer in the income tax return.

Taxpayers receiving section 18A receipts issued by a PBO not formally approved by the Commissioner for purposes of section 18A are not entitled to a deduction in determining their taxable income. Any claim for a deduction by taxpayers will therefore be disallowed in the determination of their taxable income.

The allowable deduction for a taxpayer that is a portfolio of a collective investment scheme,²⁷⁵ excluding a Real Estate Investment Trust (REIT),²⁷⁶ for all qualifying donations paid or transferred during the year of assessment is determined according to the following formula:²⁷⁷

$$A = B \times 0,005$$

In which formula –

- "A" represents the amount to be determined; and
- "B" represents the average value of the aggregate of all participatory interests held by investors in the portfolio for the year of assessment, determined by using the aggregate value of all the participatory interests in the portfolio at the end of each day during that year.

For all other taxpayers²⁷⁸ the allowable deduction may not exceed 10% of the taxable income excluding any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit and severance benefit of the taxpayer as calculated before allowing any deduction for donations under section 18A or a deduction for foreign taxes under section 6quat(1C).²⁷⁹

²⁷² Section 18A(1).

²⁷³ Section 18A(2).

²⁷⁴ The term "employees' tax certificate" is defined in paragraph 1 of the Fourth Schedule.

²⁷⁵ Definition of "portfolio of a collective investment scheme" in section 1(1).

²⁷⁶ See section 25BB(2A)(c) and Interpretation Note 97 "Taxation of REITs and Controlled Companies".

²⁷⁷ Section 18A(1)(A).

²⁷⁸ Excluding a "controlled company" as defined in section 25BB(1). See section 25BB(2A)(c) and Interpretation Note 97 "Taxation of REITs and Controlled Companies".

²⁷⁹ Section 18A(1)(B). This section was amended by section 35(1)(a) of the Taxation Laws Amendment Act 23 of 2018 and deemed to have come into operation on 1 March 2018.

Any excess amount of a donation made that is disallowed solely for the reason that it exceeds the amount of the deduction allowable for a year of assessment may be carried forward for purposes of section 18A. The excess amount carried forward will be deemed to be a donation actually paid or transferred in the next succeeding year of assessment, subject to the 10% limitation.²⁸⁰ If any excess remains, it can be further rolled over but always subject to the 10% limitation.²⁸¹

Example 20 – Carry-forward treatment for excess deductible donations

	Year 1	Year 2
	R	R
Taxable income	1 000 000	1 500 000
Maximum amount potentially allowable as deduction (10%)	100 000	150 000
Actual donation made	150 000	0
Deduction allowed	100 000	50 000 (amount
brought forward)		
Amount carried forward	50 000	0

²⁸⁰ The proviso to section 18A(1)(B) was inserted by section 52(1)(c) of the Taxation Laws Amendment Act 31 of 2013.

²⁸¹ The carry-forward treatment applies to donations paid or transferred during years of assessment commencing on or after 1 March 2014.

Chapter 12

Non-compliance with sections 18A and 30

12.1 Withdrawal of approval as a public benefit organisation

The Commissioner may withdraw the approval as a PBO under section 30(3) only if –

- a PBO has, in any year of assessment in any material respect or on a continuous or repetitive basis, failed to comply with section 30 or with its founding document as it relates to section 30;²⁸² or
- the NPO Directorate requests the Commissioner to withdraw the approval of a PBO if registered as an NPO and has been convicted of an offence under the NPO Act.²⁸³

The Act does not specify what constitutes a “material, continuous or repetitive” failure by a PBO to comply with section 30 or with the founding document as it relates to that section.

The *CollinsDictionary.com* provides the following descriptions:

- “Material evidence or information is directly relevant and important in a legal or academic argument.”²⁸⁴
- “A continuous process or event continues for a period of time without stopping.”²⁸⁵
- “Repetition” as “a thing, word, action, etc. that is repeated.”²⁸⁶

A failure by a PBO to comply with section 30 in any material respect may therefore include a significant, relevant and important failure. A failure on a continuous basis may be prolonged without interruption, while a failure on a repetitive basis may be done many times in the same manner by the PBO.

The Commissioner may withdraw the approval in any of the above circumstances but must decide each case on its own facts and circumstances. However, notice must be given to the transgressing PBO of the intention to withdraw the approval as a PBO and also specify a period within which corrective steps must be taken.²⁸⁷

If no corrective steps are taken by the PBO within the period stated in the notice, the approval will be withdrawn from the beginning of the year of assessment in which the non-compliance or failure by the PBO occurred.

The decision of the Commissioner to withdraw the approval is subject to objection and appeal (see **15.6**).²⁸⁸

²⁸² Section 30(5).

²⁸³ Section 30(3C).

²⁸⁴ www.collinsdictionary.com/dictionary/english/material [Accessed 28 July 2022].

²⁸⁵ www.collinsdictionary.com/dictionary/english/continuous [Accessed 28 July 2022].

²⁸⁶ www.collinsdictionary.com/dictionary/english/repetition [Accessed 28 July 2022].

²⁸⁷ Section 30(5).

²⁸⁸ Section 3(4)(b).

On withdrawal of the approval as a PBO, the affected organisation must transfer or take reasonable steps to transfer its remaining assets within six months or a longer period allowed by the Commissioner to —²⁸⁹

- another PBO;
- any institution, board or body exempt under section 10(1)(cA)(i), that has as its sole or principal object the carrying on of any PBA; or
- any sphere of the government in South Africa.

The formal dissolution process is usually preceded by a process referred to as “winding-up”. During the winding-up process all the assets of the PBO are recovered and realised. The proceeds of such realisation are applied firstly to discharge the costs of liquidation, and then to pay claims of creditors in accordance with the relevant provisions of the law relating to insolvency. On dissolution of a PBO, all its assets, or the proceeds of realised assets should have been realised and transferred. However, if any assets or funds remain after debts have been satisfied, they must be distributed in accordance with the dissolution requirement (see 4.4.4).

The winding-up of a company may occur voluntarily or compulsorily by the court. A winding-up by the court is initiated by an application to court, while a voluntary winding-up²⁹⁰ is initiated by a resolution of the company.²⁹¹ A company remains a juristic person and retains all of its powers during winding-up. From the beginning of the company’s winding-up, it must stop carrying on its business except to the extent required for its beneficial winding-up.²⁹² A company is dissolved as from the date that its name is removed from the companies register.²⁹³

The Trust Property Control Act does not provide for any formalities or specific control measures to be complied with when a trust is terminated. The following is provided by *Wills and Trusts* on the termination of a trust:²⁹⁴

“An *inter vivos* trust will terminate when the trust deed stipulates it will terminate. This can be after the lapse of time or at the happening of a future event or it can be left to the discretion of the trustees to terminate the trust. Such an event can be the death of a named person, the attainment of a specified age by a beneficiary, a fixed date mentioned in the trust deed, or a provision that the trust is to continue indefinitely until the trustees resolve to terminate it.

Prior to termination, all liabilities will have to be paid and trust property distributed according to the trust instrument. Honoré at 183 states that the office comes to an end only when the trustee has duly disposed of all the trust property. (Cameron 226–227) Surely, only after the Master has confirmed this will the trustees really have discharged their obligations. For this purpose, the Master of the High Court may require reasons for termination or the original resolutions terminating the trust by the trustees (if applicable), as well as the original letters of authority together with confirmation that the beneficiaries under trust have received their benefits. (See also Cameron 551–552; Honoré 183 and 467).”

²⁸⁹ Section 30(6).

²⁹⁰ Section 80 of the Companies Act.

²⁹¹ Section 80(6) of the Companies Act.

²⁹² Section 80(8) of the Companies Act.

²⁹³ Section 83(1) of the Companies Act.

²⁹⁴ RP Pace and WM van der Westhuizen *Wills and Trusts* [online] (My LexisNexis: November 2018) in paragraph B19.

The dissolution of an association is described by *LAWSA* as follows:²⁹⁵

“If an association ceases or is unable to carry on with the main object and purpose for which it was formed, it may be validly dissolved. It may also be dissolved in accordance with the terms of its constitution or with the consent of all its members. An association cannot simply disregard the provisions of its constitution and ‘by silent and unexpressed individual concurrence of members dissolve into thin air’. Upon its dissolution, the assets of an association will, after debts have been satisfied, devolve in accordance with the provisions of the constitution.”

(Footnotes omitted)

Failure to transfer, or to take reasonable steps to transfer the remaining assets of a PBO on dissolution or a branch of a foreign tax-exempt organisation on termination of its activities will result in an amount equal to the market value of those assets not transferred less the amount equal to the *bona fide* liabilities of the PBO or branch, being deemed to be taxable income accruing to the PBO or branch during the year of assessment²⁹⁶ in which dissolution of the PBO or the termination of the activities of the branch of a foreign tax-exempt organisation took place.²⁹⁷

The term “taxable income” is defined as –²⁹⁸

“the aggregate of –

- (a) the amount remaining after deducting from the income of any person all the amounts allowed under Part I of Chapter II to be deducted from or set off against such income; and
- (b) all amounts to be included or deemed to be included in the taxable income of any person in terms of this Act”.

A PBO or a branch of a foreign tax-exempt organisation guilty of such a transgression will therefore not be allowed to deduct any further tax allowances or deductions from its net revenue, since its net revenue is deemed to be taxable income, that is, after allowances and deductions.

Example 21 – Dissolution of a branch of a foreign tax-exempt organisation

Facts:

A company, incorporated in a foreign country, has established a branch in South Africa for purposes of conducting PBAs. The foreign company is exempt from income tax in its country of origin. The branch has obtained PBO approval from the Commissioner. The foreign company intends to convert from a tax-exempt company to a for-profit company and as a result it will be dissolved and all activities terminated in South Africa.

Result:

The change of tax-exempt status of the foreign company in its country of origin will result in the change in the tax-exempt status of the branch in South Africa, since the branch will no longer comply with the requirements of paragraph (a)(ii) of the definition of “public benefit organisation” in section 30(1). The branch will have to comply with the dissolution requirement or alternatively the penalty provisions of section 30(7) will apply.

²⁹⁵ GJ Pienaar “Association” 2 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in paragraphs 192 and 195.

²⁹⁶ The term “year of assessment” is defined in section 1(1).

²⁹⁷ Section 30(6A) read with section 30(7).

²⁹⁸ Section 1(1).

An organisation may reapply for approval as a PBO in the year of assessment following the year of assessment in which the approval was withdrawn. The Commissioner may grant the approval in that subsequent year if satisfied that the non-compliance giving rise to the withdrawal of approval has been rectified.²⁹⁹ Under these circumstances, an organisation may not be approved with retrospective effect, since the organisation was non-compliant with section 30 before reapplication for PBO approval.

An organisation that has had its approval withdrawn will be liable for income tax and other taxes and duties as a normal taxpayer. An organisation will be subject to income tax as follows:

- An NPC and any association of persons³⁰⁰ will be liable for tax on all its taxable income, namely, gross income less exempt income and allowable deductions, at the rate applicable to companies, which is currently 28%; and
- A trust will be liable for tax on its taxable income at the rate applicable to trusts, which is currently 45%, subject to sections 7 and 25B.

The Minister of Finance may announce different rates in the national annual budget. The rates are published annually in the Rates and Monetary Amounts and Amendment of Revenue Laws Act.³⁰¹

12.2 Non-compliance with section 18A

There will be adverse consequences for section 18A-approved PBOs and conduit PBOs if the Commissioner has reasonable grounds for believing that the person who is in a fiduciary capacity responsible for the management or control of the income or assets of those section 18A-approved PBOs or conduit PBOs has –³⁰²

- materially failed to ensure that the objects for which those section 18A-approved PBOs or conduit PBOs were established are carried out;
- expended the monies of those section 18A-approved PBOs or conduit PBOs for purposes not covered by their objects;
- issued or allowed a section 18A receipt to be issued for fees or other emoluments payable to section 18A-approved PBOs or conduit PBOs;
- issued or allowed section 18A receipts to be issued in contravention of section 18A;
- used a donation for which a receipt was issued for any purpose other than for any PBAs in Part II in South Africa; or
- failed to obtain and retain an audit certificate.³⁰³

²⁹⁹ Section 30(8).

³⁰⁰ See paragraph (d) of the definition of “company” in section 1(1).

³⁰¹ Section 5(2)(a).

³⁰² Section 18A(5).

³⁰³ Inserted by section 4(f) of the Tax Administration Laws Amendment Act 24 of 2020. The amendment came into operation on the date of promulgation of that Act, namely, 20 January 2021.

In the above instances, the Commissioner may, by written notice addressed to the person who is in a fiduciary capacity responsible for the management or control of the income or assets, direct that –

- the amount of the donations for which section 18A receipts were issued will be deemed to be taxable income (see **12.1**) of that PBO or conduit PBO;³⁰⁴ and
- unless corrective steps are taken by that section 18A-approved PBO or conduit PBO within a period specified in the notice, any receipt issued by that PBO or conduit PBO will not qualify as a valid section 18A receipt from the date specified in the notice. Those donations will therefore not qualify for a deduction in determining the taxable income of the donor (see **Chapter 11**).³⁰⁵ This will, however, not apply to years of assessment of donors that have become prescribed.³⁰⁶

The amounts received by a conduit PBO from investment assets held by it that are not distributed as required (see **8.3**) will be deemed to be taxable income (see **12.1**) of that conduit PBO in the year of assessment in which the six months fall.³⁰⁷

12.3 Non-compliance by responsible person

A person who is in a fiduciary capacity responsible for the management or control of the income and assets of a PBO who intentionally fails to comply with section 18A or 30 or a provision of the founding document under which such a PBO is established and governed to the extent that it relates to section 18A or 30, will be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding two years.³⁰⁸

³⁰⁴ Section 18A(5)(i).

³⁰⁵ Section 18A(5)(ii).

³⁰⁶ Section 99 of the TA Act.

³⁰⁷ Section 18A(5C).

³⁰⁸ Sections 30(11) and 18A(7).

Chapter 13

Application procedure

An organisation seeking approval as a PBO or approval under section 18A to issue section 18A receipts must complete and submit to SARS, the prescribed application form EI 1.³⁰⁹

An application for approval under section 18A can be made simultaneously when an organisation applies for approval as a PBO. If, however, a PBO subsequent to obtaining approval as a PBO wishes to apply for section 18A approval it may do so by written request to the Commissioner. The following information and documentation must be provided:

- The relevant PBAs in Part II for which approval is sought.
- A detailed demonstration of how those activities are carried on.
- The relevant supporting documentation that may include the latest founding document and annual financial statements.

The notification of approval as a PBO under section 30 and approval under section 18A is issued by the Commissioner by letter if the application was done simultaneously. A separate letter will, however, be issued by the Commissioner if the application for approval under section 18A is done subsequent to the approval as a PBO granted by the Commissioner. The date of approval under section 18A is significant because the Act does not allow for section 18A approval by the Commissioner to be granted with retrospective effect. Section 18A receipts may therefore be issued for eligible donations received only on or after the date of the letter issued by the Commissioner confirming section 18A approval.

The approval by the Commissioner of an organisation as a PBO is generally effective from the date of the notice of approval, that is, it is prospective, unless it is granted with retrospective effect.³¹⁰ A PBO may on written request apply for the approval to be applied to years of assessment before the approval date. Retrospective approval as a PBO will be granted only if the Commissioner is satisfied that the organisation complied with the requirements of section 30 during the period before it lodged its application for approval as a PBO.³¹¹ The organisation will be responsible to prove to the Commissioner that it complied with the requirements relative to the approval during the period before it lodged its application for approval as a PBO. To prevent any potential abuse, each request for retrospective approval will be considered on its own merits and specific facts.

³⁰⁹ Additional information on how to apply for approval as a PBO is available on the SARS website.

³¹⁰ Section 30(3B) was amended by section 35 of the Taxation Laws Amendment Act 34 of 2019. The amendment is effective from date of promulgation, namely, 15 January 2020.

³¹¹ Section 30(3B)(a).

The Commissioner, however, may not extend retrospective PBO approval³¹² to an organisation that has complied with all its obligations under Chapter 4,³¹³ Chapter 10³¹⁴ and Chapter 11³¹⁵ of the TA Act to years of assessment that have prescribed.³¹⁶ An assessment may not be made three years after the date of assessment of an original assessment by SARS.³¹⁷ If an organisation complied with the above chapters of the TA Act, it would have submitted its returns when due, and the three-year period will encompass the earliest year of assessment for which an assessment was issued during that period. For example, if the PBO applied for approval as a PBO on 31 March 2021, the three-year period would begin on 1 April 2018. If the organisation has a February year-end and its first assessment after 1 April 2018 was for the 2018 year of assessment, the retrospective approval can be made for the 2018 to 2020 years of assessment.

If an organisation has not complied with the above chapters of the TA Act, the Commissioner may not extend retrospective approval to years of assessment that would have prescribed if the income tax returns relating to those years had been submitted in accordance with section 25(1) of the TA Act.³¹⁸ It will therefore be necessary to determine when it would have been assessed had it complied with the return submission requirements under that section of the TA Act. This determination will require the organisation to establish when its returns should have been submitted under the public notice issued annually by the Commissioner (see **15.5**). For example, the 2018 notice required that a company lodge its return for the 2018 year of assessment within 12 months of its financial year-end. Thus, a company with a February year-end would have had to submit its 2018 return of income on or before 28 February 2019, and it is the latter date that must fall within the three years preceding the date of application for retrospective approval.

The receipts and accruals of any years of assessment not complying with the retrospective approval requirements, as discussed above, will be subject to tax as a normal taxpayer (see **12.1**).

Retrospective approval can be considered by the Commissioner only for purposes of the approval as a PBO under section 30(3) and does not apply to the approval of a PBO for purposes of section 18A (see **Chapter 8**).

The letter contains a unique reference number generally referred to as an exemption reference number, which is a different reference number to the taxpayer reference number allocated on completion of the registration for income tax purposes (see **15.5.1**). The organisation is required to retain the letter confirming approval as part of its records (see **15.4**).

A written notification will also be issued by the Commissioner to the organisation should the organisation not be granted approval as a PBO or section 18A approval together with reasons why the organisation failed to meet the conditions and requirements of section 30 or section 18A.

³¹² Section 30(3B)(b)(i).

³¹³ That chapter deals with returns and records.

³¹⁴ That chapter deals with tax liability and payment.

³¹⁵ That chapter deals with the recovery of tax.

³¹⁶ Section 99 of the TA Act.

³¹⁷ Section 99(1)(a) of the TA Act.

³¹⁸ Section 30(3B)(b)(ii).

An organisation not approved by the Commissioner as a PBO or which has had its approval withdrawn will be liable for income tax and other taxes and duties (see **14.1**) as a normal taxpayer (see **12.1**). An organisation not approved for purposes of section 18A will not be entitled to issue section 18A receipts for donations received.

Chapter 14

Other taxes and duties

14.1. Exemption from other taxes and duties

In addition to being exempt from the payment of income tax on certain receipts and accruals, PBOs also enjoy the benefit of being exempt from certain other taxes and duties.³¹⁹

14.1.1 Donations tax

Donations tax is payable on the value of any property disposed of by donation by any resident³²⁰ (the donor) to another person (the donee)³²¹ at the rate of –³²²

- 20% on that value if the aggregate of that value and the value of any other property disposed of under a donation until the date of that donation does not exceed R30 million; and
- 25% of that value to the extent that it exceeds R30 million.

A donation comprises any gratuitous disposal of property including any gratuitous waiver or renunciation of a right, for example, the waiver of debt. The disposal of property at less than its market value will also constitute a donation to the extent that the Commissioner is not satisfied that the consideration was adequate.³²³

Donations tax is payable by the donor, but if the donor fails to pay the tax within the prescribed period, the donor and donee are jointly and severally liable for the tax.³²⁴

Donations made by or to a PBO are exempt from the payment of donations tax.³²⁵

14.1.2 Estate duty

Estate duty is levied under the Estate Duty Act 45 of 1955 at the rate of 20% on the first R30 million of the dutiable amount of the estate of a deceased person, and at the rate of 25% of the dutiable amount that exceeds R30 million.³²⁶

Any property bequeathed to a PBO qualifies as a deduction and therefore is excluded from the net value of the estate and not subject to estate duty.³²⁷

³¹⁹ For more information on any of these taxes and duties, see *Taxation in South Africa*.

³²⁰ The term “resident” is defined in section 1(1).

³²¹ The term “donee” is defined in section 55(1).

³²² Section 64.

³²³ Section 58.

³²⁴ Section 59.

³²⁵ Section 56(1)(h).

³²⁶ Section 2(2) and at the rate set out in the First Schedule to the Estate Duty Act.

³²⁷ Section 4(h) of the Estate Duty Act.

14.1.3 Transfer duty

Transfer duty is levied under the Transfer Duty Act 40 of 1949 on a sliding scale on the value of any property³²⁸ acquired by any person. The rates vary from 0% to 13% for all persons.³²⁹ The person acquiring the property (the transferee) is normally the person who is liable for the payment of transfer duty. Transfer duty will apply only if the property transaction is not a taxable supply for VAT purposes.³³⁰

A PBO is exempt from the payment of transfer duty on any property acquired provided that the whole or substantially the whole³³¹ of the property is used for the purpose of carrying on one or more PBAs.³³² The transfer of property by a PBO to a separate entity controlled by that PBO may also qualify for an exemption from transfer duty.³³³

An exemption from the payment of transfer duty is not a blanket exemption but an exemption for a specific transaction.³³⁴ Each transaction is therefore considered on its own merits. A declaration³³⁵ available on eFiling **www.sarsefiling.co.za** must be submitted for each acquisition of property for which exemption is required. No supporting documents need to be submitted at the time that the required declaration is submitted. Supporting documents must, however, be retained and submitted when requested in writing by SARS through eFiling. Supporting documents may include –

- the letter issued by the Commissioner granting approval to the PBO;
- an affidavit setting out the activities to be carried out on the property; and
- confirmation that the whole or substantially the whole of the property will be used to carry on one or more PBAs.

If at any time subsequent to the acquisition of property that qualified for the exemption from transfer duty, the whole or substantially the whole of the property is used for a purpose other than for carrying on any PBAs, transfer duty becomes payable. The date the property is used for a purpose other than for the carrying on of the PBA is deemed to be the date of acquisition. The transfer duty will be calculated at the rate applicable at the deemed date of acquisition but will be based on the value of the property as at the original date of acquisition.

³²⁸ See definition of “property” in section 1(1) of the Transfer Duty Act.

³²⁹ Section 2(1)(b) of the Transfer Duty Act.

³³⁰ For further information on transfer duty in general and the processing of transactions on eFiling, see the *External Guide – Guide for Transfer Duty via eFiling* and the *Transfer Duty Guide*.

³³¹ See Binding General Ruling (Income Tax) 20 “Interpretation of the Expression ‘Substantially the Whole’ “.

³³² Section 9(1)(c) of the Transfer Duty Act.

³³³ Section 9(1A) of the Transfer Duty Act.

³³⁴ For guidance on the interpretation and application of the transfer duty exemption relating to PBOs, see Interpretation Note 22 “Transfer Duty Exemption: Public Benefit Organisations and Institutions, Boards or Bodies”.

³³⁵ The declaration is required under section 14 of the Transfer Duty Act and is regarded as a “return” and subject to section 25 of the TA Act.

14.1.4 Dividends tax

The provisions relating to dividends tax are contained in sections 64D to 64N and apply to any dividend paid by a company, other than a headquarter company, on or after 1 April 2012.³³⁶ Although dividends tax is part of the Act, it is a separate tax from normal tax.³³⁷

Dividends tax is levied at the rate of 20%³³⁸ of the amount of a dividend paid by a company that is a resident.³³⁹ Dividends tax is also payable on a foreign dividend to the extent that the foreign dividend does not constitute the distribution of an asset *in specie* and it is paid by a foreign company in respect of a listed share.³⁴⁰

Dividends tax on a cash dividend is levied on the person entitled to the benefit of the dividend attaching to the share. This person is generally known as the beneficial owner.³⁴¹

Generally, a company declaring and paying a dividend must withhold an amount of dividends tax, except to the extent that the dividend consists of a distribution of an asset *in specie*, in that case the company paying the dividend is potentially liable for dividends tax unless an exemption applies.

It is not the responsibility of the company or regulated intermediary³⁴² paying the dividend to determine who the beneficial owner of a dividend is and whether that person qualifies for an exemption from dividends tax. The exemptions from dividends tax for cash dividends are contained in section 64F while the exemptions for dividends *in specie* are contained in section 64FA(1).

Any PBO that is the beneficial owner of a dividend is exempt from dividends tax.³⁴³ This exemption applies only if the PBO has submitted a declaration to the company that declared and paid the dividend or to the regulated intermediary that paid the dividend, that it is exempt from dividends tax. The PBO is also required to submit a written undertaking to the company or regulated intermediary that it will inform such company or regulated intermediary in writing should it cease to be the beneficial owner of the shares or if the circumstances affecting the exemption change.³⁴⁴

The Commissioner has not issued actual forms to be used for purposes of a declaration or written undertaking but has prescribed the required wording and minimum information required in the forms that are to be prepared by the company, regulated intermediary or beneficial owner.³⁴⁵

³³⁶ Any dividend paid before 1 April 2012 was subject to secondary tax on companies, a tax that was levied on the company paying the dividend.

³³⁷ For more information, see the *Comprehensive Guide to Dividends Tax*.

³³⁸ Section 64E(1). The rate of dividends tax increased from 15% to 20% on any dividend paid on or after 22 February 2017.

³³⁹ A reduced or nil rate may apply under specific circumstances.

³⁴⁰ The term "listed share" is defined in section 1(1) and means a share that is listed on an exchange as defined in section 1 of the Financial Markets Act 19 of 2012 and licensed under section 9 of that Act. A listed share could thus include a share in a foreign company whose shares are listed on a South African exchange.

³⁴¹ The term "beneficial owner" is defined in section 64D.

³⁴² The term "regulated intermediary" is defined in section 64D. A regulated intermediary is generally an entity that temporarily holds a dividend paid by a company before it is paid over to the ultimate beneficial owner.

³⁴³ Sections 64F(1)(c) and 64FA(1)(a).

³⁴⁴ Sections 64G(2)(a) and 64H(2)(a).

³⁴⁵ See *Business Requirements Specifications: Administration of Dividends Tax*.

The obligation lies with the PBO which is the beneficial owner of the dividend to ensure that the prescribed declaration and written undertaking are filed timeously with the company or regulated intermediary paying the dividend.

Any PBO that is a beneficiary of a trust should determine whether it has a vested right to a dividend received by or which accrued to the trust before the dividend is paid by the relevant company in order to ensure that the necessary declaration of exemption is filed with the company or regulated intermediary. A beneficiary that has a vested right in a dividend received by or which accrued to a trust will be regarded as the beneficial owner. Should the trust be the beneficial owner of the dividend, dividends tax at the rate of 20% may become payable. A trust whose beneficiary acquires a vested right to a dividend after it is paid but before the end of the trust's year of assessment may be able to claim a refund of the dividends tax withheld.³⁴⁶

A PBO receiving a dividend that is exempt or partially exempt from dividends tax³⁴⁷ is not required to submit to SARS a Dividends Tax Return.³⁴⁸

14.1.5 Securities transfer tax

The STT Act provides that (STT must be levied at the rate of 0,25%³⁴⁹ on the taxable amount³⁵⁰ of the transfer³⁵¹ of every security³⁵² issued by a close corporation or company incorporated in South Africa as well as foreign companies listed on an exchange.³⁵³

The Securities Transfer Tax Administration Act 26 of 2007 contains the administration provisions governing the payment of STT. Any STT payment must be made electronically through SARS e-STT system.³⁵⁴

The exemptions from STT are contained in section 8(1) of the STT Act. STT is not payable if the security is transferred to a PBO, provided the STT would legally have been payable by that PBO.³⁵⁵ The exemption, however, is subject to a declaration³⁵⁶ being submitted by any person to a participant,³⁵⁷ who holds and administers that security.³⁵⁸

³⁴⁶ See the *Comprehensive Guide to Dividends Tax* in paragraph 2.3.1.

³⁴⁷ Section 64F or 64FA.

³⁴⁸ Section 64K(1A)(b) was deleted by section 1 of the Tax Administration Laws Amendment Act 22 of 2018 with effect from 17 January 2019.

³⁴⁹ Section 2(1) of the STT Act

³⁵⁰ Sections 3(1), 4, 5 and 6 of the STT Act determine the relevant taxable amount.

³⁵¹ The term "transfer" is defined in section 1 of the STT Act and, save for certain exclusions, includes the transfer, sale, assignment or cession or disposal in any other manner of a security or the cancellation or redemption of that security.

³⁵² The term "security" is defined in section 1 of the STT Act and means any share or depository receipt in a company, or any member's interest in a close corporation.

³⁵³ For more information on STT and the electronic submission of STT declarations and payments on the e-STT system via eFiling, see *Taxation in South Africa* and the *External Reference Guide – Securities Transfer Tax*.

³⁵⁴ Sections 3(2) and 5 of the STT Administration Act 26 of 2007.

³⁵⁵ Section 8(1)(d) of the STT Act.

³⁵⁶ Section 8(2) of the STT Act.

³⁵⁷ The term "participant" is defined in section 1 of the STT Act and means a person that holds in custody and administers a listed security or an interest in a listed security and that has been authorised in accordance with section 31 of the Financial Markets Act 19 of 2012 by a central securities depository as a participant in that central securities depository.

³⁵⁸ Section 8(3) of the STT Act.

14.1.6 Skills development levy

The skills development levy (SDL) is a compulsory levy to fund education and training under the Skills Development Levies Act 9 of 1999 (SDL Act). SARS administers the collection of this levy, which is based broadly on 1% of the payroll of employers. Employers providing training to employees may receive grants from the relevant Sector Education and Training Authority (SETA).³⁵⁹

A PBO is exempt from the payment of SDL if it –

- is registered as an employer and its annual payroll will not exceed R500 000 in the following 12 months;³⁶⁰
- solely carries on PBAs 1, 2(a), 2(b), 2(c), 2(d) and 5;³⁶¹ or
- solely provides funds to a PBO that solely carries on the above PBAs.³⁶²

14.1.7 Capital gains tax

Capital gains and capital losses may under specified circumstances be disregarded.³⁶³ As from the first day of its first year of assessment commencing on or after 1 April 2006 (as from the introduction of partial taxation in **Chapter 7**) any capital gain or capital loss made by a PBO on the disposal of an asset that has been used for a business undertaking or trading activity or substantially the whole of which has been used in such an undertaking or activity will not be disregarded.³⁶⁴

(a) Non-trading assets

This category applies to assets that have not been used by the PBO on or after the valuation date³⁶⁵ in carrying on any business undertaking or trading activity and includes assets that have been used exclusively for conducting PBAs. Only the usage of the asset on or after the valuation date is taken into account. Any trade usage before that date is ignored.³⁶⁶

³⁵⁹ For more information, see the *External Guide – Guide for Employers in respect of Skills Development Levy* and Interpretation Note 10 “Skills Development Levy Exemption: Public Benefit Organisations”.

³⁶⁰ Section 4(b) of the SDL Act.

³⁶¹ Section 4(c)(i) of the SDL Act.

³⁶² Section 4(c)(ii) of the SDL Act.

³⁶³ For further commentary, see the following publications on CGT: Interpretation Note 44 “Public Benefit Organisations: Capital Gains Tax”, the *Comprehensive Guide to Capital Gains Tax*, the *Guide on Determining the Market Value of Assets for Capital Gains Tax Purposes* and the *ABC of Capital Gains Tax for Companies*.

³⁶⁴ Paragraph 63A of the Eighth Schedule.

³⁶⁵ The valuation date is the effective date for implementation of CGT. A PBO that comes into existence after 1 April 2006 does not need a valuation date, since it will have acquired its assets at cost.

³⁶⁶ Paragraph 63A(a) of the Eighth Schedule.

Example 22 – Asset used exclusively on or after the valuation date in carrying on a PBA

Facts:

The financial year of a PBO carrying on the PBA of providing health care services to poor and needy persons ends on 30 April. The PBO acquired immovable property on 30 June 2003 from which it carries on its PBA. During the period 30 June 2003 to 30 April 2006, 30% of the property was let to third parties while the remaining usage was for its PBAs. As from the valuation date (1 May 2006) the property was used exclusively in carrying on PBAs. The property was sold on 30 September 2019 resulting in a capital gain of R100 000.

Result:

The capital gain of R100 000 must be disregarded, since the asset was used exclusively on or after the valuation date, to carry on PBAs. Any trade usage before the valuation date is disregarded.

Also included in this category are assets that are not “used” but “held”. Such assets include investments in the nature of shares and participatory interests in collective investment schemes.

Example 23 – Asset “held” not “used”

Facts:

A PBO carrying on a PBA of caring for homeless children invested its surplus funds in a collective investment scheme. The PBO disposed of its participatory interest in the collective investment scheme at a capital gain to fund the purchase of additional accommodation.

Result:

The capital gain must be disregarded, since the participatory interest was “held” by the PBO and not “used” in carrying on a business undertaking or trading activity.

(b) Minimal-trading assets

This category applies when substantially the whole of the use of the asset by the PBO on or after the valuation date was directed at a purpose other than carrying on a business undertaking or trading activity.³⁶⁷ An example of such an asset is one that is used 10% of the time for trading purposes and 90% of the time to carry on PBAs. Of critical importance are the words “substantially the whole of the use” that are explained in **7.3.1**.

The assets referred to in this category are excluded from the non-trading category, since they are used, albeit to a limited extent, in carrying on a business undertaking or trading activity. The percentage of the asset used for trade or business purposes must be determined using a method appropriate to the circumstances, for example, one based on time or floor area.

³⁶⁷ Paragraph 63A(b)(i) of the Eighth Schedule.

Example 24 – Determination of “substantially the whole of the use” on a time basis

Facts:

The financial year of a religious organisation approved as a PBO, ends on 30 April. It acquired a manse in 1995 for occupation by its resident minister. The minister’s term of office ended on 30 June 2006 and the manse was let to a third party from 1 July 2006 to 31 December 2007. The newly appointed minister took occupation on 1 January 2008 and continued to occupy the manse until it was sold on 30 April 2019.

Result:

The PBO’s valuation date is 1 May 2006, being the first day of its first year of assessment commencing on or after 1 April 2006.

The asset was held for 156 months from the valuation date to the date of sale (1 May 2006 to 30 April 2019). During this period the manse was used to carry on PBAs for 138 months (2 months from 1 May 2006 to 30 June 2006 and 136 months from 1 January 2008 to 30 April 2019) and let for 18 months (1 July 2006 to 31 December 2007). The manse was thus used on or after the valuation date 88,4% of the time ($138 / 156 \times 100$) for carrying on PBAs from the valuation date. The PBO has therefore used substantially the whole of the manse from the valuation date in carrying on its PBAs.

The PBO must accordingly disregard any capital gain or capital loss on the disposal of the manse.

(c) Permissible trading assets

This category applies when substantially the whole of the use of the asset by the PBO on or after the valuation date was directed at carrying on a business undertaking or trading activity qualifying for exemption under the following permissible business undertakings or trading activities:³⁶⁸

- Integral and directly related trade (see **7.3.1**).
- Occasional trade (see **7.3.2**).
- Ministerial approval (see **7.3.3**).

Example 25 – Asset used to carry on an integral and directly related trading activity

Facts:

A PBO carries on PBAs of providing facilities for the care of disabled persons. As a therapeutic and remedial activity, the PBO has acquired land on which the residents are taught to grow vegetables. The produce is primarily used for own consumption and any surplus is sold to a local home industry. All the labour is undertaken by the residents. The PBO disposed of the land on which the vegetable gardening took place resulting in a capital gain.

Result:

The vegetable gardening activity is regarded as an integral and directly related trading activity because it forms part of the PBA of caring for and providing training for the residents. The capital gain realised on the sale of the property is disregarded for CGT purposes.

³⁶⁸ Paragraph 63A(b)(ii) of the Eighth Schedule.

Example 26 – Asset used to carry on an occasional trading activity

Facts:

A PBO carries on a PBA of caring for poor and needy persons 60 years and older. The PBO holds an annual fête as a fundraising event for which it acquired a marquee. The fundraising event was undertaken with assistance from volunteers and the items sold were all donated.

Result:

This event qualifies as an occasional trading activity. If the marquee is sold, any resulting capital gain or capital loss must be disregarded for CGT purposes.

Different rules apply for determining the base cost of an asset depending on whether it was acquired before, or on or after the “valuation date”. The base cost of a pre-valuation date asset is its “valuation date value” plus any further qualifying costs incurred on or after the valuation date.³⁶⁹ For assets acquired on or after the valuation date the base cost of an asset is generally its actual cost determined under paragraph 20 of the Eighth Schedule. The base cost of an asset can be required to be determined at market value under specified circumstances if it is acquired by donation, for a consideration not measurable in money or at a non-arm’s length price from a connected person.³⁷⁰

The following methods of determining the base cost of an asset on the valuation date are available:

- The market value of the asset on valuation date. A PBO wishing to adopt the market-value method for an asset must have valued it within two years from the valuation date.³⁷¹ A table available in the *Comprehensive Guide to Capital Gains Tax* summarises the valuation dates for PBOs in existence on 1 April 2006 and the final date by which valuations must have been completed.
- “Twenty per cent of proceeds” method is likely to be a method of last resort. 20% of the proceeds from the disposal of the asset after first deducting from the proceeds an amount equal to the expenditure allowable as part of the base cost incurred on or after valuation date.
- The time-apportionment base cost of an asset.³⁷² A time-apportionment calculator “*TAB Calculator for PBOs and Recreational Clubs*” is available on the SARS website under Types of Tax / Capital gains tax / Calculators. An asset acquired by donation or inheritance by a PBO before the valuation date for no consideration has an acquisition cost equal to the market value of the asset at the time of its acquisition for the purposes of determining “B” in the time-apportionment formula.

³⁶⁹ Paragraph 25 of the Eighth Schedule.

³⁷⁰ Paragraph 38 of the Eighth Schedule.

³⁷¹ Paragraph 29(4)(b)(i) of the Eighth Schedule.

³⁷² The time-apportionment base cost of an asset is determined under paragraph 30 of the Eighth Schedule.

14.2 Compliance with other taxes and duties

A general overview relating to certain other taxes and duties is discussed. It is, however, important that PBOs comply with the relevant requirements and conditions relative to a particular tax or duty.

14.2.1 Provisional tax payments

Provisional tax³⁷³ is dealt with in the Fourth Schedule. It is not a separate tax but merely a mechanism to assist taxpayers in meeting their tax liability by spreading it over the relevant year of assessment as opposed to paying a large amount at the end of a year of assessment. A provisional taxpayer³⁷⁴ is required to estimate taxable income for a year of assessment and calculate provisional tax payable on that estimate.³⁷⁵

PBOs are excluded from the definition of “provisional taxpayer” in the Fourth Schedule and are not required to submit provisional tax payments.³⁷⁶ Any liability to income tax on taxable income will become payable on assessment.

14.2.2 Value-added tax

VAT is an indirect tax levied under the VAT Act. VAT is presently levied at a standard rate of 15% on most supplies and services in South Africa and on most goods imported into the country. There is a limited range of goods and services that are subject to VAT at the zero rate when supplied in South Africa and on exports to other countries. Certain goods are also exempt when supplied in, or imported into South Africa. VAT is payable only on imported services that are acquired for non-taxable purposes.

VAT is levied on an inclusive basis, which means that any prices marked on products in stores, and any prices advertised or quoted, must include VAT if the supplier is a vendor. Supplies that attract VAT at either the standard or zero rate are called “taxable supplies”. Any person that makes taxable supplies above the compulsory registration threshold or has been allowed to register voluntarily for VAT is referred to as a “vendor”. A vendor includes a person that is liable to register for VAT, even if that person has not actually registered.

The terms “public benefit organisation” and “public benefit activity” used for income tax purposes are not used in the VAT Act. Instead reference is made to an “association not for gain” and a “welfare organisation”. Both types of entity qualify for special VAT treatment provided they qualify to be registered for VAT. The benefits available to each type of entity differ depending on whether the entity is an association not for gain or a welfare organisation.³⁷⁷

Should a ruling be required relating to a specific VAT issue, a ruling application may be submitted by e-mail to **VATRulings@sars.gov.za**.³⁷⁸

³⁷³ The term “provisional tax” is defined in paragraph 1 of the Fourth Schedule.

³⁷⁴ The term “provisional taxpayer” is defined in paragraph 1 of the Fourth Schedule.

³⁷⁵ For comprehensive information, see *Taxation in South Africa* and the *Guide for Provisional Tax*.

³⁷⁶ Paragraph (aa) of the exclusions to the definition of “provisional taxpayer” in paragraph 1 of the Fourth Schedule.

³⁷⁷ For comprehensive information on the VAT implications of transactions relating to PBOs, see *VAT 414 – Guide for Associations not for Gain and Welfare Organisations*.

³⁷⁸ For information on the VAT ruling process, see the *VAT Ruling Process Quick Reference Guide*.

14.2.3 Employees' tax

Employees' tax is dealt with in the Fourth Schedule.³⁷⁹ It is often referred to as Pay-As-You-Earn or PAYE. The purpose of the employee's tax system is to ensure that an employee's income tax liability is settled at the same time that the employee's remuneration is earned, thus avoiding burdening the employee with a large tax bill on assessment. Employees' tax deducted serves as an income tax credit that is set off against the income tax liability³⁸⁰ of an employee, calculated on an annual basis, in order to determine the employees' final income tax liability for a year of assessment.

Employees' tax must be deducted or withheld by every employer (or representative employer when the employer is not resident in South Africa) who pays or becomes liable to pay an amount of remuneration³⁸¹ to any person.

A PBO is not exempted from the obligation to deduct or withhold employees' tax. The PBO must register as an employer for employees' tax purposes. The PAYE to be deducted or withheld is calculated according to the tax deduction tables prescribed by the Commissioner.

A PBO that is an employer must, if any of its employees are liable for income tax, register for employees' tax within 21 business days of becoming an employer.³⁸² Registration is done by completing the prescribed application form EMP 101e.³⁸³ A PBO already registered for another tax type on eFiling may as part of the single registration initiative register for PAYE on eFiling.³⁸⁴ A registered employer will receive a monthly return, the EMP 201 form, which must be completed and submitted together with the payment of employees' tax within seven days after the end of the month during which the deduction was made.

An employer must issue an employee with an employees' tax certificate (IRP 5 certificate) if employees' tax was deducted from the employee's remuneration. This certificate discloses, among other things, the total remuneration earned during a year of assessment and the employees' tax and unemployment insurance fund contributions deducted by the employer.

Employers who administer donations made by employees through a payroll-giving programme must take these donations into account when determining the monthly employees' tax to be deducted from their remuneration. The deduction is limited for employees' tax purposes to 5% of remuneration after deducting certain amounts as specified in the Fourth Schedule.³⁸⁵ Donations may be taken into account only if the employer received section 18A receipts issued by section 18A-approved PBOs or conduit PBOs for donations made on behalf of employees. If an employee makes a donation to a section 18A-approved PBO or conduit PBO independently of the employer, the employer is not entitled to take the donation into account. Although the section 18A receipt is issued to the employer by the section 18A-approved PBO or conduit PBO, the employer does not qualify for a deduction under section 18A. The section 18A receipt must be retained by the employer for record purposes.³⁸⁶

³⁷⁹ See the *External Guide – Guide for Employers in respect of Employees' Tax* for commentary on PAYE.

³⁸⁰ Paragraph 28 of the Fourth Schedule.

³⁸¹ The term "remuneration" is defined in paragraph 1 of the Fourth Schedule.

³⁸² Paragraph 15(1) of the Fourth Schedule read with Chapter 3 of the TA Act.

³⁸³ See the *External Guide – Guide for Completion of Employer Registration Application*.

³⁸⁴ See the *External Guide – How to Complete the Registration, Amendments and Verification Form (RAV01)*.

³⁸⁵ Paragraph 2(4)(f) of the Fourth Schedule.

³⁸⁶ Section 29 of the TA Act.

14.2.4. Unemployment insurance contributions

The unemployment insurance fund (UIF) gives short-term relief to workers when they become unemployed or are unable to work because of maternity, adoption leave or illness. It also provides relief to the dependants of a deceased contributor.³⁸⁷

The unemployment insurance system in South Africa is governed by the Unemployment Insurance Act 63 of 2001 and the Unemployment Insurance Contributions Act 4 of 2002. These statutes, among other things, provide for the benefits, to which contributors are entitled, and the imposition and collection of contributions to UIF, respectively.

UIF contributions, that are equal to 2% of the remuneration paid or payable by an employer to its employees, subject to specified exclusions, are payable by employers on a monthly basis. The employer must pay a total contribution of 2% (1% contributed by the employee and 1% contributed by the employer) within the prescribed period.

A PBO paying remuneration to its employees will also be liable for UIF contributions unless it qualifies for certain exemptions.

These contributions must be paid to the UIF office of the Department of Labour³⁸⁸ or to SARS within seven days after the end of the month during which the amount was deducted. Payment can be made via eFiling, electronic funds transfer or at a branch of an approved banking institution.³⁸⁹

³⁸⁷ See section 2 of the Unemployment Insurance Act.

³⁸⁸ Information is available from the Department of Labour's website at www.labour.gov.za.

³⁸⁹ For more information, see the *Guide for Employers in respect of the Unemployment Insurance Fund*.

Chapter 15

Administrative provisions

15.1 The Tax Administration Act

The TA Act³⁹⁰ deals with tax administration and seeks, among other things, to simplify administrative provisions by incorporating into one piece of legislation administrative provisions that are generic to all tax Acts, remove duplicated or redundant administrative provisions in the different tax Acts and as far as possible harmonise administrative provisions.³⁹¹

Some administrative provisions that apply only to, and are unique to, the administration of a specific tax type remain in the Act that imposes that tax. If the TA Act is silent on the administration of a tax Act and it is specifically provided for in any other tax Act, the provisions of that Act apply.³⁹² If there is any inconsistency between the TA Act and any other tax Act, the other Act prevails.³⁹³

General administrative provisions contained in the TA Act relating to, for example, record-keeping (see **15.4**), returns (see **15.5**), assessments, dispute resolution (see **15.6**), interest, refunds and anti-avoidance also apply to PBOs.

15.2 Furnishing of information

In order to assist in enforcing the Act, the Commissioner may submit a written request to any person to furnish information about any PBO and may require that person to –³⁹⁴

- answer any questions relating to the PBO;
- make books of account, records or other documents relating to the PBO available for inspection; or
- meet with the Commissioner's representative and produce for examination any documents relating to the PBO.

A person who wilfully and without just cause refuses or neglects to furnish, produce or make available any document or thing, or reply to or answer truly and fully any questions requested by SARS is guilty of an offence and on conviction is subject to a fine or imprisonment for a period not exceeding two years.³⁹⁵

³⁹⁰ The TA Act came into effect on 1 October 2012.

³⁹¹ For comprehensive information relating to taxpayers' obligations and entitlements under the TA Act, see the *SARS Short Guide to the Tax Administration Act, 2011 (Act No. 28 of 2011)*.

³⁹² Section 4(2) of the TA Act.

³⁹³ Section 4(3) of the TA Act.

³⁹⁴ Sections 30(10) and 46(1) of the TA Act.

³⁹⁵ Section 234(2)(h) and (i) of the TA Act.

15.3 Changes in registered particulars

A PBO must inform SARS of changes in its registered particulars to ensure that SARS has the most accurate and current information. A PBO must communicate to SARS any change of postal, physical or electronic addresses, representative taxpayer³⁹⁶ and banking particulars.³⁹⁷

A person who wilfully and without just cause refuses or neglects to notify SARS of a change in registered particulars is guilty of an offence and on conviction is subject to a fine or imprisonment for a period not exceeding two years.³⁹⁸

15.4 Record-keeping

All PBOs are required to keep records for five years³⁹⁹ from the date of the submission of a return under the TA Act.⁴⁰⁰

A return⁴⁰¹ includes any form, declaration, document or other manner of submitting information to SARS that incorporates a self-assessment or is the basis on which an assessment is to be made by SARS.

Although records are generally required to be kept and retained for five years, there are circumstances in which they are required to be retained for longer periods.⁴⁰²

The required retention periods for records, books of account or documents are as follows:⁴⁰³

- Five years from the date of the submission of a return.⁴⁰⁴
- If no return is submitted for a tax period but is required to be submitted, records, books of account or documents must be kept and retained indefinitely until the obligation to submit a return has been complied with, and then for five years from the date of submission of the return.⁴⁰⁵
- If an objection or appeal against an assessment or decision is lodged, the records, books of account or documents relevant to the objection or appeal must be kept and retained until the disputed assessment or decision becomes final or the applicable five-year period has elapsed, whichever is the later.⁴⁰⁶
- A person notified of, or who is aware of an audit or investigation by SARS must retain the records, books of account or documents relevant to that audit or investigation until it is concluded or the applicable five-year period has elapsed, whichever is the later.⁴⁰⁷

³⁹⁶ The term “representative taxpayer” is defined in section 1 of the TA Act and assigned meaning in section 153(1) of that Act. The term generally means a person who is responsible for paying the tax liability of another person as an agent.

³⁹⁷ Section 23 of the TA Act.

³⁹⁸ Section 234(2)(a) of the TA Act.

³⁹⁹ Section 29(3) of the TA Act.

⁴⁰⁰ Sections 3 and 4 of the Tax Administration Laws Amendment Act 44 of 2014 amended and repealed sections 18A(4) and 30(9), respectively. These amendments came into operation on 20 January 2015.

⁴⁰¹ The term “return” is defined in section 1 of the TA Act.

⁴⁰² Section 32 of the TA Act.

⁴⁰³ See the *SARS Short Guide to the Tax Administration Act, 2011 (Act No. 28 of 2011)*.

⁴⁰⁴ Section 29(2)(a) read with section 29(3)(a) of the TA Act.

⁴⁰⁵ Section 29(2)(b) of the TA Act.

⁴⁰⁶ Section 32(b) of the TA Act.

⁴⁰⁷ Section 32(a) of the TA Act.

- Indefinitely, if a document is relevant for future years of assessment such as the prescribed application form EI 1 and the required supplementary information and documentation on which the Commissioner based the decision to approve or not to approve an exemption from normal tax.

The records, books of account, or documents that must be kept and retained may include anything that contains a written, sound or pictorial record or other record of information whether in physical or electronic form.

Example 27 – Non-exhaustive examples of records, books of account or documents that must be kept and retained

- Cash books
- Debtors, creditors and sales ledgers
- Journals
- Fixed-asset register
- Bank statements and deposit slips
- Invoices
- Section 18A receipts issued by section 18A-approved PBOs or conduit PBOs
- Audit certificates
- Minutes of meetings where scholarships, bursaries or awards were granted (see 2.4.1).

In order to ensure the safe retention of records as well as easy and efficient access to records by SARS, especially for inspection or audit purposes during the prescribed retention period, a PBO is required to keep and retain its records in their original form, in an orderly fashion and in a safe place.⁴⁰⁸

The electronic form of record-keeping is regulated by the Electronic Record-Keeping Rules.⁴⁰⁹ The rules require that electronic records must be kept in their original form,⁴¹⁰ and should within a reasonable time, be accessible to and readable by SARS. Other requirements deal with the location of the records, the maintenance of system documentation and measures for storage, back-ups and conversions.⁴¹¹

A person who wilfully and without just cause fails or neglects to retain records is guilty of an offence and on conviction is subject to a fine or imprisonment for a period not exceeding two years.⁴¹²

⁴⁰⁸ Section 30 of the TA Act.

⁴⁰⁹ See Government Notice 787 in *Government Gazette* 35733 of 1 October 2012.

⁴¹⁰ See section 14 of the Electronic Communications and Transactions Act 25 of 2002. Under that section a document will be regarded as being in original form if the integrity of the data is maintained, for example, when it is complete and unaltered.

⁴¹¹ For further information, see the *Electronic Communications Guide*.

⁴¹² Section 234(2)(e) of the TA Act.

15.5 Income tax returns

The prescribed Income Tax Return for Exempt Organisations (IT12EI) applicable to PBOs must be submitted on an annual basis. It may be obtained from –

- the **eFiling website**;
- any SARS branch office; or
- the SARS National Contact Centre.

A return must be a full and true return⁴¹³ and be signed by the PBO or by the PBO's duly authorised representative. The person signing the return will be regarded as being cognisant of the statements made in the return.⁴¹⁴

Non-receipt of an income tax return does not affect the obligation to submit an income tax return.⁴¹⁵ A person who wilfully and without cause refuses or neglects to submit a return or document to SARS is guilty of an offence and on conviction is subject to a fine or imprisonment for a period not exceeding two years.⁴¹⁶

15.5.1 Taxpayer reference number

A taxpayer reference number is allocated on completion of registration for income tax purposes.⁴¹⁷ For a group registration a taxpayer reference number will be allocated to the coordinating body and not to each individual PBO within the group.

The taxpayer reference number must be included when filing a return or any document with SARS.

15.5.2 Filing an income tax return

The public notice issued annually by the Commissioner also prescribes the period within which returns must be submitted for the years of assessment specified in that notice. An appropriate penalty⁴¹⁸ will be imposed by SARS if satisfied that the company failed to comply with the obligation to submit an income tax return under the Act and public notice issued by the Commissioner.⁴¹⁹ The appropriate penalty for non-compliance will be imposed according to a fixed amount penalty table.⁴²⁰

Income tax returns may be submitted manually or electronically on the eFiling website.

⁴¹³ Section 25(2) of the TA Act.

⁴¹⁴ Section 25(3) of the TA Act.

⁴¹⁵ Section 25(4) of the TA Act.

⁴¹⁶ Section 234(2)(d) of the TA Act.

⁴¹⁷ The term "taxpayer reference number" is defined in section 1 of the TA Act and means the reference number referred to in section 24 of the same Act.

⁴¹⁸ The terms "administrative non-compliance penalty" and "penalty" are defined in section 208 of the TA Act and means a penalty imposed by SARS in accordance with Chapter 15 of the TA Act or a tax Act other than this Act, and excludes an understatement penalty referred to in Chapter 16 of the TA Act.

⁴¹⁹ Section 210 of the TA Act. For commentary, see the *Guide to Understatement Penalties*.

⁴²⁰ Section 211 of the TA Act.

15.5.3 Year of assessment

A PBO that is a trust or a testamentary trust will have a year of assessment ending on the last day of February. A trust can apply for permission to draw up its financial statements to a different closing date if it would be more convenient for it to do so.⁴²¹

A PBO that is an NPC or an association of persons established under a constitution or any other written instrument will have a year of assessment ending on the date that coincides with its financial year-end. If the financial year-end is 30 June, its year of assessment will run from 1 July to 30 June of the following year. The Commissioner may exercise discretion to accept financial accounts of a company for a period ending on a day differing from the last day of the company's financial year.⁴²²

15.5.4 Supporting documentation

It is not a requirement for supporting documents to be submitted together with the income tax return. The PBO will be notified if supporting documentation is required to substantiate any aspect of the income tax return.

A PBO whose income tax return is supported by any balance sheet, statement of assets and liabilities or account prepared by any other person may be requested to submit a certificate or statement recording –⁴²³

- the extent of the examination by the preparer of the books of account and of the documents from which the books of account were prepared; and
- in so far as may be ascertained by the examination, whether the entries in those books and documents disclose the true nature of any transaction, receipt, accrual, payment or debit.

The accounts must be signed by a person responsible for the PBO in a fiduciary capacity and by the person who prepared them on behalf of the PBO.

15.5.5 Financial statements

A PBO that is an NPC may be required to be audited or independently reviewed under the Companies Act⁴²⁴ taking into account, for example, the category of the company and its public interest score.

⁴²¹ See Interpretation Note 19 “Year of Assessment of Natural Persons and Trusts: Accounts Accepted to a Date other than the Last Day of February”.

⁴²² See Interpretation Note 90 “Year of Assessment of a Company: Accounts Accepted to a Date other than the Last Day of a Company's Financial Year”.

⁴²³ Section 28 of the TA Act.

⁴²⁴ See section 30(2) of the Companies Act read with regulations 27, 28 and 29 to that Act.

15.6 Objection and appeal

Any decision of SARS in the exercise of its discretion under section 30 and section 18A(1)(a)(cc), (b), (bA)(dd) and (c)⁴²⁵ is subject to objection and appeal.⁴²⁶

The Commissioner's discretion under section 30 will be exercised, for example, to determine –

- whether an organisation may be approved as a PBO for purposes of section 30(3);
- whether a PBO is or was knowingly a party to, or knowingly allowed itself to be used as part of a tax-avoidance scheme;
- whether a PBO has in any material respect, or on a continuous or repetitive basis failed to comply with section 30; and
- the non-compliance of any co-ordinating body of a group of PBOs.

A PBO may object to a decision or an assessment within 30 business days⁴²⁷ from the date of the decision or assessment⁴²⁸ in accordance with Chapter 9 of the TA Act read with the “rules” as published in the *Government Gazette*.⁴²⁹

The objection must be made on the prescribed form and specify in detail the grounds on which it is made. SARS will consider the objection and may disallow the objection or allow the objection in whole or in part.

If on disallowance of the objection the PBO is dissatisfied with the decision by SARS, it may appeal against the disallowance. Such appeal must be in writing and lodged with SARS within the prescribed period.⁴³⁰

⁴²⁵ Section 3 of the Tax Administration Laws Amendment Act 24 of 2020 amended section 3(4)(b) to allow the discretion exercised by the Commissioner under section 18A(1)(bA)(dd) also to be subject to objection and appeal. The amendment is effective from date of promulgation, namely, 15 January 2021.

⁴²⁶ Section 3(4)(b). Section 9(1) of the TA Act applies only to decisions or notices made by SARS, which are not subject to objection and appeal under section 3(4).

⁴²⁷ The term “business day” is defined in section 1 of the TA Act.

⁴²⁸ See Interpretation Note 15 “Exercise of Discretion in case of Late Objection or Appeal”.

⁴²⁹ The rules for objections and appeals are formulated under section 103 of the TA Act and published in Government Notice 550 in *Government Gazette* 37819 of 11 July 2014. Rule 7 deals with objections.

⁴³⁰ For more information on the resolution of tax disputes, see the *Dispute Resolution Guide: Guide on the Rules Promulgated in terms of Section 103 of the Tax Administration Act, 2011* and the *Alternative Dispute Resolution: Quick Guide*.

Annexure A – Section 10(1)(cN)

10. Exemptions.—(1) There shall be exempt from normal tax—

- (cN) the receipts and accruals of any public benefit organisation approved by the Commissioner in terms of section 30(3), to the extent that the receipts and accruals are derived—
 - (i) otherwise than from any business undertaking or trading activity; or
 - (ii) from any business undertaking or trading activity—
 - (aa) if the undertaking or activity—
 - (A) is integral and directly related to the sole or principal object of that public benefit organisation as contemplated in paragraph (b) of the definition of “public benefit organisation” in section 30;
 - (B) is carried out or conducted on a basis substantially the whole of which is directed towards the recovery of cost; and
 - (C) does not result in unfair competition in relation to taxable entities;
 - (bb) if the undertaking or activity is of an occasional nature and undertaken substantially with assistance on a voluntary basis without compensation;
 - (cc) if the undertaking or activity is approved by the Minister by notice in the *Gazette*, having regard to—
 - (A) the scope and benevolent nature of the undertaking or activity;
 - (B) the direct connection and interrelationship of the undertaking or activity with the sole or principal object of the public benefit organisation;
 - (C) the profitability of the undertaking or activity; and
 - (D) the level of economic distortion that may be caused by the tax exempt status of the public benefit organisation carrying out the undertaking or activity; or
 - (dd) other than an undertaking or activity in respect of which item (aa), (bb) or (cc) applies and do not exceed the greater of—
 - (i) 5 per cent of the total receipts and accruals of that public benefit organisation during the relevant year of assessment; or
 - (ii) R200 000;

Annexure B – Section 18A

18A. Deduction of donations to certain organisations.—(1) Notwithstanding the provisions of section 23, there shall be allowed to be deducted in the determination of the taxable income of any taxpayer so much of the sum of any *bona fide* donations by that taxpayer in cash or of property made in kind, which was actually paid or transferred during the year of assessment to—

- (a) any—
 - (i) public benefit organisation contemplated in paragraph (a)(i) of the definition of “public benefit organisation” in section 30(1) approved by the Commissioner under section 30; or
 - (ii) institution, board or body contemplated in section 10(1)(cA)(i),
which—
 - (aa) carries on in the Republic any public benefit activity contemplated in Part II of the Ninth Schedule, or any other activity determined from time to time by the Minister by notice in the *Gazette* for the purposes of this section;
 - (bb) complies with the requirements contemplated in subsection (1C), if applicable, and any additional requirements prescribed by the Minister in terms of subsection (1A); and
 - (cc) has been approved by the Commissioner for the purposes of this section;
- (b) any public benefit organisation contemplated in paragraph (a)(i) of the definition of “public benefit organisation” in section 30(1) approved by the Commissioner under section 30, which provides funds or assets to any public benefit organisation, institution, board or body contemplated in paragraph (a), or any department contemplated in paragraph (c) and which has been approved by the Commissioner for the purposes of this section; or
- (bA)
 - (i) any agency contemplated in the definition of “specialized agencies” in section 1 of the Convention on the Privileges and Immunities of the Specialized Agencies, 1947, set out in Schedule 4 to the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001);
 - (ii) the United Nations Development Programme (UNDP);
 - (iii) the United Nations Children’s Fund (UNICEF);
 - (iv) the United Nations High Commissioner for Refugees (UNHCR);
 - (v) the United Nations Population Fund (UNFPA);
 - (vi) the United Nations Office on Drugs and Crime (UNODC);
 - (vii) the United Nations Environmental Programme (UNEP);
 - (viii) the United Nations Entity for Gender, Equality and the Empowerment of Women (UN Women);
 - (ix) the International Organisation for Migration (IOM);
 - (x) the Joint United Nations Programme on HIV/AIDS (UNAIDS);
 - (xi) the Office of the High Commissioner for Human Rights (OHCHR); or
 - (xii) the United Nations Office for the Coordination of Humanitarian Affairs (OCHA),
if that agency, programme, fund, High Commissioner, office, entity or organisation—
 - (aa) carries on in the Republic any public benefit activity contemplated in Part II of the Ninth Schedule, or any other activity determined from time to time by the Minister by notice in the *Gazette* for the purposes of this section;

- (bb) furnishes the Commissioner with a written undertaking that such agency will comply with the provisions of this section;
 - (cc) waives diplomatic immunity for the purposes of subsection (5)(i); and
 - (dd) has been approved by the Commissioner for the purposes of this section; or
- (c) any department of government of the Republic in the national, provincial or local sphere as contemplated in section 10(1)(a), which has been approved by the Commissioner for the purposes of this section, to be used for purpose of any activity contemplated in Part II of the Ninth Schedule,

as does not exceed—

- (A) where the taxpayer is a portfolio of a collective investment scheme, an amount determined in accordance with the following formula:

$$A = B \times 0,005$$

in which formula:

- (AA) "A" represents the amount to be determined;
 - (BB) "B" represents the average value of the aggregate of all of the participatory interests held by investors in the portfolio for the year of assessment, determined by using the aggregate value of all of the participatory interests in the portfolio at the end of each day during that year; or
- (B) in any other case, ten per cent of the taxable income (excluding any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit and severance benefit) of the taxpayer as calculated before allowing any deduction under this section or section 6quat (1C):

Provided that any amount of a donation made as contemplated in this subsection and which has been disallowed solely by reason of the fact that it exceeds the amount of the deduction allowable in respect of the year of assessment shall be carried forward and shall, for the purposes of this section, be deemed to be a donation actually paid or transferred in the next succeeding year of assessment.

(1A) The Minister may, by regulation, prescribe additional requirements with which a public benefit organisation, institution, board or body or the department carrying on any specific public benefit activity identified by the Minister in the regulations, must comply before any donation made to that public benefit organisation, institution, board or body or the department shall be allowed as a deduction under subsection (1).

(1B) Any activity determined by the Minister in terms of subsection (1)(a) or any requirements prescribed by the Minister in terms of subsection (1A), must be tabled in Parliament within a period of 12 months after the date of publication by the Minister of that activity or those requirements, as the case may be, in the *Gazette*, for incorporation into this Act.

(1C) The constitution or founding document of a public benefit organisation carrying on the activity contemplated in paragraph 4(d) of Part II of the Ninth Schedule, must expressly provide that the organisation—

- (a) may not issue any receipt contemplated in subsection (2) in respect of any donation made by a person to that public benefit organisation, unless—
 - (i) that donation is made by that person on or after 1 August 2002; and
 - (ii) that person (in the case of a company, together with any other company in the same group of companies as that company) has during the relevant year of assessment of that person donated an amount of at least R1 million to that organisation;
- (b) must ensure that every donation contemplated in paragraph (a), in respect of which such a receipt has been issued, will be matched by a donation to that organisation of the same amount made by a person who is not a resident and which is made from funds generated and held outside the Republic; and

- (c) must utilise the amount of—
 - (i) all donations contemplated in paragraph (a), in respect of which such a receipt has been issued, and all income derived therefrom, in the Republic in carrying on that activity; and
 - (ii) all donations contemplated in paragraph (b), either in the Republic in carrying on that activity, or in respect of a transfrontier conservation area of which the Republic forms part.

(2) Any claim for a deduction in respect of any donation under subsection (1) shall not be allowed unless supported by—

- (a) a receipt issued by the public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation or the department concerned, containing—
 - (i) the reference number of the public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation or the department issued by the Commissioner for the purposes of this section;
 - (ii) the date of the receipt of the donation;
 - (iii) the name of the public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation or the department which received the donation, together with an address to which enquiries may be directed in connection therewith;
 - (iv) the name and address of the donor;
 - (v) the amount of the donation or the nature of the donation (if not made in cash);
 - (vi) a certification to the effect that the receipt is issued for the purposes of section 18A of the Income Tax Act, 1962, and that the donation has been or will be used exclusively for the object of the public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation concerned or, in the case of a department in carrying on the relevant public benefit activity; or
 - (vii) such further information as the Commissioner may prescribe by public notice; or
- (b) an employees' tax certificate as defined in the Fourth Schedule on which the amount of donations contemplated in paragraph 2(4)(f) of that Schedule, for which the employer has received a receipt contemplated in paragraph (a), is given.

(2A) A public benefit organisation, institution, board, body or department may only issue a receipt contemplated in subsection (2) in respect of any donation to the extent that—

- (a) in the case of a public benefit organisation, institution, board or body contemplated in subsection (1)(a) which carries on activities contemplated in Parts I and II of the Ninth Schedule, that donation will be utilised solely in carrying on activities contemplated in Part II of the Ninth Schedule;
- (b) in the case of a public benefit organisation contemplated in subsection (1)(b)—
 - (i) that organisation will within 12 months after the end of the relevant year of assessment distribute or incur the obligation to distribute at least 50 per cent of all funds received by way of donation during that year in respect of which receipts were issued: Provided that the Commissioner may, upon good cause shown and subject to such conditions as he or she may determine, either generally or in a particular instance, waive, defer or reduce the obligation to distribute any funds, having regard to the public interest and the purpose for which the relevant organisation wishes to accumulate those funds; and

(ii) which provides funds or assets to public benefit organisations, institutions, boards or bodies or any department that carry on public benefit activities contemplated in Parts I and II of the Ninth Schedule, that donation will be utilised solely to provide funds or assets to a public benefit organisation, institution, board or body contemplated in subsection (1)(a), which will utilise those funds or assets solely in carrying on activities contemplated in Part II of the Ninth Schedule or to any department contemplated in subsection (1)(c) which will utilise those funds or assets solely for the purpose of any activity contemplated in Part II of the Ninth Schedule; or

(c) in the case of a department, that donation will be utilised solely in carrying on activities contemplated in Part II of the Ninth Schedule.

(2B) A public benefit organisation, institution, board or body contemplated in subsection (2A), must obtain and retain an audit certificate confirming that all donations received or accrued in that year in respect of which receipts were issued in terms of subsection (2), were utilised in the manner contemplated in subsection (2A).

(2C) The accounting officer or accounting authority contemplated in the Public Finance Management Act or an accounting officer contemplated in the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003), as the case may be, for the department which issued any receipts in terms of subsection (2), must on an annual basis submit an audit certificate to the Commissioner confirming that all donations received or accrued in the year in respect of which receipts were so issued were utilised in the manner contemplated in subsection (2A).

(2D) Any public benefit organisation contemplated in subsection (1)(b), in respect of any amount that is not distributed as required by subsection (2A)(b)(i), shall distribute or incur the obligation to distribute all amounts received in respect of investment assets held by it, other than amounts received in respect of disposals of those investment assets to any public benefit organisation, institution, board or body contemplated in subsection (1)(a) or to any department contemplated in subsection (1)(c), no later than six months after—

(a) every five years from the date on which the Commissioner issued a reference number referred to in subsection (2)(a)(i) to that public benefit organisation referred to in subsection (1)(b), if that public benefit organisation is incorporated, formed or established on or after 1 March 2015; or

(b) every five years from 1 March 2015, if that public benefit organisation referred to in subsection (1)(b) was incorporated, formed or established and issued with a reference number referred to in subsection (2)(a)(i) prior to 1 March 2015.

(3) If any deduction is claimed by any taxpayer under the provisions of subsection (1) in respect of any donation of property in kind, other than immovable property of a capital nature where the lower of market value or municipal value exceeds cost, the amount of such deduction shall be deemed to be an amount equal to—

(a) where such property constitutes—

(i) a financial instrument which is trading stock of the taxpayer, the lower of fair market value of that financial instrument on the date of that donation or the amount which has been taken into account for the purposes of section 22(8)(C); or

(ii) any other trading stock of the taxpayer (including any livestock or produce in respect of which the provisions of paragraph 11 of the First Schedule are applicable), the amount which has been taken into account for the purposes of section 22(8)(C) or, in the case of such livestock or produce, the said paragraph 11, in relation to the donation of such property; or

(b) where such property (other than trading stock) constitutes an asset used by the taxpayer for the purposes of his trade, the lower of—

(i) the fair market value of that property on the date of that donation; or

- (ii) the cost to the taxpayer of such property less any allowance (other than any investment allowance) allowed to be deducted from the income of the taxpayer under the provisions of this Act in respect of that asset; or
- (c) where such property does not constitute trading stock of the taxpayer or an asset used by him for the purposes of his trade, the lower of—
 - (i) the fair market value of that property on the date of that donation; or
 - (ii) the cost to the taxpayer of such asset, less, in the case of a movable asset which has deteriorated in condition by reason of use or other causes, a depreciation allowance calculated in the manner contemplated in section 8(5)(bB)(i); or
- (d) where such property is purchased, manufactured, erected, assembled, installed or constructed by or on behalf of the taxpayer in order to form the subject of the said donation, the lower of—
 - (i) the fair market value of that property on the date of that donation; or
 - (ii) the cost to the taxpayer of such property.

(3A) If any deduction is claimed by any taxpayer under the provisions of subsection (1) in respect of any donation of immovable property of a capital nature where the lower of market value or municipal value exceeds cost, the amount of such deduction shall be determined in accordance with the formula:

$$A = B + (C \times D)$$

in which formula:

- (a) “A” represents the amount deductible in respect of subsection (1);
- (b) “B” represents the cost of the immovable property being donated;
- (c) “C” represents the amount of a capital gain (if any), that would have been determined in terms of the Eighth Schedule had the immovable property been disposed of for an amount equal to the lower of market value or municipal value on the day the donation is made; and
- (d) “D” represents 60 per cent in the case of a natural person or special trust or 20 per cent in any other case.

(3B) No deduction shall be allowed under this section in respect of the donation of any property in kind which constitutes, or is subject to any fiduciary right, usufruct or other similar right, or which constitutes an intangible asset or financial instrument, unless that financial instrument is—

- (a) a share in a listed company; or
- (b) issued by an eligible financial institution as defined in section 1 of the Financial Sector Regulation Act.

(4) The provisions of section 30(10) shall apply *mutatis mutandis* in respect of any institution, board or body contemplated in subsection (1)(a).

(5) If the Commissioner has reasonable grounds for believing that any person who is in a fiduciary capacity responsible for the management or control of the income or assets of any public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation (other than an institution, board or body in respect of which subsection (5B) applies) has—

- (a) in any material way failed to ensure that the objects for which the public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation was established are carried out or has expended moneys belonging to the public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation for purposes not covered by such objects;

- (b) issued or allowed a receipt to be issued to any taxpayer for the purposes of this section in respect of any fees or other emoluments payable to that organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation by that taxpayer;
- (c) issued or allowed a receipt to be issued in contravention of subsection (2A) or utilised a donation in respect of which a receipt was issued for any purpose other than the purpose contemplated in that subsection;
- (d) failed to obtain and retain an audit certificate as contemplated in subsection (2B); or
- (e) failed to submit an audit certificate as contemplated in subsection (2C),

the Commissioner may by notice in writing addressed to that person direct that—

- (i) any donation in respect of which a receipt was issued by that public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation during any year of assessment specified in that notice, will be deemed to be taxable income of that public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation in that year; and
- (ii) if corrective steps are not taken by that public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation within a period stated by the Commissioner in that notice, any receipt issued by that public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation in respect of any donation made on or after the date specified in that notice shall not qualify as a valid receipt for purposes of subsection (2).

(5A) If the Commissioner has reasonable grounds for believing that any regulating or co-ordinating body of a group of public benefit organisations, institutions, boards or bodies contemplated in section 30(3A) or subsection (6) fails to—

- (a) take any steps contemplated in section 30(3A) or subsection (6), to exercise control over any public benefit organisation, institution, board or body in that group; or
- (b) notify the Commissioner where it becomes aware of any material failure by any public benefit organisation, institution, board or body over which it exercises control to comply with any provision of this section,

the Commissioner may by notice in writing addressed to that regulating or co-ordinating body direct that if corrective steps are not taken by that regulating or co-ordinating body within a period stated by the Commissioner in that notice, any receipt issued by public benefit organisations, institutions, boards or bodies in that group in respect of any donation made on or after the date specified in that notice shall not qualify as a valid receipt for purposes of subsection (2).

(5B) If the Commissioner has reasonable grounds for believing that any accounting officer or accounting authority contemplated in the Public Finance Management Act or an accounting officer contemplated in the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003), as the case may be, for any institution in respect of which that Act applies, has issued or allowed a receipt to be issued in contravention of subsection (2A) or utilised a donation in respect of which a receipt was issued for any purpose other than the purpose contemplated in that subsection, the Commissioner—

- (a) must notify the National Treasury and the Provincial Treasury (if applicable) of the contravention; and
- (b) may by notice in writing addressed to that accounting officer or accounting authority direct that, if corrective steps are not taken by that accounting officer or accounting authority within a period stated by the Commissioner in that notice, any receipt issued by that institution in respect of any donation made on or after the date specified in that notice shall not qualify as a valid receipt for purposes of subsection (2).

(5C) If any public benefit organisation contemplated in subsection (1)(b), has not distributed amounts as contemplated in subsection (2D), or has not incurred the obligation to distribute those amounts received in respect of investment assets held by it, those amounts shall be deemed to be taxable income of that public benefit organisation in that year of assessment.

(6) The Commissioner may, for the purposes of this section, approve a group of institutions, boards or bodies contemplated in subsection (1)(a)(ii), sharing a common purpose which carry on any public benefit activity under the direction or supervision of a regulating or co-ordinating body, where that body takes such steps, as prescribed by the Commissioner, to exercise control over those institutions, boards or bodies in order to ensure that they comply with the provisions of this section.

(7) Any person who is—

- (i) in a fiduciary capacity responsible for the management or control of the income and assets of any public benefit organisation, institution, board or body contemplated in this section; or
- (ii) the accounting officer or accounting authority contemplated in the Public Finance Management Act or the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003), as the case may be, for any institution in respect of which that Act applies,

who intentionally fails to comply with any provisions of this section, or a provision of the constitution, will or other written instrument under which such organisation is established to the extent that it relates to the provisions of this section, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 24 months.

Annexure C – Section 30

30. Public benefit organisations.—(1) For the purposes of this Act—

“**public benefit activity**” means—

- (a) any activity listed in Part I of the Ninth Schedule; and
- (b) any other activity determined by the Minister from time to time by notice in the Gazette to be of a benevolent nature, having regard to the needs, interests and well-being of the general public;

“**public benefit organisation**” means any organisation—

- (a) which is—
 - (i) a non-profit company as defined in section 1 of the Companies Act or a trust or an association of persons that has been incorporated, formed or established in the Republic; or
 - (ii) any branch within the Republic of any company, association or trust incorporated, formed or established in any country other than the Republic that is exempt from tax on income in that other country;
- (b) of which the sole or principal object is carrying on one or more public benefit activities, where—
 - (i) all such activities are carried on in a non-profit manner and with an altruistic or philanthropic intent;
 - (ii) no such activity is intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee; and
 - (iii)
- (c) where—
 - (i) each such activity carried on by that organisation is for the benefit of, or is widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups);
 - (ii)
 - (iii)

(2) Any activity determined by the Minister in terms of paragraph (b) of the definition of “public benefit activity” in subsection (1) or any conditions prescribed by the Minister in terms of subsection (3)(a) must be tabled in Parliament within a period of 12 months after the date of publication by the Minister of that activity or those conditions in the *Gazette*, for incorporation into this Act.

(3) The Commissioner shall, for the purposes of this Act, approve a public benefit organisation which—

- (a) complies with such conditions as the Minister may prescribe by way of regulation to ensure that the activities and resources of such organisation are directed in the furtherance of its object;
- (b) has submitted to the Commissioner a copy of the constitution, will or other written instrument under which it has been established and in terms of which it is—
 - (i) required to have at least three persons, who are not connected persons in relation to each other, to accept the fiduciary responsibility of such organisation and no single person directly or indirectly controls the decision making powers relating to that organisation: Provided that the provisions of this subparagraph shall not apply in respect of any trust established in terms of a will of any person;

- (ii) prohibited from directly or indirectly distributing any of its funds to any person (otherwise than in the course of undertaking any public benefit activity) and is required to utilise its funds solely for the object for which it has been established;
- (iii) in the case of a public benefit organisation contemplated in paragraph (a)(i) of the definition of “public benefit organisation” in subsection (1), required on dissolution to transfer its assets to—
 - (aa) any public benefit organisation which has been approved in terms of this section;
 - (bb) any institution, board or body which is exempt from tax under the provisions of section 10(1)(cA)(i), which has as its sole or principal object the carrying on of any public benefit activity;
 - (cc) the government of the Republic in the national, provincial or local sphere, contemplated in section 10(1)(a); or
 - (dd) the National Finance Housing Corporation contemplated in section 10(1)(f)(xvii),

which is required to use those assets solely for purposes of carrying on one or more public benefit activities;

- (iiiA) in the case of a branch of a public benefit organisation contemplated in paragraph (a) (ii) of the definition of “public benefit organisation” in subsection (1), is required on termination of its activities in the Republic to transfer the assets of such branch to any public benefit organisation, institution, board, body, department or administration contemplated in subparagraph (iii), if more than 15 per cent of the receipts and accruals attributable to that branch during the period of three years preceding that termination are derived from a source within the Republic;
- (iv)
- (v) prohibited from accepting any donation which is revocable at the instance of the donor for reasons other than a material failure to conform to the designated purposes and conditions of such donation, including any misrepresentation with regard to the tax deductibility thereof in terms of section 18A: Provided that a donor (other than a donor which is an approved public benefit organisation or an institution board or body which is exempt from tax in terms of section 10(1)(cA)(i), which has as its sole or principal object the carrying on of any public benefit activity) may not impose conditions which could enable such donor or any connected person in relation to such donor to derive some direct or indirect benefit from the application of such donation;
- (vi) required to submit to the Commissioner a copy of any amendment to the constitution, will or other written instrument under which it was established;
- (c) the Commissioner is satisfied is or was not knowingly a party to, or does not knowingly permit, or has not knowingly permitted, itself to be used as part of any transaction, operation or scheme of which the sole or main purpose is or was the reduction, postponement or avoidance of liability for any tax, duty or levy which, but for such transaction, operation or scheme, would have been or would have become payable by any person under this Act or any other Act administered by the Commissioner;
- (d) has not and will not pay any remuneration, as defined in the Fourth Schedule, to any employee, office bearer, member or other person which is excessive, having regard to what is generally considered reasonable in the sector and in relation to the service rendered and has not and will not economically benefit any person in a manner which is not consistent with its objects;
- (e) complies with such reporting requirements as may be determined by the Commissioner;
- (f) the Commissioner is satisfied that, in the case of any public benefit organisation which provides funds to any association of persons contemplated in paragraph 10(iii) of Part 1 of the Ninth Schedule, has taken reasonable steps to ensure that the funds are utilised for the purpose for which those funds have been provided; and

(g)

(h) has not and will not use its resources directly or indirectly to support, advance or oppose any political party.

(3A) The Commissioner may, for the purposes of subsection (3), grant approval in respect of any group of organisations sharing a common purpose, which carry on any public benefit activity under the direction or supervision of a regulating or co-ordinating body, where that body takes such steps, as prescribed by the Commissioner, to exercise control over those organisations in order to ensure that they comply with the provisions of this section.

(3B) (a) Subject to paragraph (b), where an organisation applies for approval, the Commissioner may approve that organisation for the purposes of this section with retrospective effect, if the Commissioner is satisfied that that organisation during the relevant period prior to its application complied with the requirements of a public benefit organisation as defined in subsection (1).

(b) For the purposes of paragraph (a), where the organisation—

- (i) has complied with all its obligations under chapters 4, 10 and 11 of the Tax Administration Act, the Commissioner may not extend approval to the years of assessment in respect of which an assessment may in terms of section 99(1) of that Act not be made; or
- (ii) has not complied with all its obligations under chapters 4, 10 and 11 of the Tax Administration Act, the Commissioner may not extend approval to the years of assessment in respect of which an assessment could in terms of section 99 (1) of that Act, not have been made had the income tax returns relating to those years of assessment been submitted in accordance with section 25(1) of that Act.

(3C) Notwithstanding any other provision of this section, the Director of Nonprofit Organisations designated in terms of section 8 of the Nonprofit Organisations Act, 1997 (Act No. 71 of 1997), may, in respect of any organisation that has been convicted of an offence under that Act, request the Commissioner to withdraw the approval of that organisation in terms of subsection (5) and the Commissioner may pursuant to that request withdraw such approval.

(4) Where the constitution, will or other written instrument does not comply with the provisions of subsection (3)(b), it shall be deemed to so comply if the persons contemplated in subsection (3)(b)(i) responsible in a fiduciary capacity for the funds and assets of a branch contemplated in paragraph (a)(ii) of the definition of “public benefit organisation” in subsection (1) or any trust established in terms of a will of any person furnishes the Commissioner with a written undertaking that such organisation will be administered in compliance with the provisions of this section.

(5) Where the Commissioner is—

- (a) satisfied that any public benefit organisation approved under subsection (3) has during any year of assessment in any material respect; or
- (b) during any year of assessment satisfied that any such public benefit organisation has on a continuous or repetitive basis,

failed to comply with the provisions of this section, or the constitution, will or other written instrument under which it is established to the extent that it relates to the provisions of this section, the Commissioner shall after due notice withdraw approval of the organisation with effect from the commencement of that year of assessment, where corrective steps are not taken by that organisation within a period stated by the Commissioner in that notice.

(5A) Where any regulating or co-ordinating body contemplated in subsection (3A)—

- (a) with intent or negligently fails to take any steps contemplated in that subsection to exercise control over any public benefit organisation; or
- (b) fails to notify the Commissioner where it becomes aware of any material failure by any public benefit organisation over which it exercises control to comply with any provision of this section,

the Commissioner shall after due notice withdraw the approval of the group of public benefit organisations with effect from the commencement of that year of assessment, where corrective steps are not taken by that regulating or co-ordinating body within a period stated by the Commissioner in that notice.

(6) Where the Commissioner has so withdrawn his approval of such organisation, such organisation shall, within six months or such longer period as the Commissioner may allow after the date of such withdrawal, transfer, or take reasonable steps to transfer, its remaining assets to any public benefit organisation, institution, board or body or the government as contemplated in subsection (3)(b)(iii).

(6A) As part of—

- (a) the dissolution of an organisation contemplated in paragraph (a)(i) of the definition of “public benefit organization” in subsection (1); or
- (b) the termination of the activities of a branch contemplated in paragraph (a)(ii) of that definition, if more than 15 per cent of the receipts and accruals attributable to that branch during the period of three years preceding that termination are derived from a source within the Republic,

the organisation or branch must transfer its assets to any public benefit organisation, institution, board or body or the government contemplated in subsection (3)(b)(iii).

(7) If the organisation fails to transfer, or to take reasonable steps to transfer, its assets, as contemplated in subsection (6) or (6A), an amount equal to the market value of those assets which have not been transferred, less an amount equal to the bona fide liabilities of the organisation, must for purposes of this Act be deemed to be an amount of taxable income which accrued to such organisation during the year of assessment in which approval was withdrawn or the dissolution of the organisation or termination of activities took place.

(8) The provisions of this section shall not, if the Commissioner is satisfied that the non-compliance giving rise to the withdrawal contemplated in subsection (5) has been rectified, preclude any such organisation from applying for approval in terms of this section in the year of assessment following the year of assessment during which the approval was so withdrawn by the Commissioner.

(9)

(10) In the application of the provisions of this Act, the Commissioner may by notice in writing require any person whom the Commissioner may deem able to furnish information in regard to any approved public benefit organisation—

- (a) to answer any questions relating to such organisation; or
- (b) to make available for inspection by the Commissioner or any person appointed by him, any books of account, records or other documents relating to such organisation; or
- (c) to attend at the time and place appointed by the Commissioner for the purposes of producing for examination by the Commissioner or any person appointed by him, any books of account, records or other documents relating to such organisation.

(11) Any person who is in a fiduciary capacity responsible for the management or control of the income and assets of any approved public benefit organisation and who intentionally fails to comply with any provision of this section or of the constitution, will or other written instrument under which such organisation is established to the extent that it relates to the provisions of this section, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 24 months.

(12)

Annexure D – Part I

NINTH SCHEDULE

PUBLIC BENEFIT ACTIVITIES (Section 30)

PART I

WELFARE AND HUMANITARIAN

1.
 - (a) The care or counseling of, or the provision of education programmes relating to, abandoned, abused, neglected, orphaned or homeless children.
 - (b) The care or counseling of poor and needy persons where more than 90 per cent of those persons to whom the care or counseling are provided are over the age of 60.
 - (c) The care or counseling of, or the provision of education programmes relating to, physically or mentally abused and traumatized persons.
 - (d) The provision of disaster relief.
 - (e) The rescue or care of persons in distress.
 - (f) The provision of poverty relief.
 - (g) Rehabilitative care or counseling or education of prisoners, former prisoners and convicted offenders and persons awaiting trial.
 - (h) The rehabilitation, care or counseling of persons addicted to a dependence-forming substance or the provision of preventative and education programmes regarding addiction to dependence-forming substances.
 - (i) Conflict resolution, the promotion of reconciliation, mutual respect and tolerance between the various peoples of South Africa.
 - (j) The promotion or advocacy of human rights and democracy.
 - (k) The protection of the safety of the general public.
 - (l) The promotion or protection of family stability.
 - (m) The provision of legal services for poor and needy persons.
 - (n) The provision of facilities for the protection and care of children under school-going age of poor and needy parents.
 - (o) The promotion or protection of the rights and interests of, and the care of, asylum seekers and refugees.
 - (p) Community development for poor and needy persons and anti-poverty initiatives, including—
 - (i) the promotion of community-based projects relating to self-help, empowerment, capacity building, skills development or anti-poverty;
 - (ii) the provision of training, support or assistance to community-based projects contemplated in item (i); or
 - (iii) the provision of training, support or assistance to emerging micro enterprises to improve capacity to start and manage businesses, which may include the granting of loans on such conditions as may be prescribed by the Minister by way of regulation.
 - (q) The promotion of access to media and a free press.

HEALTH CARE

- 2.
- (a) The provision of health care services to poor and needy persons.
 - (b) The care or counseling of terminally ill persons or persons with a severe physical or mental disability, and the counseling of their families in this regard.
 - (c) The prevention of HIV infection, the provision of preventative and education programmes relating to HIV/AIDS.
 - (d) The care, counseling or treatment of persons afflicted with HIV/AIDS, including the care or counseling of their families and dependants in this regard.
 - (e) The provision of blood transfusion, organ donor or similar services.
 - (f) The provision of primary health care education, sex education or family planning.

LAND AND HOUSING

- 3.
- (a) The development, construction, upgrading, conversion or procurement of housing units for the benefit of persons whose monthly household income is equal to or less than R15 000 or any greater amount determined by the Minister of Finance by notice in the *Gazette* after consultation with the Minister of Housing.
 - (b) The development, servicing, upgrading or procurement of stands, or the provision of building materials, for purposes of the activities contemplated in subparagraph (a).
 - (c) The provision of residential care for retired persons, where—
 - (i) more than 90 per cent of the persons to whom the residential care is provided are over the age of 60 and nursing services are provided by the organisation carrying on such activity; and
 - (ii) residential care for retired persons who are poor and needy is actively provided by that organisation without full recovery of cost.
 - (d) Building and equipping of—
 - (i) clinics or crèches; or
 - (ii) community centres, sport facilities or other facilities of a similar nature, for the benefit of the poor and needy.
 - (e) The promotion, facilitation and support of access to land and use of land, housing and infrastructural development for promoting official land reform programmes.
 - (f) Granting of loans for purposes of subparagraph (a) or (b), and the provision of security or guarantees in respect of such loans, subject to such conditions as may be prescribed by the Minister by way of regulation.
 - (g) The protection, enforcement or improvement of the rights of poor and needy tenants, labour tenants or occupiers, to use or occupy land or housing.
 - (h) The provision of training, support or assistance to emerging farmers in order to improve capacity to start and manage agricultural operations.

EDUCATION AND DEVELOPMENT

- 4.
- (a) The provision of education by a “school” as defined in the South African Schools Act, 1996, (Act No. 84 of 1996).
 - (b) The provision of “higher education” by a “higher education institution” as defined in terms of the Higher Education Act, 1997, (Act No. 101 of 1997).
 - (c) “Adult education and training”, as defined in the Adult Education and Training Act, 2000, (Act No. 52 of 2000), including literacy and numeracy education.
 - (d) “Continuing education and training” provided by a “private college” as defined in the Continuing Education and Training Colleges Act, 2006 (Act No. 16 of 2006), which is registered in terms of that Act.

- (e) Training for unemployed persons with the purpose of enabling them to obtain employment.
- (f) The training or education of persons with a severe physical or mental disability.
- (g) The provision of bridging courses to enable educationally disadvantaged persons to enter a higher education institution as envisaged in subparagraph (b).
- (h) The provision of educare or early childhood development services for pre-school children.
- (i) Training of persons employed in the national, provincial and local spheres of government, for purposes of capacity building in those spheres of government.
- (j) The provision of school buildings or equipment for public schools and educational institutions engaged in public benefit activities contemplated in subparagraphs (a) to (h).
- (k) Career guidance and counseling services provided to persons attending any school or higher education institution as envisaged in subparagraphs (a) and (b).
- (l) The provision of hostel accommodation to students of a public benefit organisation contemplated in section 30 or an institution, board or body contemplated in section 10(1)(cA)(i), carrying on activities envisaged in subparagraphs (a) to (g).
- (m) Programmes addressing needs in education provision, learning, teaching, training, curriculum support, governance, whole school development, safety and security at schools, pre-schools or educational institutions as envisaged in subparagraphs (a) to (h).
- (n) Educational enrichment, academic support, supplementary tuition or outreach programmes for the poor and needy.
- (o) The provision of scholarships, bursaries, awards and loans for study, research and teaching on such conditions as may be prescribed by the Minister by way of regulation in the *Gazette*.
- (p) The provision or promotion of educational programmes with respect to financial services and products, carried on under the auspices of a public entity listed under Schedule 3A of the Public Finance Management Act.
- (q) The provision, to the general public, of education and training programmes and courses that are administered and accredited by entities contemplated in paragraph (r).
- (r) The administration, provision and publication of qualification and certification services by industry organisations recognised by an industry specific organisation and its qualifications accredited by the Quality Council for Trades and Occupations established in 2010 in terms of the Skills Development Act, 1998 (Act No. 97 of 1998).

RELIGION, BELIEF OR PHILOSOPHY

- 5. (a) The promotion or practice of religion which encompasses acts of worship, witness, teaching and community service based on a belief in a deity.
- (b) The promotion and/or practice of a belief.
- (c) The promotion of, or engaging in, philosophical activities.

CULTURAL

- 6. (a) The advancement, promotion or preservation of the arts, culture or customs.
- (b) The promotion, establishment, protection, preservation or maintenance of areas, collections or buildings of historical or cultural interest, national monuments, national heritage sites, museums, including art galleries, archives and libraries.
- (c) The provision of youth leadership or development programmes.

CONSERVATION, ENVIRONMENT AND ANIMAL WELFARE

7. (a) Engaging in the conservation, rehabilitation or protection of the natural environment, including flora, fauna or the biosphere.
- (b) The care of animals, including the rehabilitation, or prevention of the ill-treatment of animals.
- (c) The promotion of, and education and training programmes relating to, environmental awareness, greening, clean-up or sustainable development projects.
- (d) The establishment and management of a transfrontier area, involving two or more countries, which—
- (i) is or will fall under a unified or coordinated system of management without compromising national sovereignty; and
 - (ii) has been established with the explicit purpose of supporting the conservation of biological diversity, job creation, free movement of animals and tourists across the international boundaries within the peace park, and the building of peace and understanding between the nations concerned.

RESEARCH AND CONSUMER RIGHTS

8. (a) Research including agricultural, economic, educational, industrial, medical, political, social, scientific and technological research.
- (b) The protection and promotion of consumer rights and the improvement of control and quality with regard to products or services.

SPORT

9. The administration, development, co-ordination or promotion of sport or recreation in which the participants take part on a non-professional basis as a pastime.

PROVIDING OF FUNDS, ASSETS OR OTHER RESOURCES

10. The provision of—
- (a) funds, assets, services or other resources by way of donation;
 - (b) assets or other resources by way of sale for a consideration not exceeding the direct cost to the organisation providing the assets or resources;
 - (c) funds by way of loan at no charge; or
 - (d) assets by way of lease for an annual consideration not exceeding the direct cost to the organisation providing the asset divided by the total useful life of the asset,
- to any—
- (i) public benefit organisation which has been approved in terms of section 30;
 - (ii) institution, board or body contemplated in section 10(1)(cA)(i), which conducts one or more public benefit activities in this part (other than this paragraph);
 - (iii) association of persons carrying on one or more public benefit activity contemplated in this part (other than this paragraph), in the Republic; or
 - (iv) department of state or administration in the national or provincial or local sphere of government of the Republic, contemplated in section 10(1)(a).

GENERAL

11. (a) The provision of support services to, or promotion of the common interests of public benefit organisations contemplated in section 30 or institutions, boards or bodies contemplated in section 10(1)(cA)(i), which conduct one or more public benefit activities contemplated in this part.

- (b) The bid to host or hosting of any international event approved by the Minister for purposes of this paragraph, having regard to—
 - (i) the foreign participation in that event; and
 - (ii) the economic impact that event may have on the country as a whole.

- (c) The promotion, monitoring or reporting of development assistance for the poor and needy.

- (d) The provision of funds to an organisation—
 - (i) which is incorporated, formed or established in any country other than the Republic;
 - (ii) which is exempt from tax on income in that other country;
 - (iii) the sole or principal object of which is the carrying on of one or more activities that would qualify as public benefit activities listed in Part I of this Schedule if carried on in the Republic; and
 - (iv) that carries on each of its activities—
 - (aa) in a non-profit manner;
 - (bb) with altruistic or philanthropic intent;
 - (cc) in a manner which does not directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation other than by way of reasonable remuneration; and
 - (dd) for the benefit of, or is widely accessible to the general public of that country including any sector thereof (other than small and exclusive groups).

Annexure E – Part II

NINTH SCHEDULE

PART II

WELFARE AND HUMANITARIAN

1.
 - (a) The care or counseling of, or the provision of education programmes relating to, abandoned, abused, neglected, orphaned or homeless children.
 - (b) The care or counseling of poor and needy persons where more than 90 per cent of those persons to whom the care or counseling are provided are over the age of 60.
 - (c) The care or counseling of, or the provision of education programmes relating to, physically or mentally abused and traumatised persons.
 - (d) The provision of disaster relief.
 - (e) The rescue or care of persons in distress.
 - (f) The provision of poverty relief.
 - (g) Rehabilitative care or counseling or education of prisoners, former prisoners and convicted offenders and persons awaiting trial.
 - (h) The rehabilitation, care or counseling of persons addicted to a dependence-forming substance or the provision of preventative and education programmes regarding addiction to dependence-forming substances.
 - (i) Conflict resolution, the promotion of reconciliation, mutual respect and tolerance between the various peoples of South Africa.
 - (j) The promotion or advocacy of human rights and democracy.
 - (k) The protection of the safety of the general public.
 - (l) The promotion or protection of family stability.
 - (m) The provision of legal services for poor and needy persons.
 - (n) The provision of facilities for the protection and care of children under school-going age of poor and needy parents.
 - (o) The promotion or protection of the rights and interests of, and the care of, asylum seekers and refugees.
 - (p) Community development for poor and needy persons and anti-poverty initiatives, including—
 - (i) the promotion of community-based projects relating to self-help, empowerment, capacity building, skills development or anti-poverty;
 - (ii) the provision of training, support or assistance to community-based projects contemplated in item (i); or
 - (iii) the provision of training, support or assistance to emerging micro enterprises to improve capacity to start and manage businesses, which may include the granting of loans on such conditions as may be prescribed by the Minister by way of regulation.
 - (q) The promotion of access to media and a free press.

HEALTH CARE

2. (a) The provision of health care services to poor and needy persons.
- (b) The care or counseling of terminally ill persons or persons with a severe physical or mental disability, and the counseling of their families in this regard.
- (c) The prevention of HIV infection, the provision of preventative and education programmes relating to HIV/AIDS.
- (d) The care, counseling or treatment of persons afflicted with HIV/AIDS, including the care or counseling of their families and dependants in this regard.
- (e) The provision of blood transfusion, organ donor or similar services.
- (f) The provision of primary health care education, sex education or family planning.

EDUCATION AND DEVELOPMENT

3. (a) The provision of education by a "school" as defined in the South African Schools Act, 1996, (Act No. 84 of 1996).
- (b) The provision of "higher education" by a "higher education institution" as defined in terms of the Higher Education Act, 1997, (Act No. 101 of 1997).
- (c) "Adult education and training", as defined in the Adult Education and Training Act, 2000 (Act No. 52 of 2000), including literacy and numeracy education.
- (d) "Continuing education and training" provided by a "private college" as defined in the Continuing Education and Training Colleges Act, 2006 (Act No. 16 of 2006), which is registered in terms of that Act.
- (e) Training for unemployed persons with the purpose of enabling them to obtain employment.
- (f) The training or education of persons with a severe physical or mental disability.
- (g) The provision of bridging courses to enable educationally disadvantaged persons to enter a higher education institution as envisaged in subparagraph (b).
- (h) The provision of educare or early childhood development services for pre-school children.
- (i) The provision of school buildings or equipment for public schools and educational institutions engaged in public benefit activities contemplated in subparagraphs (a) to (h).
- (j) Programmes addressing needs in education provision, learning, teaching, training, curriculum support, governance, whole school development, safety and security at schools, pre-schools or educational institutions as envisaged in subparagraphs (a) to (h).
- (k) Educational enrichment, academic support, supplementary tuition or outreach programmes for the poor and needy.
- (l) Training of persons employed in the national, provincial and local spheres of government, for purposes of capacity building in those spheres of government.
- (m) Career guidance and counseling services provided to persons attending any school or higher education institution as envisaged in subparagraphs (a) and (b).
- (n) The provision of hostel accommodation to students of a public benefit organisation contemplated in section 30 or an institution, board or body contemplated in section 10 (1)(cA)(i), carrying on activities envisaged in subparagraphs (a) to (g).
- (o) The provision of scholarships, bursaries, awards and loans for study, research and teaching on such conditions as may be prescribed by the Minister by way of regulation in the *Gazette*.
- (p) The provision or promotion of educational programmes with respect to financial services and products, carried on under the auspices of a public entity listed under Schedule 3A of the Public Finance Management Act.

CONSERVATION, ENVIRONMENT AND ANIMAL WELFARE

4. (a) Engaging in the conservation, rehabilitation or protection of the natural environment, including flora, fauna or the biosphere.
- (b) The care of animals, including the rehabilitation or prevention of the ill-treatment of animals.
- (c) The promotion of, and education and training programmes relating to, environmental awareness, greening, clean-up or sustainable development projects.
- (d) The establishment and management of a transfrontier area, involving two or more countries, which—
- (i) is or will fall under a unified or coordinated system of management without compromising national sovereignty; and
 - (ii) has been established with the explicit purpose of supporting the conservation of biological diversity, job creation, free movement of animals and tourists across the international boundaries of the peace park, and the building of peace and understanding between the nations concerned.

LAND AND HOUSING

5. (a) The development, construction, upgrading, conversion or procurement of housing units for the benefit of persons whose monthly household income is equal to or less than R15 000 or any greater amount determined by the Minister of Finance by notice in the *Gazette* after consultation with the Minister of Housing.
- (b) The development, servicing, upgrading or procurement of stands, or the provision of building materials, for purposes of the activities contemplated in subparagraph (a).
- (c) Building and equipping of clinics or crèches for the benefit of the poor and needy.
- (d) The protection, enforcement or improvement of the rights of poor and needy tenants, labour tenants or occupiers, to use or occupy land or housing.
- (e) The promotion, facilitation and support of access to land and use of land, housing and infrastructural development for promoting official land reform programmes.

GNR.302

28 FEBRUARY 2003

REGULATIONS ISSUED IN TERMS OF PARAGRAPH 4(o) OF PART I OF THE NINTH SCHEDULE TO THE INCOME TAX ACT, 1962 (ACT NO. 58 OF 1962), TO PRESCRIBE CONDITIONS FOR THE PROVISION OF SCHOLARSHIPS, BURSARIES AND AWARDS FOR STUDY, RESEARCH AND TEACHING

By virtue of the power vested in me by paragraph 4(o) of Part I of the Ninth Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), I, Trevor Andrew Manuel, Minister of Finance, hereby prescribe in the Schedule hereto, the conditions on which any scholarships, bursaries and awards for study, research and teaching must be provided for purposes of that paragraph and section 30 of the Act.

SCHEDULE

1. In these regulations, unless the context otherwise indicates, any word or expression to which a meaning has been assigned in the Income Tax Act, 1962, bears the meaning assigned thereto.

2. For purposes of paragraph 4(o) of Part I of the Ninth Schedule to the Income Tax Act, 1962, an organisation which provides any scholarships, bursaries and awards for study, research or teaching must comply with the conditions prescribed in these regulations.

3. Subject to regulation 4, the founding document of the organisation contemplated in regulation 2, must expressly provide that—

- (a) all scholarships, bursaries or awards granted by that organisation must be *bona fide* and be granted to an individual on grounds of objective merit or need;
- (b) no scholarship, bursary or award granted by that organisation may—
 - (i) be revocable, otherwise than for reasons of a material failure to conform to the designated purposes and conditions of that scholarship, bursary or award;
 - (ii) be subject to conditions which would enable the donor of the funds of that scholarship, bursary or award or any connected person in relation to that donor, to derive some direct benefit from the application of that scholarship, bursary or award; or
 - (iii) be granted to any person who is or will become an employee of the donor of the funds of that scholarship, bursary or award or that organisation (or any associated institution in relation to that donor or organisation) or any relative of that person, unless circumstances indicate that that scholarship, bursary or award would have been granted to that person or his or her relative, even if that person had not been an employee of that donor, organisation or associated institution;
- (c) all decisions regarding the granting of scholarships, bursaries and awards must be made by a duly constituted committee consisting of at least three persons who are not connected persons in relation to the donors or the person to whom the scholarship, bursary or award is granted; and
- (d) all scholarships, bursaries and awards granted by that organisation in respect of overseas study, research or teaching will be subject to an undertaking by the person to whom the scholarship, bursary or award is granted—
 - (i) to apply the knowledge obtained from the study, research or teaching immediately after completion thereof, in the Republic for a period of at least the period that the study, research or training was funded by the organisation; or
 - (ii) to refund the full amount of the scholarship, bursary or award should he or she decide not to apply the knowledge as contemplated in subparagraph (i).

4. Where the founding document of an organisation which was established before 1 January 2003 does not expressly provide for the conditions contemplated in regulation 3, the organisation will be deemed to comply with regulation 3 until 31 December 2007, if the person responsible in a fiduciary capacity for the funds and assets of that organisation submits a written undertaking to the Commissioner that all scholarships, bursaries and awards granted by that organisation comply with the provisions of these regulations.

5. Copies of all documents and information relating to any scholarship, bursary or award and minutes of all meetings at which any scholarship, bursary or award is granted must be made available to the Commissioner on request.


GNR.333

8 APRIL 2005

REGULATIONS ISSUED IN TERMS OF PARAGRAPH 3(o) OF PART II OF THE NINTH SCHEDULE TO THE INCOME TAX ACT, 1962 (ACT NO. 58 OF 1962), TO PRESCRIBE CONDITIONS FOR THE PROVISION OF SCHOLARSHIPS, BURSARIES AND AWARDS FOR STUDY, RESEARCH AND TEACHING

By virtue of the power vested in me by paragraph 3(o) of Part II of the Ninth Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), I, Trevor Andrew Manuel, Minister of Finance, hereby determine that the regulations issued in terms of paragraph 4(o) of Part I of the Ninth Schedule to the Income Tax Act, 1962, and published under Government Notice No. R. 302 in *Gazette* No. 24941 of 28 February 2003, and any amendments thereto, apply *mutatis mutandis* for purposes of paragraph 3(o) of Part II of the Ninth Schedule to that Act.

Annexure G – Example of section 18A receipt

	<p style="text-align: center;">ABC PRIMARY SCHOOL Oxford Street, Pretoria, 0001 – Telephone (00) 000 0000 Exemption Reference Number: 930000000</p>	
<p>DONATION RECEIPT: Issued under section 18A of the Income Tax Act 58 of 1962. The donation received below will be used exclusively for the objects of ABC Primary School in carrying out public benefit activities approved under section 18A.</p>		0001
<p>RECEIPT NO.</p>		0001
<p>NAME OF DONOR</p>		
<p>ADDRESS OF DONOR</p>	<p>_____</p> <p>_____</p> <p>_____</p>	
<p>AMOUNT OF DONATION</p>	<p>R _____</p>	
<p>NATURE OF DONATION</p>	<p>CASH: Amount: R _____</p> <p>OTHER:</p> <ul style="list-style-type: none"> • Description: _____ • Details of how the value was determined: _____ _____ • Value: R _____ 	
<p>DATE OF DONATION</p>	<p>_____</p>	
<p>I confirm that the receipt is issued for the purposes of section 18A of the Income Tax Act, 1962, and that the donation has been or will be used exclusively for the object of ABC Primary School.</p> <p>HEADMASTER / SECRETARY / BURSAR DATE</p>		