

INTERPRETATION NOTE 64 (Issue 4)

DATE: 13 November 2018

ACT : INCOME TAX ACT 58 OF 1962
SECTION : SECTION 10(1)(e)
SUBJECT : INCOME TAX EXEMPTION: BODIES CORPORATE, SHARE BLOCK COMPANIES AND ASSOCIATIONS OF PERSONS MANAGING THE COLLECTIVE INTERESTS COMMON TO ALL MEMBERS

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Preamble

In this Note unless the context indicates otherwise –

- “**basic exemption**” means the exemption of receipts and accruals from all other sources other than levy income, up to a maximum of R50 000;
- “**body corporate**” means a body corporate established under the Sectional Titles Act;
- “**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 as defined in section 1(1);
- “**Companies Act**” means the Companies Act 71 of 2008;
- “**founding document**” means the written instrument under which an association of persons is established and governed, such as a constitution or memorandum of incorporation;
- “**levy**” or “**levy income**” is the amount received or accrued from members for the purposes of funding expenditure relating to their collective interests;
- “**member**” means a member of a body corporate, a shareholder of a share block company or a member of an association of persons;
- “**qualifying entity**” means a body corporate, share block company or an association of persons referred to in section 10(1)(e)(i) provided that such entities are not party to the type of transaction, operation or scheme discussed in 6;
- “**Schedule**” means a Schedule to the Act;
- “**section**” means a section of the Act;
- “**Sectional Titles Act**” means the Sectional Titles Act 95 of 1986;
- “**share block company**” means a “share block company” as defined in the Share Blocks Control Act;

- “**Share Blocks Control Act**” means the Share Blocks Control Act 59 of 1980;
- “**TEU**” means the Tax Exemption Unit, which is a dedicated office within SARS that deals with all applications by entities seeking exemption from income tax under section 10(1)(e)(i)(cc) on behalf of the Commissioner;
- “**the Act**” means the Income Tax Act 58 of 1962; and
- any other word or expression bears the meaning ascribed to it in the Act.

1. Purpose

This Note provides guidance on the application and interpretation of section 10(1)(e).

2. Background

Section 10(1)(e) exempts from income tax the levy income of a body corporate, a share block company and an association of persons. It also provides a basic exemption for these qualifying entities.

3. The law

Section 10(1)(e)

10. Exemptions.—(1) There shall be exempt from normal tax—

- (e) (i) any levy received by or accrued to—
- (aa) any body corporate established in terms of the Sectional Titles Act, 1986 (Act No. 95 of 1986), from its members;
 - (bb) a share block company as defined in the Share Blocks Control Act from the holders of shares in that share block company; or
 - (cc) any other association of persons (other than a company as defined in the Companies Act, any co-operative, close corporation and trust, but including a non-profit company as defined in that Act) from its members, where the Commissioner is satisfied that, subject to such conditions as he or she may deem necessary, such association of persons—
 - (A) has been formed solely for purposes of managing the collective interests common to all its members, which includes expenditure applicable to the common immovable property of such members and the collection of levies for which such members are liable; and
 - (B) is not permitted to distribute any of its funds to any person other than a similar association of persons:

Provided that such body, company or association 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 become payable by any person under this Act or any other law administered by the Commissioner; and

- (ii) any receipts and accruals other than levies derived by a body corporate, share block company or association contemplated in subparagraph (i), to the extent that the aggregate of those receipts and accruals does not exceed R50 000;

4. Application of the law

4.1 Qualifying entities

4.1.1 Bodies corporate

The Sectional Titles Act provides for separate ownership of a unit in a development scheme. Generally, the buildings and land of the development scheme are divided into sections and common property. A unit refers to a particular section and an undivided share in the common property associated with that section.

A body corporate is established to take responsibility for the enforcement of Rules¹ and for the control, administration and management of the common property for the benefit of all owners.

Membership of the body corporate is compulsory and is linked to ownership in the development scheme. The members are required to contribute levies to meet the costs of the common property.

A body corporate is a qualifying entity under section 10(1)(e)(i)(aa), unless it is a party to the type of transaction, operation or scheme discussed in **6**.

4.1.2 Share block companies

The Share Blocks Control Act defines a share block company as follows:

“**[S]hare block company**’ means a company the activities of which comprise or include the operation of a share block scheme;”

The same Act defines a share block scheme as follows:

“**[S]hare block scheme**’ means any scheme in terms of which a share, in any manner whatsoever, confers a right to or an interest in the use of immovable property;”

The main object of a share block company is to operate a share block scheme in respect of immovable property owned by it. A shareholder that owns a share in a share block company acquires the right of use and occupation of a specific unit or portion of the immovable property owned by the company. The shareholder does not become the owner of the specific part of the immovable property.

A share block company must establish a levy fund to which the shareholders contribute. The levy fund is used to defray expenditure relating to the repairs, upkeep, control and management and administration of the company and of the immovable property for which it operates the share block scheme as well as the payment of rates and other local authority charges for services. It is compulsory for the members to contribute to the levy fund. On disposal of a share, the new member automatically becomes a contributor to the levy fund.

A share block company is a qualifying entity under section 10(1)(e)(i)(bb) unless it is a party to the type of transaction, operation or scheme discussed in **6**.

¹ The rules of a particular development scheme established under the Sectional Titles Act. These rules provide for the control, management, administration, use and enjoyment of the sections in the development scheme and the common property.

4.1.3 Association of persons

An association of persons includes –

- a “non-profit company” as defined in section 1 of the Companies Act; and
- a voluntary association of members founded on a basis of mutual agreement whose intent and objectives are usually set out in a formal founding document.²

The Commissioner must be satisfied that the association of persons –

- has been formed solely for purposes of managing the collective interests common to members, which includes expenditure applicable to the common immovable property of such members and the collection of levies for which such members are liable;³ and
- is not permitted to distribute any of its funds to any person other than a similar association of persons.⁴

The Commissioner may prescribe conditions applicable to associations of persons in addition to those listed above (see **5.2**).

An association of persons that satisfies these requirements is a qualifying entity under section 10(1)(e)(i)(cc), unless it is a party to the type of transaction, operation or scheme discussed in **6**.

A “company” as defined in the Companies Act (other than a non-profit company), any co-operative, close corporation and trust are specifically excluded as associations of persons and do not qualify for the exemption under section 10(1)(e).

An association of persons accepts the responsibility to control and manage the financial and administrative affairs pertaining to the common immovable property on behalf of its members.

An association of persons may include home owners’ associations, and associations formed to control and manage the maintenance, security or appearance of the immovable property common to the members. These associations of persons take responsibility for the collection of levies and payment of expenditure for the common immovable property.

Membership of the association of persons is linked to the ownership or occupation of a particular unit or portion of the property. Members may include residents or owners of a particular residential area such as security estates, complexes or gated communities or tenants of a shopping centre or mall.

² An association of persons contemplated in section 10(1)(e)(i)(cc) is generally established or formed by adopting a legal founding document such as a constitution or other written instrument. See JAvS d’Oliveira, DW Butler, GJ Pienaar *et al* “Formation” 2 (Third Edition Volume) LAWSA [online] (My LexisNexis: 28 February 2015) in paragraph 155.

³ Section 10(1)(e)(i)(cc)(A).

⁴ Section 10(1)(e)(i)(cc)(B).

Example 1 – Entities qualifying as associations of persons

The following are examples of entities qualifying as associations of persons based on the assumption that the requirements of section 10(1)(e)(i)(cc) have been met:

- Green Estate Home Owners' Association has been formed to control and manage the maintenance and general expenditure on the common immovable property of Birchwood Estate, a security estate consisting of 30 residential stands. It is compulsory under its founding document for all the owners to be members of the association and to contribute levies to defray expenditure incurred on the common immovable property. These expenses include maintenance of the pavements, perimeter fence or wall, entrance gardens, guard house and security.
- City Mall Merchants' Association was formed by the developers of a shopping mall to control and manage the décor and aesthetics of the common immovable property of the Mall. It is compulsory for all the tenants to belong to the association and the members contribute levies to cover the relevant expenses.
- ABC Residents' Association is an association of persons formed to control and manage the security of a gated area. The residents in this gated community are collectively responsible for the costs of security patrols, the security gates and perimeter fencing. The residents are required to pay a monthly levy to defray the security costs.
- Gated Community Residents' Association was formed by private home owners in a residential area for purposes of controlling and managing the maintenance of the common road, security fencing, entrance boom gates and the cost of hiring security personnel. Membership of the association is voluntary. The owners of the residential stands contribute to the collective maintenance and upkeep of the common facilities.

4.2 Non-qualifying entity

4.2.1 Time-share exchange entities

Under a time-sharing arrangement members of the public obtain the exclusive right to use or occupy a property for a specified period each year. The owners of time-share points do not own the common immovable property and are not responsible for expenditure such as maintenance, repairs and improvements or bond repayments, relating to the property.

An entity selling time-sharing interests in holiday accommodation to members of the public not implemented under the Sectional Titles Act or the Share Blocks Control Act is not a qualifying entity and will not qualify for exemption under section 10(1)(e).

4.3 Levy

The exemption under section 10(1)(e)(i) is limited to the levy income received by or accrued to qualifying entities.

The term "levy" is not defined in the Act. In the context of section 10(1)(e) the levies received by or accrued to qualifying entities are the amounts collected by them from their members to pay certain expenditure which arises from the management of the collective interests of the members. The members would be responsible for paying

and administering their share of the expenditure if it were not for the qualifying entities that manage their collective interests.

4.3.1 Receipts and accruals qualifying as levy income

In determining whether an amount is a levy, regard must be had to the true nature of the transaction. For example, a charge for the late payment of a levy is likely to be in the nature of interest.

(a) General levies

A “general” levy usually covers the day-to-day running, maintenance or operating costs. General levies received by or accrued to qualifying entities are exempt from income tax.

(b) Special levies

A “special” levy may be raised to pay for capital improvements such as the installation of a satellite dish, the laying of paving or upgrading of security fencing or to create a reserve for future capital expenditure such as the future resurfacing of a tennis court or the future upgrading of an entrance and guard house. Special levies received by or accrued to qualifying entities are exempt from income tax.

(c) Building penalty levies

The management rules of a home owners’ association sometimes provide for a higher levy to be paid by a member for failing to commence or complete building activities within a certain period. Typically such a “building penalty levy” is expressed as a multiple of the normal levy, the primary purpose of which is to recover additional costs incurred by the home owners’ association as a result of delayed construction. Such costs include, for example, the cost of repairing damage to roads and kerbs caused by heavy construction vehicles and the additional cost of hiring security personnel to ensure that the security of other home owners is not compromised by the presence of vacant stands or by the influx of construction workers. A building penalty levy of this nature will qualify for exemption as a levy and must be distinguished from a penalty or fine.

(d) Stabilisation fund levies

Home owners’ associations sometimes establish a levy stabilisation fund for the purposes of subsidising day-to-day expenditure and to provide a reserve for future capital improvements or unforeseen expenditure on the common immovable property. A fund of this nature is intended to ensure that the monthly and special levies remain affordable by smoothing out the levies to avoid undue increases in monthly levies. The levy may be imposed as a once-off payment either when the owner disposes of a unit (a departure or exit levy) or when a person purchases a unit (an entry levy). The payments may be fixed or determined as a percentage of a certain amount such as a percentage of the selling price of the unit.

The contribution to the stabilisation fund of a qualifying association of persons will be regarded as a levy provided the following requirements and conditions are met:

- The founding document of the qualifying association of persons must make provision for the establishment of a levy stabilisation fund including rules relating to its governance.

- The founding document must stipulate that the funds of the stabilisation fund may only be used to defray expenditure on the common immovable property governed by the qualifying association of persons.
- The levy must be a charge imposed by the qualifying association of persons on the member. If the levy is payable by the owner on alienation of a unit, the founding document must specify that the amount to be paid into the levy stabilisation fund on joining the association of persons is a liability due, although only payable by the member when the member alienates the unit or property.
- The methodology under which the amount that will be payable to the levy stabilisation fund is to be determined must be specified in the founding document.

4.3.2 Receipts and accruals not qualifying as levy income

(a) Fines

A member may be required to pay an additional amount over and above any general or special levy, which is not related to expenditure incurred or to be incurred in relation to the common immovable property. Receipts of this nature often occur as a result of a member's conduct or lack of conduct and are instituted to encourage a desired behaviour, for example, amounts charged as a penalty for littering or engaging in activities that disturb other residents. In these instances the receipts will not qualify as levy income, since they do not represent an amount collected with the intention of funding expenditure relating to the common immovable property.

(b) Late payments

Late payment penalties or interest charged on outstanding levies or other amounts payable to a qualifying entity do not constitute levy income.

4.4 Basic exemption and effective date

The basic exemption applies to all the receipts and accruals other than levy income of the qualifying entities.

The basic exemption of R50 000 is applied to the total receipts and accruals, excluding the levy income, which are taxable and not to each separate source of income.

Example 2 – Basic exemption

Facts:

ABC Estate Home Owners' Association has been formed to manage the maintenance and general expenditure relating to the common immovable property of ABC Estate. The following income is reflected in the financial statements for the year ended 30 June 2018:

	R
Levies received from members	460 240
Rent from cell mast	120 000
Interest on investment	<u>80 000</u>
Total income	<u>660 240</u>

Result:

Income exempt from income tax

Levies – exempt from normal tax under section 10(1)(e)(i)	<u>460 240</u>
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Receipts and accruals subject to income tax

Rent from cell mast	120 000
Interest on investment	<u>80 000</u>
Total receipts and accruals subject to income tax	200 000
Less: Basic exemption	<u>(50 000)</u>
Income subject to income tax (before allowable deductions)	<u>150 000</u>

5. Application for exemption

5.1 Bodies corporate and share block companies

A body corporate or share block company is not required to apply for exemption under section 10(1)(e)(i)(aa) or (bb) respectively. These entities are not registered at the TEU for income tax, but are required to register at a branch office and submit annual income tax returns⁵ even if they are unlikely to have an income tax liability. The levy income exemption and the basic exemption are applied on assessment.

5.2 Association of persons

An association of persons must lodge an application with the Commissioner at the TEU to qualify for exemption from income tax under section 10(1)(e)(i)(cc). See the **Annexure** for the contact details of the TEU. It will be determined on application whether the requirements discussed in **4.1.3** have been met. Additional conditions may be prescribed to ensure that the above requirements are met.

The following should be included in the founding document:

- The sole object of the association of persons must be to manage the collective interests common to all its members, which includes expenditure applicable to the common immovable property and the collection of levies for which such members are liable.
- The association of persons is not permitted to distribute its funds to any person other than to a similar association of persons.
- Any amendments to the founding document of the association of persons must be submitted to the Commissioner.
- On dissolution of the association of persons, its remaining assets must be distributed to a similar association of persons that is also exempt from income tax under section 10(1)(e).

An association of persons will be fully taxable on all its receipts and accruals in the absence of approval by the Commissioner.

⁵ The Commissioner annually publishes a notice in accordance with section 25(1)(b) of the Tax Administration Act 28 of 2011 stipulating under which circumstances companies must submit income tax returns.

6. Prohibited transactions, operations or schemes

The exemption under section 10(1)(e) does not apply to a qualifying entity that is a party to a transaction, operation or scheme the sole or main purpose of which is or was to reduce, postpone or avoid any tax, levy or duty otherwise payable by any person under the Act or any other Act administered by the Commissioner.⁶ The denial of the relief will apply only if the entity was knowingly a party to such an arrangement. This rule will apply irrespective of whether the entity itself or any other person, for example, a shareholder or unit holder, benefitted from the reduction, postponement or avoidance of any applicable tax, duty or levy. The type of tax, duty or levy that has been so reduced, postponed or avoided may arise under the Act, for example, donations tax, income tax, or dividends tax, or under any other Act administered by the Commissioner, for example, value-added tax or transfer duty.

7. Determination of taxable income

7.1 Receipts and accruals

7.1.1 Levy income

Levy income received by or accrued to qualifying entities is exempt from income tax.

Expenditure incurred by a qualifying entity in relation to the management of the collective interests of members and which is funded by the levies from the members is not allowable as a deduction in determining its taxable income because it is incurred in the production of exempt income.⁷ Consequently, such expenditure in excess of the levy income may not be set off against other income which is subject to income tax and must be disregarded in determining taxable income.

7.1.2 Receipts and accruals from sources other than levy income

Receipts and accruals from a source other than levy income will be subject to income tax. Examples include –

- fees charged for the use of facilities and equipment such as squash courts, tennis courts and washing machines;
- rental income from the letting of immovable property such as parking bays, servants' quarters and a demarcated area for a cell phone mast;
- investment income;
- amounts charged on unpaid levies or late payment of levies;
- income received for services rendered; and
- fines paid for not adhering to the management rules excluding building penalties.

Receipts and accruals derived from these sources (less the basic exemption), less allowable expenditure attributable to them, will constitute taxable income which is subject to tax.

⁶ The Acts administered by the Commissioner involving tax, duties or levies are set out in Schedule 1 of the South African Revenue Service Act 34 of 1997.

⁷ Sections 11(a) and 23(f).

The exemption for interest income under section 10(1)(i) does not apply to qualifying entities, since the application of that section is limited to natural persons.

7.2 Expenditure

Expenditure relating directly to the receipts and accruals not qualifying for exemption will qualify for deduction in determining taxable income provided it meets the requirements for deductibility under the Act.

General expenditure incurred, such as bank charges and audit fees, will be allowable as a deduction to the extent that it meets the requirements for deductibility under the Act. For example, expenditure of a capital nature will not qualify for deduction under section 11(a).

The use of a fixed percentage of the general expenditure for the purpose of allocating it to a particular source of income is not acceptable. General expenditure must be allocated to the various sources of income on a logical, fair and reasonable basis. For example, depending on the facts, it may be acceptable to allocate the general expenses *pro rata* by applying the ratio that a particular source of receipts and accruals bears to the total receipts and accruals derived by the entity.

Since the basic exemption applies to receipts and accruals other than levies, the portion of those receipts and accruals that are not exempt from income tax must be determined before calculating allowable deductions.

Example 3 – Calculation of taxable income

Facts:

The XYZ Home Owners' Association, a "non-profit company" as defined in section 1 of the Companies Act, has been approved by the Commissioner for the purposes of section 10(1)(e)(i)(cc).

The financial statements for the year ended 30 June 2018 reflect the following income and expenditure:

Receipts and accruals	R
Monthly levies from members	2 000 000
Building penalty levies	40 000
Penalty on late payment of levies and fines for non-compliance	80 000
Interest on investments	<u>20 000</u>
Total receipts and accruals	<u>2 140 000</u>

4. Calculate taxable income	R
Income subject to income tax (2)	50 000
Less: Allowable deductions (3)	<u>(327)</u>
Taxable income	<u>49 673</u>
5. Calculate income tax payable	
Taxable income (4)	49 673
Income tax payable at 28% company tax rate for the 2018 year of assessment ending on 30 June 2018	<u>13 908,44</u>

8. Rate of tax

Qualifying entities fall within the definition of “company” in section 1(1) and are treated as companies for income tax purposes and pay tax at the company rate on their taxable income.

9. Provisional tax

Qualifying entities are excluded from the definition of “provisional taxpayer”⁸ and are not required to make provisional tax payments or submit provisional tax returns. A qualifying entity that has taxable income must settle its tax liability on assessment.

10. Donations tax

Donations made by or to a qualifying entity are exempt from donations tax under section 56(1)(h).

11. Capital gains tax

All capital gains and capital losses made on the disposal of assets must be taken into account in determining a taxable capital gain or assessed capital loss unless excluded by specific provisions. The capital gains tax (CGT) provisions are contained in the Eighth Schedule. CGT forms part of the income tax system and a taxable capital gain must be included in taxable income under section 26A. A body corporate, a share block company and an association of persons have an inclusion rate of 80%.⁹ This inclusion rate means that 80% of a capital gain will be included in the taxable income of a company.

In practice it would be unusual for a body corporate, a share block company or an association of persons to derive a capital gain during the normal course of its operations as illustrated by the following examples:

- Movable depreciable assets such as washing machines used in a common laundry room are unlikely to yield capital gains on disposal because this would require a consideration in excess of the original cost.

⁸ Paragraph 1 of the Fourth Schedule.

⁹ The inclusion rate in paragraph 10 of the Eighth Schedule was increased from 66,6% to 80% with effect from years of assessment commencing on or after 1 March 2016. The inclusion rate was 50% for years of assessment commencing before 1 March 2012.

- The common property in a development scheme is owned by the sectional title holder's jointly in undivided shares and not by the body corporate.¹⁰ The sale of a portion of the common property will therefore not have CGT consequences for the body corporate; rather the unit holders must account for any capital gain or capital loss.
- The transfer of immovable property in a share block company to a holder of shares in the company will not give rise to a capital gain or capital loss in the company. Such a transfer could involve a conversion to sectional title or a transfer of freehold title.¹¹ In this regard paragraph 67B(3)(a) of the Eighth Schedule provides that the share block company must disregard any capital gain or capital loss determined on the disposal. Likewise, paragraph 67B(3)(b)(i) provides that the holder of shares must disregard any capital gain or loss on disposal of the share, which of necessity includes the right of use and occupation attaching to the share.¹² The capital gain or capital loss made by the person acquiring the immovable property is deferred until the person actually disposes of it. This roll-over treatment is achieved by carrying across to the immovable property details of the cost and date of acquisition of the shares, cost and date of effecting improvements, usage, and any market valuation performed on valuation date.¹³

Capital gains may arise on conversion of a company to a share block company as a result of the disposal of the right of use and occupation to holders of the company's shares.

12. Dividends tax

A beneficial owner is liable for dividends tax on a cash dividend paid by a company unless the dividend is exempt because it is paid to a beneficial owner listed in section 64F(1). A cash dividend paid to a beneficial owner that is a resident company is exempt from dividends tax under section 64F(1)(a). Since a qualifying entity is a resident company, a cash dividend paid to it will be exempt from dividends tax.

A resident company paying a dividend *in specie* is potentially liable for dividends tax subject to the exemptions in section 64FA. Section 64FA(1)(d) exempts from dividends tax any dividend that constitutes a disposal contemplated in paragraph 67B(2) of the Eighth Schedule. Such a disposal occurs when a share block company distributes immovable property to a holder of its shares (see 11).

¹⁰ Section 16 of the Sectional Titles Act.

¹¹ Section 8(3)(c) of the Share Blocks Control Act prohibits the transfer of a unit to a member otherwise than through Schedule 1 of that Act, which deals with conversion to sectional title. Thus, to the extent that shareholders wish to take transfer under freehold title it would first be necessary for them to cancel their rights of use and occupation before transfer can be effected.

¹² Section 10(b) of the Share Blocks Control Act.

¹³ For more on paragraph 67B, see paragraph 13.6 of the *Comprehensive Guide to Capital Gains Tax*, available on the SARS website www.sars.gov.za.

13. Conclusion

In conclusion –

- only the levy income of qualifying entities is fully exempt from income tax under section 10(1)(e)(i);
- the sum of other income received by qualifying entities is subject to a basic exemption under section 10(1)(e)(ii);
- bodies corporate and share block companies qualify for an automatic exemption from income tax under section 10(1)(e)(i)(aa) and (bb) respectively and no pre-approval by the Commissioner is required;
- associations of persons are required to apply for approval with the Commissioner at the TEU to qualify for exemption from income tax under section 10(1)(e)(i)(cc);
- qualifying entities are excluded from the payment of provisional tax and are not required to submit provisional tax returns;
- donations made by or to a qualifying entity are exempt from donations tax under section 56(1)(h);
- the transfer of immovable property in a share block company to a holder of shares in the company will not give rise to a capital gain or capital loss in the company under paragraph 67B(3)(a) of the Eighth Schedule;
- a cash dividend paid to a qualifying entity is exempt from dividends tax under section 64F(1)(a); and
- a dividend *in specie* declared and paid by a share block company that comprises a disposal contemplated in paragraph 67B(2) of the Eighth Schedule is exempt from dividends tax under section 64FA(1)(d).

Legal Counsel

SOUTH AFRICAN REVENUE SERVICE

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Date of 3rd issue : 17 August 2015

Annexure – Contact details of the Tax Exemption Unit

Postal address	PO Box 11955 Hatfield 0028
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Telephone	012 483 1700
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