

INTERPRETATION NOTE 98

DATE: 7 February 2018

ACT : INCOME TAX ACT 58 OF 1962
SECTION : SECTIONS 30(1), (3)(f) AND PUBLIC BENEFIT ACTIVITY 10 IN PART I OF THE NINTH SCHEDULE
SUBJECT : PUBLIC BENEFIT ORGANISATIONS: THE PROVISION OF FUNDS, ASSETS OR OTHER RESOURCES TO ANY ASSOCIATION OF PERSONS

Preamble

In this Note unless the context indicates otherwise –

- “**conduit PBO**” means a “public benefit organisation” as defined in section 30(1), which has been approved by the Commissioner under section 30(3), and has as its sole or principal object the provision of funds, assets, or other resources contemplated in PBA 10 in Part I;
- “**founding document**” means the constitution, will or other written instrument under which an organisation is established and governed;
- “**Ninth Schedule**” means the Ninth Schedule to the Act;
- “**Part I**” and “**Part II**” mean Part I and Part II of the Ninth Schedule;
- “**PBA**” means a “public benefit activity” listed in Part I of the Ninth Schedule and any other activity determined by the Minister 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;
- “**PBO**” means a “public benefit organisation” as defined in section 30(1) and which has been approved by the Commissioner under section 30(3);
- “**section**” means a section of the Act;
- “**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.

The guides referred to in this Note are available on the SARS website at www.sars.gov.za. The latest issue of these guides should be consulted.

1. Purpose

This Note provides guidance on –

- a conduit PBO carrying on PBA 10 in Part I;
- the requirement imposed under section 30(3)(f) on a conduit PBO providing funds to an association of persons contemplated in PBA 10(iii) in Part I; and
- the meaning of “association of persons” contemplated in PBA 10(iii) in Part I.

2. Background

Before 2001 tax-exempt organisations were allowed to make funds available only to organisations providing residential accommodation to retired persons and religious, charitable and educational institutions of a public character that were formally constituted and exempt from income tax.¹

This restricted exemption resulted in many informal community projects not qualifying to benefit from such funding.²

In order to address the exclusion of informal community projects from receiving funding, subparagraph (iii) was included in PBA 10 under the category “Providing of Funds, Assets or Other Resources” in Part I.³ A conduit PBO may therefore provide funds, assets or other resources contemplated in PBA 10 in Part I to an association of persons carrying on one or more PBAs, with the exception of PBA 10 in Part I, in South Africa.

3. The law

Sections 30(1), (3)(f) and PBA 10 in Part I are quoted in the **Annexure**.

4. Application of the law

4.1 A conduit PBO

A conduit PBO may provide –⁴

- funds, assets, services or other resources by way of donation;
- assets or other resources by way of sale for a consideration not exceeding the direct cost to the conduit PBO providing the assets or resources;
- funds by way of loan at no charge; or
- assets by way of lease for an annual consideration not exceeding the direct cost to the conduit PBO providing the asset divided by the total useful life of the asset,

to any –

- PBO;
- institution, board or body contemplated in section 10(1)(cA)(i) conducting one or more PBAs in Part I, other than PBA 10;
- association of persons (see **4.3**) carrying on one or more PBAs in Part I, other than PBA 10, in South Africa; or
- department of state or administration in the national, provincial or local sphere of government in the Republic contemplated in section 10(1)(a).

¹ Under the repealed section 10(1)(cF) and section 10(1)(f).

² MM Katz *et al* “Community-based and Informal Organisations (CBOs)” (1999) *Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa* at 12.

³ See section 41 of the Taxation Laws Amendment Act 30 of 2002.

⁴ PBA 10 in Part I.

PBA 10 in Part I must be carried on by a conduit PBO –

- in a non-profit manner with an altruistic or philanthropic intent;⁵
- without directly or indirectly promoting the economic self-interest of any fiduciary or employee of the conduit PBO otherwise than by reasonable remuneration;⁶ and
- for the benefit of, or be widely accessible to, the general public at large, this may include any sector of the general public but may not be for the benefit of a small and exclusive group.⁷

A conduit PBO must in addition to the above also comply with the requirement of section 30(3)(f) as discussed below.

Example 1 – Providing of funds, assets or other resources by a conduit PBO

Facts:

An organisation has committed its support to a group of unemployed women in the local rural community who have identified an urgent need for daily day care and basic early childhood development services for pre-school children who are left unattended. The organisation will donate monthly food supplies as well as basic stationery and equipment such as tables, chairs and mattresses to the group of women.

Result:

The organisation is regarded as a conduit PBO providing funds, assets or other resources contemplated in PBA 10 in Part I to an association of persons contemplated in PBA 10(iii) in Part I, which in this case is the group of unemployed women. The Commissioner will approve the organisation as a PBO if satisfied that the organisation has taken reasonable steps to ensure that the funds are used for the purpose for which those funds have been provided [section 30(3)(f)].

Part I of the Ninth Schedule lists a variety of activities which are recognised as PBAs for purposes of section 30(1). Part II of the Ninth Schedule lists some, but not all, of the activities listed in Part I for the purposes of section 18A. PBA 10 is not included in Part II of the Ninth Schedule and therefore donations received by a PBO to carry on that activity will not qualify for a tax deduction under section 18A.⁸

4.2 Section 30(3)(f) requirement

The Commissioner will approve an organisation carrying on PBA 10(iii) as a PBO if satisfied that reasonable steps have been taken by the organisation to ensure that the funds are used by the association of persons in carrying on PBAs in Part I in South Africa. The funds may not be used to promote the economic self-interest of any individual person.

⁵ Paragraph (b)(i) of the definition of “public benefit organisation” in section 30(1).

⁶ Paragraph (b)(ii) of the definition of “public benefit organisation” in section 30(1).

⁷ Paragraph (c)(i) of the definition of “public benefit organisation” in section 30(1).

⁸ See *Basic Guide to Tax-Deductible Donations* for the basic requirements for obtaining and retaining approval under section 18A.

The words “reasonable steps” are not defined in the Act and should therefore be interpreted according to their ordinary meaning as applied to the subject matter relating to which they are used⁹ unless the ordinary meaning creates an absurdity or ambiguity. The context in which words or expressions are used must also be considered.

The ordinary meaning is as follows:¹⁰

- “Reasonable” is “*fair and sensible, as much as is appropriate or fair; moderate*”.
- “Steps” are “*a measure or action taken to deal with or achieve something*”.

The measures, steps or action taken by a conduit PBO will vary depending on the circumstances and facts relating to a particular case. Each case will therefore be considered and evaluated on its own merits.

Example 2 – Examples of what may be considered reasonable steps

The following are non-exhaustive examples of what may be regarded as being reasonable steps taken by a conduit PBO to ensure funds to an association of persons are used for the purpose for which those funds have been provided:

- Facilitate workshops or brainstorming sessions to help develop a business plan, timeframe and cost analysis for the association of persons.
- Implement relevant monitoring and evaluation tools to track challenges and outcomes.
- Regular on-site visits at agreed specific phases during the implementation of PBAs in Part I carried on by the association of persons.

An organisation failing to take reasonable steps and ensure funds are used by an association of persons for the purpose for which they were provided may result in the Commissioner not granting approval as a PBO.

A conduit PBO failing to take reasonable steps to ensure funds are used by an association of persons for the purpose for which they were provided after obtaining approval as a PBO may result in the Commissioner withdrawing the approval after notice is given.¹¹ The approval may be withdrawn from the beginning of the relevant year of assessment during which non-compliance with section 30(3)(f) occurred unless the conduit PBO has taken corrective steps within a period specified in the notice of withdrawal.¹²

⁹ See EA Kellaway *Principles of Legal Interpretation of Statutes, Contracts and Wills* (1995) Butterworths at 224. See also *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

¹⁰ M Wait, S Hawker and C Soanes *Oxford Dictionary, Thesaurus, and Wordpower Guide* (2001) Oxford University Press.

¹¹ For further information see the *Tax Exemption Guide for Public Benefit Organisations in South Africa*.

¹² Section 30(5).

4.3 Association of persons

The “association of persons” referred to in the definition of “public benefit organisation”¹³ and an “association of persons” referred to in PBA 10(iii) in Part I are listed in PBA 10 in Part I separately as beneficiaries that may benefit from the funds, assets or other resources provided by a conduit PBO. The separate identification of a PBO and an association of persons in PBA 10 in Part I implies that the respective associations of persons differ, the former being a formal association of persons established by adopting a legal founding document which may qualify for approval as a PBO and the latter a voluntary informal association or group of persons carrying on one or more PBAs in Part I in South Africa. Such an association or group of individuals will not qualify for approval as a PBO because they do not have a founding document.¹⁴

An association of persons contemplated in PBA 10(iii) in Part I must carry on one or more PBAs in Part I in South Africa, other than the provision of funds, assets or other resources contemplated in PBA 10 in Part I. The words “carrying on” in the present context means that the association of persons must itself conduct and use its funds, assets or other resources received from any conduit PBO to carry on PBAs in Part I in South Africa. An association of persons may therefore not pass on any of its funds, assets or other resources received from any conduit PBO to any other organisation or association of persons.

Example 3 – Associations of persons

The following are non-exhaustive examples of associations of persons contemplated in PBA 10(iii) in Part I:

- A rural community in a remote village does not have running water. The leaders in the community are committed to embarking on a project to provide their community members with running water. A PBO 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 accessible to all the members of the community. The community leaders are regarded as the “association of persons” contemplated in PBA 10(iii) in Part I, who may be regarded as carrying on PBA 1(p) in Part I.
- A group of women in a remote rural community have formed an informal association to provide home-based care to terminally-ill members in their community. The informal association does not have a constitution and can therefore not be approved as a PBO. A PBO has undertaken to provide the informal association with the relevant training, supplying nutritional food parcels as well as donating a vehicle to enable women to reach remote patients in need of care. The informal association of women is regarded as the “association of persons” contemplated in PBA 10(iii) in Part I, who may be regarded as carrying on PBA 2(a) in Part I.

¹³ An association of persons contemplated in paragraph (a)(i) of the definition of “public benefit organisation” in section 30(1) 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* Associations/Nature and Formation/Formation Volume 2, Third Edition Volume LAWSA [online] (My LexisNexis: 10 November 2016) in paragraph 155.

¹⁴ See section 30(3)(b).

5. Conclusion

A conduit PBO may provide funds, assets or other resources to an informal voluntary association of persons contemplated in PBA 10(iii) in Part I.

The Commissioner must be satisfied that, in the case of any conduit PBO providing funds to any such association of persons, has taken reasonable steps to ensure that the funds are used for the purpose for which those funds have been provided, which is to carry on one or more PBAs in Part I (other than PBA 10 in Part I) in South Africa.

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Annexure – The law

The definition of a “public benefit organisation” in section 30(1)

<p>30. Public benefit organisations.—(1) For the purposes of this Act—</p> <p>“public benefit organisation” means any organisation—</p> <p>(a) which is—</p> <p>(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</p> <p>(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;</p> <p>(b) of which the sole or principal object is carrying on one or more public benefit activities, where—</p> <p>(i) all such activities are carried on in a non-profit manner and with an altruistic or philanthropic intent;</p> <p>(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</p> <p>(iii)</p> <p>(c) where—</p> <p>(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);</p>
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Section 30(3)(f)

<p>(3) The Commissioner shall, for the purposes of this Act, approve a public benefit organisation which—</p> <p>(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</p>
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PBA 10 of Part I

<p style="text-align: center;">NINTH SCHEDULE</p> <p style="text-align: center;">PUBLIC BENEFIT ACTIVITIES</p> <p style="text-align: center;">(Section 30)</p> <p style="text-align: center;">PART I</p> <p style="text-align: center;">PROVIDING OF FUNDS, ASSETS OR OTHER RESOURCES</p> <p>10. The provision of—</p> <p>(a) funds, assets, services or other resources by way of donation;</p> <p>(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;</p>
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- (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).