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**SOUTH AFRICAN REVENUE SERVICE**

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# **Draft Tax Exemption Guide for Small Business Funding Entities**

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Another helpful guide brought to you by the  
South African Revenue Service



# Draft Tax Exemption Guide for Small Business Funding Entities

## Preface

This guide provides general guidance on the approval of small business funding entities under section 30C and taxation under section 10(1)(cQ).

The guide deals with the following taxes that may affect entities approved as small business funding entities:

- Capital gains tax
- Dividends tax
- Donations tax
- Employees' tax
- Estate duty
- Income tax
- Securities transfer tax
- Skills development levy
- Transfer duty
- Unemployment insurance fund 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 general binding ruling under section 89 of Chapter 7 of the Tax Administration Act. Should an advance tax ruling be required, visit the SARS website at [www.sars.gov.za](http://www.sars.gov.za) for details of the relevant application procedure.

This guide is based on 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 forms, *Government Gazettes*, guides, interpretation notes, returns rulings and tables referred to in this guide are the latest versions available on the SARS website unless the context indicates otherwise.

For more information, guidance and assistance on how to apply for approval you may –

- contact the SARS Tax Exemption Unit:  
Postal address : PO Box 436  
PRETORIA  
0001

Physical address : Second floor  
SARS Pretoria CBD Branch Office  
cnr Lilian Ngoyi and Frances Baard streets  
PRETORIA  
0002

Telephone : 012 483 1700 / 02 / 03

General enquiries e-mail : **teu@sars.gov.za**

New applications e-mail : **teunewcases@sars.gov.za**

- 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 on 0800 00 7277;
- visit the SARS website at **www.sars.gov.za**; or
- contact your own tax advisor or tax practitioner.

Comments on this guide may be emailed to **policycomments@sars.gov.za**.

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Date of issue:

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## Glossary

In this guide unless the context indicates otherwise –

- **“basic exemption”** means the amount determined as a threshold and applied to the total receipts and accruals from business undertakings or trading activities of an approved SBFE to the extent that such receipts and accruals are not derived in the manner specified in section 10(1)(cQ)(i) and (ii);
- **“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;
- **“Companies Act”** means the Companies Act 71 of 2008;
- **“fiduciary”** means a person who holds a position of trust or responsibility including decision-making powers over the affairs of an entity;
- **“founding document”** means the written instrument such as the trust deed, constitution, or memorandum of incorporation under which an entity is established and governed;
- **“micro business”** means a person that meets the requirements set out in Part II of the Sixth Schedule;
- **“NPC”** means a “non-profit company” as defined in section 1 of the Companies Act;
- **“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 as set out in section 10(1)(cQ);
- **“PBO”** means a “public benefit organisation” as defined in section 30(1) approved by the Commissioner under section 30(3);
- **“prescribed requirements”** mean the formal conditions and requirements set out in section 30C(1)(d), which an entity must comply with to qualify for approval as an SBFE;
- **“SBC”** means an entity that meets the requirements of the definition of “small business corporation” in section 12E(4)(a);
- **“SBFE”** means a “small business funding entity” as defined in section 1(1) and approved by the Commissioner under section 30C(1) for purposes of section 10(1)(cQ);
- **“Schedule”** means a Schedule to the Act;
- **“section”** means a section of the Act;
- **“SMME”** means a “small, medium or micro-sized enterprise” as defined in section 1(1), which is any person qualifying as a micro business, or any person that is an SBC;
- **“TA Act”** means the Tax Administration Act 28 of 2011;
- **“TEU”** means the Tax Exemption Unit, a dedicated unit within SARS established to consider, amongst other things, applications by entities for approval as SBFEs. The TEU also monitors compliance by approved SBFEs with the legislative requirements, investigates, verifies and, if necessary, raises assessments on SBFEs;
- **“the Act”** means the Income Tax Act 58 of 1962;
- **“Trust Property Control Act”** means the Trust Property Control Act 57 of 1998;

- “**VAT**” means value-added tax;
- “**VAT Act**” means the Value-Added Tax Act 89 of 1991; and
- any other word or expression bears the meaning ascribed to it in the Act.

# 1. Background

A major challenge in the growth of small, medium and micro enterprises<sup>1</sup> is access to funding due to their inherent risk and lack of collateral together with the fact that they often lack the necessary training and commercial skills to manage and develop the business.<sup>2</sup>

Several funding entities are engaged in activities that support small, medium and micro enterprises, for example, the provision of developmental funding, business support and training. Relief was previously afforded to funders of small, medium and micro enterprises only if monies were invested through a venture capital company (VCC),<sup>3</sup> or if approved by the Commissioner as a PBO.<sup>4</sup> Any activity provided to small, medium and micro enterprises that did not fall under the VCC regime or PBO legislation<sup>5</sup> therefore did not qualify for relief under the Act.<sup>6</sup>

To assist in the development of and to encourage support to SMMEs the following were introduced specifically for SBFES:

- Definitions in section 1(1) of the terms “small business funding entity” and “small, medium or micro-sized enterprise”.
- Section 30C<sup>7</sup> setting out the prescribed requirements an entity must comply with to qualify for and retain approval as an SBFES so as to enjoy partial taxation.
- Section 10(1)(cQ)<sup>8</sup> providing for the exemption from income tax of certain receipts and accruals of SBFES and the taxation of receipts and accruals falling outside the permissible business undertaking or trading activity categories provided in that section at a rate of tax of 28% of its taxable income.

An entity will enjoy preferential tax treatment under section 10(1)(cQ) only after it has been granted approval by the Commissioner under section 30C(1) and continues to comply with the relevant prescribed requirements as set out in the Act.

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<sup>1</sup> The general concept “small, medium or micro-sized enterprises” is widely used in South Africa and defined in a number of different ways. See definition of “small enterprise” in section 1 of the National Small Enterprise Act 102 of 1996 as well as the classification of small enterprises in the Schedule to that Act. The meaning of the concept varies in the context of the enactment and the reason why the determination needs to be made. The term for purposes of the Act is defined in section 1(1).

<sup>2</sup> *Explanatory Memorandum on the Taxation Amendment Bill, 2014.*

<sup>3</sup> The term “venture capital company” is defined in section 12J(1). For more information, see *Guide on Venture Capital Companies.*

<sup>4</sup> The sole or principal object of an organisation seeking approval as a PBO must be to carry on one or more public benefit activities (PBAs) listed in the Ninth Schedule. See PBA 1(p)(iii) in Part I of the Ninth Schedule, which provides for the training, support or assistance to emerging micro enterprises to improve capacity to start and manage businesses, that may include the granting of loans, in the furtherance of community development for poor and needy persons and anti-poverty initiatives.

<sup>5</sup> For more information on the approval as a PBO, see *Tax Exemption Guide for Public Benefit Organisations in South Africa.*

<sup>6</sup> *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2014.*

<sup>7</sup> Section 30C was inserted by section 49(1) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 March 2015.

<sup>8</sup> Section 10(1)(cQ) was inserted by section 14(1)(a) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 March 2015 and applicable in respect of amounts received or accrued on or after that date.



## 2. Approval requirements

The Commissioner must approve an entity as an SBFE under section 30C for purposes of section 10(1)(cQ) if –<sup>9</sup>

- the entity is incorporated, formed or established in South Africa as –<sup>10</sup>
  - a trust (see **3.1**);
  - an association of persons (see **3.2**); or
  - an NPC (see **3.3**);<sup>11</sup>
- the sole or principal object of the entity is the provision of funding (see **4**) for SMMEs (see **6**);<sup>12</sup>
- the funding (see **5**) provided by the entity is –<sup>13</sup>
  - for the benefit of, or is widely accessible to SMMEs;
  - provided on a non-profit basis and with an altruistic or philanthropic intent ; and
  - not intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of that entity, otherwise by way of reasonable remuneration payable to that fiduciary or employee;
- a copy of the entity's founding document is submitted to the Commissioner (see **7**);<sup>14</sup> and
- the founding document of the entity provides for all the prescribed requirements (see **8**).<sup>15</sup>

All of the above requirements must be met to qualify for approval as an SBFE.

An entity seeking approval as an SBFE must complete the prescribed application form EI 1. The completed application form with the required registration information together with all requested supporting documentation must be submitted to SARS.

The notification of approval as an SBFE is issued by the Commissioner by letter. The letter contains a unique reference number generally referred to as an exemption reference number that is a different reference number to the taxpayer reference number (see **17.1**). The entity is required to retain the letter confirming approval as an SBFE as part of its records (see **16**). The approval as an SBFE is effective from the date the approval is granted by the Commissioner.

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<sup>9</sup> Section 30C(1).

<sup>10</sup> Section 30C(1)(a).

<sup>11</sup> An NPC was included in section 30C(1)(a) by section 55(1) of the Taxation Laws Amendment Act 25 of 2015. The amendment is deemed to have come into operation on 1 March 2015.

<sup>12</sup> Section 30C(1)(b)(i).

<sup>13</sup> Section 30C(1)(b)(ii).

<sup>14</sup> Section 30C(1)(c).

<sup>15</sup> Section 30C(1)(d).

The Commissioner will also issue a written notification to the entity should the approval not be granted together with reasons why the entity failed to meet the conditions and requirements of section 30C. The decision by the Commissioner not to approve an entity as an SBFE is subject to objection and appeal (see **18**). An entity not approved by the Commissioner as an SBFE will be liable for income tax and other taxes and duties as a normal taxpayer (see **9.2**).

### 3. Type of entity qualifying for approval

Trusts, associations of persons or NPCs incorporated, formed or established in South Africa may apply for approval as an SBFE.

#### 3.1 Trusts

The term “trust” is defined and means –<sup>16</sup>

“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”.

A trust is created when a founder (also referred to as the donor) has the intention to create a trust and transfers property<sup>17</sup> to be administered by trustees on behalf of one or more beneficiaries, in accordance with the trust instrument, which could be a trust deed or will (see **7.1**).<sup>18</sup>

The following methods of creating a trust are recognised in South Africa:<sup>19</sup>

- 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 only become effective 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 his will, are aimed at specific rather than general orders that must be carried out.
- The *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 ante-nuptial contract, or a contract between the founder and trustee.
- Trusts can also be created by way of legislation, treaties and orders of court.

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<sup>16</sup> Section 1(1).

<sup>17</sup> The reference to property may refer to 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.

<sup>18</sup> For further information on trusts under South African law, see *Guide to the Taxation of Special Trusts* and the *Comprehensive Guide to Capital Gains Tax*.

<sup>19</sup> PA Olivier, S Strydom and GPJ van den Berg *Trust Law and Practice* [online] (My LexisNexis: August 2018) in paragraph 2.4

### 3.2 Association of persons

The expression “association of persons” is not defined in the Act and should therefore be interpreted according to its ordinary meaning as applied to the subject matter with regard to which they are used.<sup>20</sup>

LAWSA describes an “association” as follows:<sup>21</sup>

“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.)

### 3.3 Non-profit company

The term “non-profit company” is defined in the Companies Act and means –<sup>22</sup>

“a company incorporated for a public benefit or other object as required by item 1(1) of Schedule 1;<sup>23</sup> and 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) of Schedule 1”.<sup>24</sup>

An NPC does not automatically qualify for exemption from income tax<sup>25</sup> and must satisfy the statutory requirements of the Act to qualify for approval as an SBFEE and for certain of its receipts and accruals to be exempt from the payment of income tax.

The primary distinction of an NPC from 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, which is approved, as an SBFEE must be used for the provision of funding for SMMEs.

## 4. Sole or principal object

An SBFEE must have as its sole or principal object the provision of funding for SMMEs.<sup>26</sup>

The sole or principal object of an SBFEE 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.<sup>27</sup>

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<sup>20</sup> 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 page 4 to 7.

<sup>21</sup> GJ Pienaar “Association” 2 (Third Edition Volume) LAWSA [online] (My LexisNexis: 28 February 2015) in paragraph 155.

<sup>22</sup> Section 1 of that Act.

<sup>23</sup> The reference to an “other object” in item 1(1) of Schedule 1 to the Companies Act refers to cultural, social activities, communal or group interests.

<sup>24</sup> 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, or make payments in accordance with any legal obligation binding on the company.

<sup>25</sup> Item 1(6) of Schedule 1 of the Companies Act.

<sup>26</sup> Section 30C(1)(b)(i).

<sup>27</sup> See *Mitchell’s Plain Town Centre Merchants Association v McLeod* [1996] 3 SA 297 (SCA).

The object of the entity is not the subjective goals or intentions of the entities founders or fiduciary but the activities the entity is mandated by its founding document to perform. To determine whether an entity's mandated object is its sole or principal object, one must look at the extent to which the object is actively pursued through what the entity does. The sole or principal object of an entity equates to the activities it physically and actively carries on.

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."<sup>28</sup>
- "Principal" as "first or highest in rank, importance, value, chief."<sup>29</sup>
- "Objective" as "something that one's efforts or actions are intended to attain, accomplish, purpose, goal, target."<sup>30</sup>

In ITC 1569,<sup>31</sup> 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". 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",<sup>32</sup> which in the strict sense is interpreted by SARS as 90% but not less than 85% (see **8.5**).

## 5. Funding

The intention is to confine the approval of an entity as an SBFE, to one whose sole or principal object is the provision of funding for SMMEs.

The expression "provision of funding"<sup>33</sup> and the word "funding"<sup>34</sup> are not defined in the Act.

The *Free Dictionary* describes the expression "provision of funding" as –<sup>35</sup>

"the action of providing or supplying a sum of money for a purpose".

The *Cambridge Dictionary* describes "funding" as –<sup>36</sup>

"money made available for a particular purpose."

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<sup>28</sup> [www.dictionary.com/browse/sole](http://www.dictionary.com/browse/sole) [Accessed 16 September 2021].

<sup>29</sup> [www.dictionary.com/browse/principal?s=t](http://www.dictionary.com/browse/principal?s=t) [Accessed 16 September 2021].

<sup>30</sup> [www.dictionary.com/browse/objective](http://www.dictionary.com/browse/objective) [Accessed 16 September 2021].

<sup>31</sup> (1993) 56 SATC 86 (C) at 90.

<sup>32</sup> 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 by 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 page 9 and 18.

<sup>33</sup> Section 30C(1)(b)(i).

<sup>34</sup> Section 30C(1)(b)(ii).

<sup>35</sup> [www.thefreedictionary.com/funding](http://www.thefreedictionary.com/funding) [Accessed 16 September 2021].

<sup>36</sup> <https://dictionary.cambridge.org/dictionary/english/funding> [Accessed 16 September 2021].

The description of “funding” in the *Free Dictionary* is as follows: <sup>37</sup>

“Funding is the act of providing financial resources, usually in the form of money, or other values such as effort or time, to finance a need, program, and project, usually by an organisation or government. Generally, this word is used when a firm uses its internal reserves to satisfy its necessity for cash, while the term financing is used when the firm acquires capital from external sources. Sources of funding include credit, venture capital, donations, grants, savings, subsidies and taxes. Funds can be allocated for either short-term or long-term purposes.”

The Commissioner will approve an entity as an SBFE only if the funding provided is –<sup>38</sup>

- for the benefit of, or is widely accessible to SMMEs (see **5.1**);
- on a non-profit basis (see **5.2.1**) and with an altruistic or philanthropic intent (see **5.2.2**); and
- not intended to directly or indirectly promote the economic self-interest (see **5.3**) of any fiduciary (see **8.1**) or employee of that SBFE, except if it is reasonable remuneration payable to that fiduciary or employee (see **8.9**).

Whether the above requirements are met will be a factual enquiry and may depend largely on the nature, substance and the intention of the funding provided by an SBFE. Each case will be considered on its own merits.

## **5.1 For the benefit of, or widely accessible**

The provision of funding by an SBFE must benefit, or be widely accessible to SMMEs.<sup>39</sup> SMMEs should have an equal opportunity to access and benefit from funding provided by an SBFE. Funding should be provided in a universal or public manner that is inclusive of SMMEs, for example, from a broad spectrum, target groups, geographic areas, enterprise organisational forms, developmental stages and economic sectors. Funding may not be provided on grounds of any personal or employment relationship.

### **Example 1 – Non-exhaustive examples of funding for the benefit of, or widely accessible to SMMEs**

This funding requirement will –

- not be met if an entity provides funding for the benefit of any person not qualifying as a micro business or that is not an SBC because such persons do not meet the definition of an SMME;
- not be met if an entity provides funding for the benefit of a select group such as SMMEs established by employees of that entity because the requirement of being widely accessible will not be met; and
- be met if an entity provides funding for the benefit of a certain sector of SMMEs such as black-owned and managed SMMEs, or SMMEs owned and managed by women, persons with disabilities, or persons in rural areas because this is inclusive of and widely accessible to a broad spectrum of SMMEs.

<sup>37</sup> <https://encyclopedia.thefreedictionary.com/funding> [Accessed 16 September 2021].

<sup>38</sup> Section 30C(1)(b)(ii).

<sup>39</sup> Section 30C(1)(b)(ii)(aa).

Funding provided by an SBFE may be viewed as being widely accessible based on how easy or convenient it is for an SMME to gain access, to understand, to meet the eligibility criteria, and to apply for such funding. The provision of funding will be regarded as being widely accessible, for example, if –

- the application for funding is readily available to SMMEs;
- every effort is made by the entity to attract a broad pool of SMMEs by promoting and advertising widely by using a variety of forms of media such as local and national newspapers, radio and social media;
- the eligibility criteria are fair, objective and applied in a consistent manner; and
- the selection process is transparent and unbiased.

## 5.2 Manner in which funding must be provided

Funding must be provided on a non-profit basis and with an altruistic or philanthropic intent.<sup>40</sup> It is important to note that the conjunctive “and” requires that both requirements must be met, meaning that the funding must be provided on a non-profit basis and with an altruistic or philanthropic intent.

### 5.2.1 Non-profit basis

The words “non-profit” and “basis” are not defined in the Act.

The *Merriam-Webster Dictionary* describes “non-profit” as –<sup>41</sup>

“not conducted or maintained for the purpose of making a profit”.

*Investopedia* describes “not for profit” as –<sup>42</sup>

“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 “basis” is described in the *Cambridge English Dictionary* as –<sup>43</sup>

“the reason why someone does something or why something happens”.

The sole or principal reason for establishing an entity must be for the provision of funding for SMMEs and not to generate a profit or financial return. An SBFE may not provide funding for purposes of making a distributable profit. It will be unacceptable for an SBFE to conduct profit-making activities as its sole or principal object to fund the cost of the provision of funding for SMMEs. The provision of funding for SMMEs by an SBFE should not be to maximise profits but rather to recover direct and reasonable indirect costs. An entity providing funding for SMMEs as part of a profit-making venture will not qualify for approval as an SBFE. However, an entity carrying on a business undertaking or trading activity as part of the provision of funding for SMMEs may qualify as an SBFE provided it meets all the business or trading requirements (see **10.4**).

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<sup>40</sup> Section 30C(1)(b)(ii)(bb).

<sup>41</sup> [www.merriam-webster.com/dictionary/nonprofit](http://www.merriam-webster.com/dictionary/nonprofit) [Accessed 16 September 2021].

<sup>42</sup> [www.investopedia.com/terms/n/not-for-profit.asp](http://www.investopedia.com/terms/n/not-for-profit.asp) [Accessed 16 September 2021].

<sup>43</sup> <https://dictionary.cambridge.org/dictionary/english/basis> [Accessed 16 September 2021].

### 5.2.2 Altruistic or philanthropic intent

The words “altruistic”, “philanthropic” and “intent” are not defined in the Act.

The word “altruistic” is described in the *CollinsDictionary.com* as –<sup>44</sup>

“the 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 (see 5.3). The intent of an entity must not be the provision of funding for SMMEs for the personal profit, benefit or advantage of the entity to the exclusion or regard of the well-being of SMMEs.

In *Ex Parte Henderson & another, NNO* Miller J provided the following explanation of philanthropy:<sup>45</sup>

“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).”

The word “philanthropic”, based on the above judgment, is 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 –<sup>46</sup>

“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 entity 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 entity’s purpose (see 4), that is what the entity states its intent to be in its founding document (see 7). An objective review of an entity’s activities considered together with the relevant facts and circumstances may provide an indication of an entity’s stated intent.

The expression “altruistic or philanthropic intent” can therefore be described as the purpose or object of a charitable gift or bequest the intent of which 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. Funding will be regarded as being provided with an altruistic or philanthropic intent when it is not subject to, for example, the delivery of any activity, service or product, or does not confer a financial benefit, or control to the SBFE in return for the funding provided. Thus, there must be no *quid pro quo*, reciprocal obligations and no direct or indirect personal benefit or return resulting from the funding provided by the SBFE.

#### **Example 2 – Funding provided with an altruistic or philanthropic intent**

*Facts:*

Funding of R1,5 million is provided by an entity to MNO (Pty) Ltd, an SMME, for purposes of subsidising the cost of acquiring a building from which MNO (Pty) Ltd will conduct its business as a retailer.

<sup>44</sup> [www.collinsdictionary.com/dictionary/english/altruistic](http://www.collinsdictionary.com/dictionary/english/altruistic) [Accessed 16 September 2021].

<sup>45</sup> 1971 (4) SA 549 (D) at 556.

<sup>46</sup> [www.dictionary.com/browse/intent](http://www.dictionary.com/browse/intent) [Accessed 16 September 2021].

The funding provided by the entity is subject to the condition that MNO (Pty) Ltd provides office space to that entity at no cost. The entity has applied to the Commissioner for approval as an SBFE.

*Result:*

The entity cannot be approved as an SBFE because the funding has not been provided with an altruistic or philanthropic intent, since the entity will receive a benefit in the form of office space at no cost from the funding it provided to MNO (Pty) Ltd.

### 5.3 Economic self-interest

The intent of an SBFE in the provision of funding for SMMEs may not be done to directly or indirectly promote the economic self-interest of any fiduciary (see 8.1) or employee of that SBFE. The payment of reasonable remuneration to fiduciaries or employees conducting the affairs of an SBFE to enable it to achieve its objectives is permitted (see 8.9).<sup>47</sup>

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

The word “directly” is described in the *Free Dictionary* as follows:<sup>48</sup>

- “1. In a direct line or manner, straight.
2. Without anyone or anything intervening.
4. At once, instantly.”

The *Dictionary.com* describes “indirect” as –<sup>49</sup>

- “1. not in a direct course or path, deviating from a straight line, roundabout.
2. coming or resulting otherwise than directly or immediately, as effects or consequences.
3. not direct in action or procedure.
4. not straightforward, devious, deceitful”.

The word “economic” is described in the *Dictionary.com* as –<sup>50</sup>

- “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 –<sup>51</sup>

“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 entity may not provide funding for SMMEs with the intent of directly or indirectly advancing or creating a personal or private advantage of any fiduciary or employee of that entity. A fiduciary or employee is at all times required to put the interests of the entity ahead of their own economic self-interest and prohibited from profiting when dealing on behalf of the entity. Entity’s operating for the financial gain of any fiduciary, office bearer, employee or any other person will not qualify for approval as an SBFE.

<sup>47</sup> Section 30C(1)(b)(ii)(cc).

<sup>48</sup> [www.thefreedictionary.com/directly](http://www.thefreedictionary.com/directly) [Accessed 16 September 2021].

<sup>49</sup> [www.dictionary.com/browse/indirectly](http://www.dictionary.com/browse/indirectly) [Accessed 16 September 2021].

<sup>50</sup> [www.dictionary.com/browse/economic](http://www.dictionary.com/browse/economic) [Accessed 16 September 2021].

<sup>51</sup> [www.businessdictionary.com/definition/self-interest.html](http://www.businessdictionary.com/definition/self-interest.html) [Accessed 16 September 2021].



### **Example 3 – No self-interest**

#### *Facts:*

XYZ Funding Foundation, an entity applying for approval as an SBFE, has provided funding of R900 000 to ABC (Pty) Ltd, an SMME. A shareholder of ABC (Pty) Ltd is also an employee of XYZ Funding Foundation. XYZ Funding Foundation approved the funding application and the amount was paid to ABC (Pty) Ltd.

#### *Result:*

The entity cannot be approved as an SBFE because a shareholder of ABC (Pty) Ltd is also an employee of XYZ Funding Foundation. The funding provided to ABC (Pty) Ltd has therefore directly promoted the economic self-interest of an employee of XYZ Funding Foundation.

## **6. Small, medium or micro-sized enterprises**

The term “small, medium or micro-sized enterprise” is defined and means any person that qualifies as a micro business or that is an SBC.<sup>52</sup>

An SBFE is responsible for determining whether a person qualifies as an SMME before providing funding to such person. The Commissioner may on application, or on submission of the annual income tax return (see 17), request an SBFE to furnish information relating to the persons to whom funding is provided as well as confirmation that such persons qualify as SMMEs.

### **6.1 Micro businesses**

A person,<sup>53</sup> whose qualifying turnover<sup>54</sup> does not exceed R1 million for the year of assessment, qualifies as a micro business if that person is –<sup>55</sup>

- a natural person (or the deceased or insolvent estate of a natural person who was a registered micro business at the time of death or insolvency,<sup>56</sup> or
- a company.<sup>57</sup>

The SMME, that is a micro business, to whom an SBFE provides funding, is required only to meet the qualifying criteria to be a micro business. It is not a requirement that the SMME be a registered micro business<sup>58</sup> for turnover tax<sup>59</sup> with SARS.

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<sup>52</sup> Section 1(1).

<sup>53</sup> For more information and quick tests to determine whether a natural person or a company qualifies as a micro business, see *Tax Guide for Micro Businesses*.

<sup>54</sup> The term “qualifying turnover” is defined in paragraph 1 in the Sixth Schedule.

<sup>55</sup> Paragraph 2(1) of the Sixth Schedule.

<sup>56</sup> Partners in a partnership and sole proprietors fall within the natural person category.

<sup>57</sup> The term “company” is defined in section 1(1).

<sup>58</sup> The term “registered micro business” is defined in paragraph 1 of the Sixth Schedule.

<sup>59</sup> Turnover tax is imposed under section 48A and is payable by any person that is a registered micro business.

The following are examples of persons not qualifying as a micro business:<sup>60</sup>

- A labour broker<sup>61</sup> or personal service provider<sup>62</sup> other than a labour broker who has been issued with a certificate of exemption<sup>63</sup> by SARS.
- A company with a year of assessment ending on a date other than the last day of February.
- A business if any of its partners, members or shareholders are not natural persons during the relevant year of assessment.
- Companies approved by the Commissioner as PBOs, recreational clubs,<sup>64</sup> any other association, or an SBFE under sections 30, 30A, 30B and 30C, respectively.
- All partners in a partnership if any one of them is not a natural person or if the qualifying turnover of the partnership as a whole exceeds R1 million.

## 6.2 Small business corporations

The requirements that must be met for an entity to qualify as an SBC are set out in section 12E(4).<sup>65</sup> These requirements are broadly summarised as follows:

- The entity must be a juristic person in the form of a close corporation,<sup>66</sup> co-operative,<sup>67</sup> a personal liability company,<sup>68</sup> or private company.<sup>69</sup>
- All the holders of shares in the company, members of the close corporation, or co-operative must always be natural persons during a year of assessment.
- No holders of shares or members should hold any shares or have any interest in the equity of any other company, other than companies as specified in the definition of “small business corporation”.<sup>70</sup>

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<sup>60</sup> Paragraph 3 of the Sixth Schedule.

<sup>61</sup> The term “labour broker” is defined in paragraph 1 of the Fourth Schedule and means any natural person who conducts or carries on any business whereby such person, for reward, provides a client with his or her own employees to perform work for the client or procures workers for a client, but does not personally provide the services required by the client. A company, close corporation or trust that provides such services is not classified as a labour broker. For further information, see *Tax Guide for Small Businesses*.

<sup>62</sup> The term “personal service provider” is defined in paragraph 1 of the Fourth Schedule. For further information, see *Tax Guide for Small Businesses*. To determine whether a company, close corporation or trust is a “personal service provider”, see Interpretation Note 35 “Employees’ Tax: Personal Service Providers and Labour Brokers”.

<sup>63</sup> See paragraph 2(5) of the Fourth Schedule.

<sup>64</sup> For general guidance on the approval and exemption from income tax of qualifying recreational clubs, see *Tax Exemption Guide for Recreational Clubs*.

<sup>65</sup> For guidance on the interpretation and application of section 12E, see Interpretation Note 9 “Small Business Corporations”.

<sup>66</sup> The term “close corporation” is defined in section 1(1). For further information, see *Tax Guide for Small Businesses*.

<sup>67</sup> The term “co-operative” is defined in section 1(1). For further information, see *Tax Guide for Small Businesses*.

<sup>68</sup> The term “personal liability company” refers to a personal liability company as contemplated in section 8(2)(c) of the Companies Act.

<sup>69</sup> The term “private company” is defined in section 1 of the Companies Act and refers to a company meeting the criteria set out in section 8(2)(b) of that Act. For further information, see *Tax Guide for Small Businesses*.

<sup>70</sup> The term “small business corporation” is defined in section 12E(4)(a).

- The gross income<sup>71</sup> of the entity for the year of assessment may not exceed R20 million.
- Not more than 20% of the total receipts and accruals (other than those of a capital nature) and all capital gains<sup>72</sup> of the entity may consist collectively of investment income<sup>73</sup> and income from rendering a personal service.<sup>74</sup>
- The entity may not be a personal service provider.<sup>75</sup>

An entity could meet all the qualifying requirements and be an SBC in one year of assessment but not in another year of assessment. Whether an entity qualifies and is assessed as an SBC for a particular year of assessment is determined based on a set of questions relating to section 12E in the Income Tax Return for Companies (ITR14). A taxpayer therefore elects in the ITR14 to be assessed as an SBC if it meets the qualifying criteria.

The SMME, that is an SBC, to whom an SBFE provides funding, has to meet only the qualifying criteria of an SBC. It is not a requirement that the SMME be assessed by SARS as an SBC.

## 7. Founding document

An entity that applies for approval as an SBFE must have a founding document. The founding document must establish and govern the SBFE. The founding document will depend on the type of entity incorporated, formed or established:

- A trust (see **3.1**) will have a trust deed.
- An association of persons (see **3.2**) will have a constitution adopted by its members.
- An NPC (see **3.3**) will have a memorandum of incorporation.

The founding document must be submitted to the Commissioner<sup>76</sup> as part of the application for approval as an SBFE (see **2**). The founding document must provide for the prescribed requirements (see **8**).<sup>77</sup> The founding document as a whole will be examined to ensure that the prescribed requirements are included.

Any amendment to the founding document of an SBFE must be submitted to the Commissioner (see **8.11**).

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<sup>71</sup> The term “gross income” is defined in section 1(1) and includes the total amount received by or accrued to a person that is not of a capital nature unless specifically included under paragraphs (a) to (n). For information on how to determine a person’s gross income, see *Tax Guide for Small Businesses*.

<sup>72</sup> For more information on the effective rates of capital gains tax, see *ABC of Capital Gains Tax for Companies*.

<sup>73</sup> The term “investment income” is defined in section 12E(4)(c).

<sup>74</sup> The term “personal service” is defined in section 12E(4)(d).

<sup>75</sup> The term “personal service provider” is defined in paragraph 1 of the Fourth Schedule. To determine whether a company, close corporation or trust is a “personal service provider”, see Interpretation Note 35 “Employees’ Tax: Personal Service Providers and Labour Brokers”.

<sup>76</sup> Section 30C(1)(c).

<sup>77</sup> Section 30C(1)(d).

## 7.1 Trust deed

For purposes of the approval as a SBFE only trusts governed under the Trust Property Control Act, will only qualify for such approval.

The term “trust instrument” is defined in the Trust Property Control Act and means –<sup>78</sup>

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

LAWSA states the following on the formation requirement of trusts:<sup>79</sup>

“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. 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. “

(Footnotes omitted.)

The registration of a trust deed<sup>80</sup> 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.<sup>81</sup>

The variation of a trust deed is dealt with in the *South African Financial Planning Handbook* as follows:<sup>82</sup>

“The ability to vary or amend a trust document depends on whether the trust is a testamentary (will) trust or an *inter vivos* trust. Generally, a court cannot vary the terms of a will trust because in South Africa there is freedom of testation. However, if a testamentary trust contains discriminatory provisions which offend the Constitution, a court can delete the offending parts of the trust deed.

Section 13 of the Act<sup>83</sup> is also important because it gives the court certain powers regarding the amendment of a trust deed.”

The Trust Property Control Act provides that if a trust instrument lodged with the Master of the High Court is varied, the trustee must lodge the amendment or a copy thereof so certified with the Master.

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<sup>78</sup> Section 1 of that Act.

<sup>79</sup> HJ Erasmus and MJ de Waal “Wills and Succession” 31 (Second Edition Volume) LAWSA [online] (My LexisNexis: 28 February 2011) in paragraph 533.

<sup>80</sup> The term “trust deed” is not defined in the Act, however, see definition of “trust instrument” in the Trust Property Control Act.

<sup>81</sup> RP Pace “Trusts and Trustees” [online] (My LexisNexis: August 2015) in paragraph 4.1.1.

<sup>82</sup> B Goodall, M Botha, L du Preez *et al* *South African Financial Planning Handbook* [online] (My LexisNexis: April 2019) in paragraph 33.20.

<sup>83</sup> The reference is to the Trust Property Control Act.

## 7.2 Constitution

LAWSA provides the following on the constitution of an association:<sup>84</sup>

“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.)

LAWSA provides the following on amendments to constitutions:<sup>85</sup>

“Where a constitution does not provide for its amendment by majority (or special majority) vote, the amendment can be effected only by the unanimous vote of the members concerned. But even where the constitution empowers a majority of members to amend it, there are other factors which must be taken into account. So, for instance, the proposed amendment must be passed in the *bona fide* belief that it is to the benefit of the association and in accordance with the procedure prescribed by the constitution. Whether or not the majority can alter a fundamental object depends on the nature and character of the association, as well as its constitution and objects. A rule in the constitution which provides for the alteration of the constitution may itself be amended in the prescribed way.”

(Footnotes omitted.)

## 7.3 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. After the completed and signed memorandum of incorporation<sup>86</sup> and the filing of a notice of incorporation<sup>87</sup> the registration of the company is confirmed by the Companies and Intellectual Property Commission<sup>88</sup> under the Companies Act through the issuing and delivery to the company of a registration certificate.<sup>89</sup>

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<sup>84</sup> GJ Pienaar “Association” 2 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in paragraph 156.

<sup>85</sup> GP Pienaar “Associations” 2 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in paragraph 158.

<sup>86</sup> See section 13(1)(a) and Regulation 15 in Government Notice Regulation 351 in *Government Gazette* 34239 of 26 April 2011 and Form CoR 15.1C.

<sup>87</sup> 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.

<sup>88</sup> Section 14(1) of the Companies Act.

<sup>89</sup> Section 14(1)(b)(iii) and section 14(4) of the Companies Act. See also Form CoR 14.3, Registration Certificate, included in the Regulations.

LAWSA states the following on the incorporation of a company:<sup>90</sup>

“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.)

The following is provided by LAWSA on the amendment of the memorandum of incorporation:<sup>91</sup>

“The amendment of the memorandum of incorporation may take the form of a new memorandum of incorporation in substitution for the existing one, or one or more alterations by changing the name of the company, deleting, altering, or replacing any of its provisions, or inserting new provisions or any combination of these.

An amendment to a company’s memorandum of incorporation takes effect, in the case of an amendment that changes the name of the company, on the date set out in the amended registration certificate issued by the commission or, in any other case, on the later of the date on and time at which the notice of amendment is filed or the date, if any, set out in the notice of amendment.”

(Footnotes omitted.)

Pre-existing companies approved as SBFES that may have amended their memoranda and articles of association or replaced the latter with a memorandum of incorporation under the Companies Act must ensure that the prescribed requirements (see **8**) remain included in the amended or replacement founding documents. A copy of the amended or replacement founding documents must be submitted to the Commissioner (see **8.11**).

#### **Example 7 – Amendments to the founding document**

*Facts:*

Ezezimali, an association of persons, was approved by the Commissioner as an SBFES. Its constitution provided for all the prescribed requirements. Two years after obtaining approval, the members of the governing body accepting fiduciary responsibility of Ezezimali took the decision that funds may be provided to employees and their relatives. The constitution was amended accordingly and the Commissioner was not informed.

*Result:*

The provision of funds to employees and their relatives is contrary to the requirements for approval as an SBFES. Consequently, the approval as an SBFES granted by the Commissioner to Ezezimali will be withdrawn and the entity may be liable for transgression penalties (see **9**).

<sup>90</sup> RC Williams “Companies Part 1” 4(1) (Second Edition Volume) LAWSA [online] (My LexisNexis: 30 November 2012) in paragraph 108.

<sup>91</sup> RC Williams “Companies: Part I” 4 (Second Edition Volume) LAWSA [online] (My LexisNexis: 30 November 2012) in paragraph 113.

## 8. Prescribed requirements

The mandatory requirements under section 30C, which must be addressed in the founding document are discussed in detail below.

### 8.1 Committee, board or body accepting fiduciary responsibility

An SBFE must have a committee, a board of management or similar governing body consisting of at least three natural persons who are not connected persons<sup>92</sup> in relation to each other to accept fiduciary responsibility for the SBFE.<sup>93</sup>

#### 8.1.1 Fiduciaries of a trust

The term “trustee” is defined and means –<sup>94</sup>

”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”.

The *Trust Law and Practice* provide the following on trustees accepting fiduciary responsibility for a trust:<sup>95</sup>

“The object of the powers given to a trustee is to enable him to do justice to the fiduciary duties which attach to his office. It is self-evident that there is a duty to exercise all powers in such a manner that the beneficiaries reap the benefits.

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 1988<sup>96</sup> makes provision for a number of duties, so that it can be said that these duties are based on legislation.”

(Footnotes omitted.)

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

#### 8.1.2 Fiduciaries of an association of persons

The following is provided by *LAWSA* on the fiduciaries of an association:<sup>97</sup>

“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.”

(Footnotes omitted.)

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<sup>92</sup> The term “connected person” is defined in section 1(1). For more information on the term “connected person”, see Interpretation Note 67 “Connected Persons”.

<sup>93</sup> Section 30C(1)(d)(i)(aa).

<sup>94</sup> Section 1(1).

<sup>95</sup> PA Olivier, S Strydom and GPJ van den Berg *Trust Law and Practice* [online] (My LexisNexis: August 2018) in paragraph 3.4.

<sup>96</sup> Trust Property Control Act.

<sup>97</sup> GJ Pienaar “Association” 2 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in paragraphs 166 and 178.

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 an SBFE.

### 8.1.3 Fiduciaries of a non-profit company

An SBFE incorporated, as an NPC is required under the Companies Act to have a minimum of three persons to incorporate the NPC<sup>98</sup> and to appoint at least three directors.<sup>99</sup> 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 –<sup>100</sup>

- in good faith that 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 man / woman test).

## 8.2 Decision-making powers

No single person may have the ability or authority, either directly or indirectly, to control the decision-making powers of the SBFE.<sup>101</sup>

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.”<sup>102</sup>
- “Power” as “the ability to cause or prevent an action, make things happen; the discretion to act or not act.”<sup>103</sup>

The organisational and managerial activities of an SBFE 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 an SBFE.

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<sup>98</sup> Section 13(1) read together with item 3 of Schedule 1 to the Companies Act.

<sup>99</sup> Section 66(2)(b) of the Companies Act.

<sup>100</sup> Section 76 of the Companies Act.

<sup>101</sup> Section 30C(1)(d)(ii).

<sup>102</sup> [www.businessdictionary.com/definition/decision-making.html](http://www.businessdictionary.com/definition/decision-making.html) [Accessed 16 September 2021].

<sup>103</sup> [www.businessdictionary.com/definition/power.html](http://www.businessdictionary.com/definition/power.html) [Accessed 16 September 2021].



The decision-making powers, for example, may include the following:

- Decisions that relate to the day-to-day or general functioning or operations of the SBFE.
- Strategic decisions affecting the SBFEs objectives, organisational goals and any other important policy matters.
- Financial decisions relating to the SBFEs source of finance such as issuing of shares, debentures, loans, and advances and managing cash flow.
- Investment decisions such as the selection and acquisition of assets in which funds will be invested by the SBFE.

#### **Example 4 – Decision-making powers**

*Facts:*

T is the founder of T Funding Enterprises, an association of persons established and governed under a constitution. The constitution provides that the founder –

- serves indefinitely on the governing body;
- presides as chairperson at all meetings of the governing body;
- has the casting vote to resolve any deadlocks;
- has the discretion to appoint office bearers, employees and persons to serve on the governing body; and
- determines the employees' remuneration.

T Funding Enterprises has applied to the Commissioner for approval as an SBFE.

*Result:*

T Funding Enterprises will not be granted approval as an SBFE because the founder, T, is vested with autonomous powers and directly controls the decision-making powers of T Funding Enterprises, which is contrary to the requirement in section 30C(1)(d)(ii) for approval as an SBFE.

### **8.3 Prohibition on distributions to any person**

An SBFE may not distribute any of its funds or assets directly or indirectly to any person, unless this occurs in the course of furthering its sole or principal object, which must be the provision of funds for SMMEs.<sup>104</sup>

The words “distribute”, “funds” and “assets” are not defined in the Act.

The word “distribute” is described in the *Dictionary.com* as –<sup>105</sup>

“to divide and give out in shares; deal out; allot”.

<sup>104</sup> Section 30C(1)(d)(iii).

<sup>105</sup> [www.dictionary.com/browse/distribute](http://www.dictionary.com/browse/distribute) [Accessed 16 September 2021].

The word “funds” is described in the *BusinessDictionary.com* as follows:<sup>106</sup>

“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.”

The word “funds” is interpreted to mean the financial resources, namely, money available to a business for spending in the form of cash, liquid securities and credit lines.<sup>107</sup>

*Investopedia* describes “assets” as follows:<sup>108</sup>

“An asset is a resource with economic value that an individual, corporation, or country owns or controls with the expectation that it will provide a future benefit. Assets are reported on a company’s balance sheet and are bought or created to increase a firm’s value or benefit the firm’s operations. An asset can be thought of as something that, in the future, can generate cash flow, reduce expenses, or improve sales, regardless of whether it’s manufacturing equipment or a patent.”

The word “assets” has a broad meaning and therefore includes movable and immovable as well as tangible or intangible assets of an entity.

The term “person” is defined and includes –<sup>109</sup>

“an insolvent estate, the estate of a deceased person, any trust, and any portfolio of a collective investment scheme, but does not include a foreign partnership”.

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. Foreign partnerships, however, are specifically excluded. A South African partnership is not a legal entity<sup>110</sup> and a partnership is not a person at common law.<sup>111</sup> A partnership would not be a person for income tax purposes, however, the individual partners are persons for income tax purposes.

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 to any person, the SBFE may be subject to the transgression penalties (see **9.2**).

An SBFE must use its funds and assets to carry on its sole or principal object (see **4**). Any funds or assets not used for such purpose may, however, not be distributed in any way to any person unless this happens because of the provision of funding for SMMEs.

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<sup>106</sup> [www.businessdictionary.com/definition/funds.html](http://www.businessdictionary.com/definition/funds.html) [Accessed 16 September 2021].

<sup>107</sup> See the meaning of “financial resources” in the *BusinessDictionary.com* available online at [www.businessdictionary.com/definition/financial-resources.html](http://www.businessdictionary.com/definition/financial-resources.html) [Accessed 16 September 2021].

<sup>108</sup> [www.investopedia.com/terms/a/asset.asp](http://www.investopedia.com/terms/a/asset.asp) [Accessed 16 September 2021]

<sup>109</sup> Section 1(1).

<sup>110</sup> *Michalow, NO v Premier Milling Co Ltd* 1960 (2) SA 59 (W) at 61.

<sup>111</sup> *Chipkin (Natal) (Pty) Ltd v C: SARS* 2005 (5) SA 566 (SCA), 67 SATC 243 at 246.

## 8.4 Prohibition on distributions to any employee or fiduciaries

An SBFE may not distribute, either directly or indirectly, any of its funds or assets (see 8.3) to any –<sup>112</sup>

- employee in relation to that SBFE;
- person that is a connected person<sup>113</sup> in relation to any such employee; or
- person accepting fiduciary responsibility for the SBFE (see 8.1).

The term “employee” is not defined for purposes of the Act, and should be given its ordinary meaning within the context it is used. The term “employee” is defined for purposes of the Fourth Schedule and means –<sup>114</sup>

- any person (other than a company) who receives remuneration (see 8.9) or to whom any remuneration accrues;
- any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker;<sup>115</sup>
- any labour broker (see 6.1);
- any person or class or category of person whom the Minister of Finance by notice in the *Government Gazette* declares to be an employee for the purposes of this definition;<sup>116</sup>
- any personal service provider (see 6.1).

*Silke on South African Income Tax* provides the following explanation regarding an employee:<sup>117</sup>

“Note that the scope of the term ‘employee’ is not restricted to persons who are ‘employees’ at common law, for example, under the law of master and servant, but includes all persons to whom ‘remuneration’, as widely defined in the Fourth Schedule, is paid or payable.”

### Example 5 – Non-exhaustive examples of prohibited distributions to any employee or connected person

It will be unacceptable if an SBFE distributes funds by –

- making a loan to any employee of that SBFE or any person that is a connected person in relation to such employee or a person accepting fiduciary responsibility for that SBFE, which is later written off;
- paying excessive salaries or wages not commensurate with services rendered; or

<sup>112</sup> Section 30C(1)(d)(iv).

<sup>113</sup> The term “connected person” is defined in section 1(1) and must be applied accordingly.

<sup>114</sup> Paragraph 1 of the Fourth Schedule.

<sup>115</sup> This type of employee is generally referred to as a “labour broker’s worker”. See AP de Koker & RC Williams *Silke on South African Income Tax* [online] (My LexisNexis: February 2020 in § 20.29.

<sup>116</sup> This type of “employee” is generally referred to as a “declared employee”. See AP de Koker & RC Williams *Silke on South African Income Tax* [online] (My LexisNexis: February 2020 in § 20.29.

<sup>117</sup> AP de Koker & RC Williams *Silke on South African Income Tax* [online] (My LexisNexis: February 2020 in § 20.29.

- donating assets to any employee of that SBFE or any person that is a connected person in relation to such employee or a person accepting fiduciary responsibility for that SBFE.

## 8.5 Use of funds

An SBFE is required to use substantially the whole of its funds (see 5) for its sole or principal object for which it has been established (see 4).<sup>118</sup>

The expression “substantially the whole” is not defined in the Act. In the strict sense, the expression “substantially the whole” is regarded by SARS to mean 90% or more. However, since SBFEs operate in an uncertain environment making proper planning difficult, SARS will accept a percentage of not less than 85%.<sup>119</sup> This percentage must be determined using a method appropriate to the circumstances and may be motivated by taking into account time or cost.

This requirement allows an SBFE to build up reserves to ensure some degree of financial sustainability and create an opportunity to earn passive income. Funds not used to provide funding for SMMEs may be accumulated or invested for future use in carrying on the sole or principal object of the SBFE. The funds may be invested as desired provided they do not amount to an indirect distribution of profits or the award of an impermissible benefit. It is expected that fiduciaries should act with prudence, integrity and reasonable care.

## 8.6 Distribution of assets held

An SBFE must within 12 months after the end of the relevant year of assessment (see 17.3) distribute or incur the obligation to distribute at least 25% of all amounts received or accrued in respect of assets (see 8.3) held, other than any amount received or accrued on the disposal of those assets, during that year of assessment.<sup>120</sup>

The words “incur” and “obligation” are not defined in the Act. The *Free Dictionary* describes the words separately as follows:

- “Incur” as “to become subject to and liable for, to have liabilities imposed by act or operation of law. Expenses are incurred, for example, when the legal obligation to pay them arises.”<sup>121</sup>
- “Obligation” as “a generic term for any type of legal duty or liability. Currently obligation is used in reference to anything that an individual is required to do because of a promise, vow, oath, contract, or law. It refers to a legal or moral duty that an individual can be forced to perform or penalized for neglecting to perform.”<sup>122</sup>

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<sup>118</sup> Section 30C(1)(d)(v).

<sup>119</sup> For further information, see Binding General Ruling (Income Tax) 20 “Interpretation of the Expression ‘Substantially the Whole’”.

<sup>120</sup> Section 30C(1)(d)(vi). This section was amended by section 52(1) of the Taxation Laws Amendment Act 23 of 2018 and came into operation on 1 January 2019. Before the amendment, the distribution had to occur during the year of assessment in which amounts from the disposal of assets were received or accrued by an SBFE. The ability of SBFEs to meet the distribution requirement during a year of assessment proved to be challenging especially when those amounts were received by an SBFE on or close to the last day of a particular year of assessment.

<sup>121</sup> <https://legal-dictionary.thefreedictionary.com/incurred> [Accessed 16 September 2021].

<sup>122</sup> <https://legal-dictionary.thefreedictionary.com/obligation> [Accessed 16 September 2021].

The distribution requirement is based on 25% of the gross amounts received or accrued in respect of assets held. In other words, expenditure is not taken into account. The fact that the percentage is based on gross receipts should not present any practical difficulties in meeting the distribution requirement because the percentage is low and the SBFE, not being a trading entity, is unlikely to incur large amounts of expenditure in relation to its passive investments. It does not relate to the payment of creditors.

The amounts required to be distributed must be used to provide funding for SMMEs and the relevant requirements must be adhered to (see 5).

The distribution requirement is not subject to the discretion of the Commissioner and cannot in general or in a particular instance be waived, deferred or reduced. The obligation to incur the required distribution is an absolute obligation that has no legal alternative since it is an unconditional duty.<sup>123</sup> There will be adverse consequences if an SBFE fails to distribute or incur the obligation to distribute assets held by it as required (see 9.2).

#### **Example 6 – Distribution of assets held**

*Facts:*

An SBFE invested R2 million of surplus funds. The SBFE derived interest income of R140 000 on the invested funds and paid fees of R8 000 to a financial management company to manage this investment during the year of assessment ending 28 February 2021.

The SBFE also received taxable dividend income from shares it held in a REIT<sup>124</sup> of R150 000 during the same year of assessment.

*Result:*

To comply with the distribution requirement the SBFE will be required to distribute to SMMEs at least R72 500 [(R140 000 + R150 000) × 25%] within but no later than 28 February 2022 year of assessment.

### **8.7 Personal or private interest of a member of the committee, board or body**

A member of the committee, board or body (see 8.1) of an SBFE may not have any personal or private interest, either directly or indirectly, in that SBFE.<sup>125</sup> Such a personal or private interest in an SBFE may have the potential to interfere with the responsibilities and objective judgement of a member who has accepted fiduciary responsibility for that SBFE.

A personal or private interest does not include only the personal, professional or business interests of a member themselves (direct interest) but would, it is submitted, include the personal, professional or business interests of any connected person in relation to such members (indirect interest). A personal or private interest will therefore arise when a member or any connected person in relation to a member directly or indirectly benefits financially or otherwise either from an action, or lack thereof, or from a decision by a member in a fiduciary capacity responsible for the management of an SBFE.

<sup>123</sup> See types of obligations described in <https://legal-dictionary.thefreedictionary.com/obligation> [Accessed 16 September 2021].

<sup>124</sup> This stands for “Real Estate Investment Trust” and is defined in section 1(1). For more information, see Interpretation Note 97 “Taxation of REITs and Controlled Companies”.

<sup>125</sup> Section 30C(1)(d)(vii).

Members in a fiduciary capacity responsible for the management of an SBFE should not take decisions to gain any financial or other material benefits for themselves or any connected person in relation to themselves but solely in the furtherance of the sole or principal object of the SBFE.

## 8.8 Activities

Substantially the whole (see **8.5**), which is not less than 85%, of the activities of the SBFE must be directed to the furtherance of its sole or principal object (see **4**).<sup>126</sup>

The word “activities” is not defined in the Act. The *CollinsDictionary.com* describes “activity” as follows:<sup>127</sup>

“An activity is something that you spend time doing. The activities of a group are the things that they do in order to achieve their aims.”

## 8.9 Remuneration

Employees (see **8.4**), office bearers, members or other persons may receive remuneration from an SBFE for services actually rendered to that SBFE provided the remuneration –<sup>128</sup>

- is not excessive taking into account the particular service rendered;
- is considered to be reasonable in the particular sector; and
- does not economically benefit any person in a manner inconsistent with the sole or principal object of the SBFE (see **5.3**).

The term “remuneration”<sup>129</sup> 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, among other things, may 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 an SBFE (see **12.5**).

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 SBFE may differ, each case will be considered on its own merit. The ultimate test remains whether the remuneration is reasonable in the sector in relation to the service rendered and the burden is on the SBFE to motivate that the remuneration is not excessive.

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<sup>126</sup> Section 30C(1)(d)(viii).

<sup>127</sup> [www.collinsdictionary.com/dictionary/english/activity](http://www.collinsdictionary.com/dictionary/english/activity) [Accessed 16 September 2021].

<sup>128</sup> Section 30C(1)(d)(ix).

<sup>129</sup> Paragraph 1 in Part I of the Fourth Schedule.

## 8.10 Dissolution or liquidation

On dissolution or liquidation, an SBFE must transfer its remaining assets to one or more of the following organisations:<sup>130</sup>

- Another SBFE.
- A PBO contemplated in paragraph (a)(i) of the definition of “public benefit organisation” in section 30(1).<sup>131</sup>
- An institution, board or body, which is exempt from tax under section 10(1)(cA)(i).<sup>132</sup>
- The government of South Africa in the national, provincial or local sphere.<sup>133</sup>

An SBFE may choose to whom it will distribute its remaining assets on dissolution, without prior approval from the Commissioner, if the recipient meets the dissolution requirement. An SBFE may not, on dissolution or liquidation, transfer any of its assets to individuals or other tax-paying entities and in so doing enable the recipients to share in the tax concession it has enjoyed.

Normally a process of winding-up precedes the formal process of dissolution. During the winding-up process all the assets of the SBFE are recovered and realised and the proceeds of such realisation are applied firstly to discharge the costs of winding-up (liquidation), then to pay claims of creditors in accordance with the relevant provisions of the law relating to insolvency. On dissolution of an SBFE all of its assets, or the proceeds of realised assets should have been realised and transferred. However, any assets or funds remaining after debts have been satisfied must be distributed in accordance with the dissolution requirement. There will be adverse consequences if an SBFE fails to transfer, or to take reasonable steps to transfer, its remaining assets as required (see **9.2**).

### 8.10.1 Termination of a trust

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 trust deed normally addresses the termination of a trust. The trustees will only be released from their responsibilities under the trust deed once the Master of the High Court has discharged them.

### 8.10.2 Dissolution of an association of persons

The dissolution of an association is described by *LAWSA* as follows:<sup>134</sup>

“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

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<sup>130</sup> Section 30C(1)(d)(x) and section 30C(5).

<sup>131</sup> This includes an NPC, trust or an association of persons incorporated, formed or established in South Africa, but excludes a branch of a foreign tax-exempt organisation established outside South Africa contemplated in paragraph (a)(ii) of the definition of “public benefit organisation” in section 30(1).

<sup>132</sup> An institution, board or body is established by or under any law and must be approved by the Commissioner before the exemption under section 10(1)(cA)(i) will apply.

<sup>133</sup> Section 10(1)(a).

<sup>134</sup> GJ Pienaar “Association” 2 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in paragraphs 192 and 195.

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.)

### 8.10.3 Winding-up and dissolution of a company

The winding-up of a company may occur voluntarily or compulsory by the court. A winding-up by the court is initiated by an application to court while a voluntary winding-up<sup>135</sup> is initiated by a resolution of the company.<sup>136</sup> A company remains a juristic person and retains all of its powers during winding-up. The company must from the beginning of the company's winding-up stop carrying on its business except to the extent required for the beneficial winding up of the company.<sup>137</sup> A company is dissolved as from the date that its name is removed from the companies register.<sup>138</sup>

### 8.11 Amendments to the founding document

The persons accepting fiduciary responsibility for the SBFE (see 8.1) must submit a copy of any amendment to its founding document (see 7) to the Commissioner within 30 days<sup>139</sup> from the date on which the amendment is affected.<sup>140</sup> This submission requirement will enable the Commissioner to ensure that any amendment is not contrary to the requirements of section 30C. It will be unacceptable for an entity to submit a founding document that complies 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.

### 8.12 Reporting

An SBFE must comply with any reporting requirements determined by the Commissioner from time to time.<sup>141</sup>

The Commissioner annually gives public notice in the *Government Gazette* of the persons that must furnish an income tax return.<sup>142</sup> Generally, the persons who are required to submit returns 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.

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;<sup>143</sup> or
- any association formed in the Republic to serve a specified purpose, beneficial to the

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<sup>135</sup> Section 80 of the Companies Act.

<sup>136</sup> Section 80(6) of the Companies Act.

<sup>137</sup> Section 80(8) of the Companies Act.

<sup>138</sup> Section 83(1) of the Companies Act.

<sup>139</sup> Section 4 of the Interpretation Act 33 of 1957 deals with the calculation of days and provides that when any particular number of days is prescribed for the doing of any act, or for any other purpose, the same will be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time will be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

<sup>140</sup> Section 30C(1)(d)(xi).

<sup>141</sup> Section 30C(1)(d)(xii).

<sup>142</sup> Section 25 of the TA Act read with section 66(1).

<sup>143</sup> Paragraph (a) of the definition of “company” in section 1(1).



public or a section of the public.<sup>144</sup>

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

An SBFE must therefore submit income tax returns (see **17**), even if its approval or exemption results in no tax liability. The income tax return enables the Commissioner to annually assess whether the SBFE is operating within the prescribed limits of its approval and to determine whether the partial taxation principles have been applied to receipts and accruals that do not qualify for exemption (see **10.1**).

### **8.13 Participation in tax avoidance schemes**

The SBFE must not knowingly become a party to, nor permit itself to be used as part of –<sup>145</sup>

- an impermissible avoidance arrangement contemplated in Part IIA of Chapter III;<sup>146</sup> or
- a transaction, operation or scheme contemplated in section 103(5).<sup>147</sup>

An SBFE may therefore 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 levy<sup>148</sup> 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. This rule will apply irrespective of whether the SBFE itself or any other person benefitted from the reduction, postponement or avoidance of any applicable tax, duty or levy.

The Act contains anti-avoidance provisions<sup>149</sup> the Commissioner may use if taxpayers and their advisers enter into schemes with the sole purpose of avoiding tax.<sup>150</sup>

According to *LAWSA* the ordinary meaning of avoiding a liability for a tax is –<sup>151</sup>

“to get out of the way of, escape or prevent an anticipated liability”.

(Footnotes omitted.)

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.

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<sup>144</sup> Paragraph (d) of the definition of “company” in section 1(1).

<sup>145</sup> Section 30C(1)(d)(xiii).

<sup>146</sup> Sections 80A to 80L.

<sup>147</sup> The cession of an amount in exchange for the right to receive dividends.

<sup>148</sup> See definition of “tax” in section 80L. These taxes, duties or levies, among other things, may include income tax (including capital gains tax), VAT, transfer duty, or employees’ tax.

<sup>149</sup> Section 103.

<sup>150</sup> M Kolitz “Tax Avoidance” [online] (My LexisNexis: October 1999).

<sup>151</sup> GC Palmer “Revenue Part 1” 22(1) (Second Edition Replacement) *LAWSA* [online] (My LexisNexis: 31 March 2018) in paragraph 696.

## 9. Non-compliance

### 9.1 Withdrawal of approval

The Commissioner may withdraw the approval as an SBFE if that SBFE has, in any year of assessment in any material respect or on a continuous or repetitive basis, failed to comply with section 30C or with its founding document as it relates to section 30C.<sup>152</sup>

The Act does not specify what constitutes a “material, continuous, or repetitive” failure by an SBFE to comply with section 30C 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.”<sup>153</sup>
- “A continuous process or event continues for a period of time without stopping.”<sup>154</sup>
- “Repetition” as “a thing, word, action, etc. that is repeated.”<sup>155</sup>

A failure by an SBFE to comply with section 30C in any material respect may therefore include a significant, relevant, and important failure,<sup>156</sup> 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 SBFE.

The Commissioner may withdraw the approval in any of the above circumstances but must decide each case on its own facts and circumstances. Notice, however, must be given to the transgressing SBFE of the intention to withdraw the approval as an SBFE and specify a period within which corrective steps must be taken.<sup>157</sup>

If no corrective steps are taken by the SBFE 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 SBFE occurred.<sup>158</sup>

The decision of the Commissioner to withdraw the SBFE approval is subject to objection and appeal (see **18**).

### 9.2 Consequences of withdrawal

On withdrawal of the approval as an SBFE the affected entity must transfer or take reasonable steps to transfer its remaining assets within six months or a longer period allowed by the Commissioner to –<sup>159</sup>

- another SBFE;

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<sup>152</sup> Section 30C(2).

<sup>153</sup> [www.collinsdictionary.com/dictionary/english/material](http://www.collinsdictionary.com/dictionary/english/material) [Accessed 16 September 2021].

<sup>154</sup> [www.collinsdictionary.com/dictionary/english/continuous](http://www.collinsdictionary.com/dictionary/english/continuous) [Accessed 16 September 2021].

<sup>155</sup> [www.collinsdictionary.com/dictionary/english/repetition](http://www.collinsdictionary.com/dictionary/english/repetition) [Accessed 16 September 2021].

<sup>156</sup> KA Adams “What Does ‘Material’ Mean” (September/October 2007) *Adams on Contract Drafting* available online at [www.adamsdrafting.com/downloads/deallawyers.9-07.pdf](http://www.adamsdrafting.com/downloads/deallawyers.9-07.pdf) [Accessed 16 September 2021].

<sup>157</sup> Section 30C(2).

<sup>158</sup> Section 30C(3).

<sup>159</sup> Section 30C(4).

- a PBO contemplated in paragraph (a)(i) of the definition of “public benefit organisation” in section 30(1);
- an institution, board or body that is exempt under section 10(1)(cA)(i); or
- the government of South Africa in the national, provincial or local sphere.

Failure to transfer, or to take reasonable steps to transfer, the remaining assets of the entity on withdrawal of its approval as an SBFE will result in an amount equal to the market value of the assets not transferred less the amount of the *bona fide* liabilities of the SBFE, being deemed to be taxable income that accrued to the SBFE during the year of assessment in which the approval was withdrawn.<sup>160</sup>

The term “taxable income” is defined as –<sup>161</sup>

“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”.

An entity 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.

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

- An NPC and an association of persons<sup>162</sup> 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%.
- A trust will be liable for tax on its taxable income at the rate applicable to trusts, which is currently 45%, subject to section 7 and section 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 Revenue Amendment Laws Act.<sup>163</sup>

### 9.3. Non-compliance by responsible person

A person who is in a fiduciary capacity responsible for the management of an SBFE (see 8.1) who intentionally fails to comply with any provision of section 30C or any provision in its founding document to the extent that it relates to section 30C, will be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding two years.<sup>164</sup>

<sup>160</sup> Section 30C(6).

<sup>161</sup> Section 1(1).

<sup>162</sup> Paragraph (d) of the definition of “company” in section 1(1).

<sup>163</sup> Section 5(2)(a).

<sup>164</sup> Section 30C(7).

## 10. Exemption from income tax

### 10.1 Partial taxation

An SBFE is allowed to carry on a business undertaking or trading activity provided its sole or principal object remains the provision of funding for SMMEs (see 4). Receipts and accruals from a business undertaking or trading activity will be exempt from income tax if they fall within one of the categories of exemption included in section 10(1)(cQ). The four categories are dealt with in 10.4. Each category of permissible business undertaking or trading activity has its own conditions and requirements and is applied separately.

There is no limit on the amount of receipts and accruals that can qualify as exempt from income tax under the categories in 10.4.1, 10.4.2 and 10.4.3. There, however, is a limitation on the amount of the exemption of the basic exemption discussed in 10.4.4.<sup>165</sup>

The broad principles in interpreting legislation in so far as they relate to partial taxation are discussed below. Since the facts and circumstances of each SBFE may differ, each situation must be considered on its own merits.

### 10.2 Exemption of receipts and accruals

Section 10(1)(cQ) exempts from income tax the “receipts and accruals” of an SBFE to the extent that they are derived in the manner specified in that section.

According to the definition of “gross income” in section 1(1), it includes the total amount received by or accrued to a person that is not of a capital nature unless specifically included under paragraphs (a) to (n). An amount will be “received” by an SBFE only if the SBFE receives it on its own behalf and for its own benefit.<sup>166</sup> An amount “accrues” to an SBFE when the SBFE is entitled to it and when the SBFE’s right to the amount is unconditional.<sup>167</sup> An amount is included in an SBFE’s gross income in the year of assessment in which that SBFE receives it or the year of assessment in, which it accrues to that SBFE, whichever, comes first.<sup>168</sup>

Receipts or accruals of a capital nature that are not specifically included in gross income would not be included in the receipts and accruals referred to in the opening words of section 10(1)(cQ) since they do not require exemption. 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” under section 26A. While a capital gain forming part of a “taxable capital gain” is potentially subject to income tax, the exemptions in section 10 do not apply to it because a capital gain is not a receipt or accrual. Paragraph 63B of the Eighth Schedule contains the rules for disregarding capital gains and losses of an SBFE (see 11.3).

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<sup>165</sup> Section 10(1)(cQ)(ii).

<sup>166</sup> *Geldenhuis v CIR* 1947 (3) SA 256 (C), 14 SATC 419; *CIR v People’s Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A), 52 SATC 9.

<sup>167</sup> *Lategan v CIR* 1926 CPD 203, 2 SATC 16; *Ochberg v CIR* 1933 CPD, 6 SATC 1.

<sup>168</sup> *SIR v Silverglen Investments (Pty) Ltd* 1969 (1) SA 365 (A), 30 SATC 199.

### 10.3 Meaning of business undertakings or trading activities in the context of section 30C

The terms “business” or “business undertaking”<sup>169</sup> are not defined in the Act. “Business” is, however, based on case law generally accepted to include anything that occupies the time, attention and labour of a person for profit.<sup>170</sup>

The *Dictionary of Legal Words and Phrases* defines “business” as follows:<sup>171</sup>

“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.”

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.<sup>172</sup>

On the issue of what constitutes “carrying on business”, Beadle CJ, in *Estate G v Commissioner of Taxes* said the following:<sup>173</sup>

“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.”

The term “trade” is defined and includes –<sup>174</sup>

“every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent ... or any design ... or any trade mark ...or any copyright ... or any property which is of a similar nature”.

The *Dictionary of Legal Words and Phrases* defines “trade” as follows:<sup>175</sup>

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

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<sup>169</sup> Section 10(1)(cQ)(ii).

<sup>170</sup> *Inter alia Smith v Anderson* (1880) (15 Ch.D.) at 258.

<sup>171</sup> RD Claassen [online] (My LexisNexis: June 2021).

<sup>172</sup> 1964 (2) SA 701 (SR), 26 SATC 168. See also *CIR v Stott* 1928 AD 252, 3 SATC 253 at 257, ITC 1283 (1978), 41 SATC 36 at 43.

<sup>173</sup> 26 SATC 168 at 173-174.

<sup>174</sup> Section 1(1)

<sup>175</sup> RD Claassen [online] (My LexisNexis: June 2021).

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 continuous turn-over of floating capital<sup>176</sup> when a taxpayer regularly buys and sells shares for purpose of making a profit, it will be a strong indicator that he deals in shares. The absence of profit, however, will not preclude a taxpayer's activities from being classified as a trade.<sup>177</sup> Each case, will however, be determined on its own merits.<sup>178</sup>

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", therefore, will also constitute "trade".

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 that is 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.<sup>179</sup>

If the SBFE has impermissible and permissible business undertakings or trading activities, the exemption will apply only to the receipts and accruals from permissible activities (see **10.4**). An apportionment will therefore have to be done by the SBFE (see **Example 9**).

The Act does not specify that the business undertaking or trading activity must be carried on by the SBFE. Legislation merely specifies that receipts and accruals from a business undertaking or trading activity of an SBFE may be exempt from income tax. An SBFE, for example, may be an income beneficiary<sup>180</sup> of a discretionary trust carrying on a business undertaking or trading activity. Any income distributed to an SBFE through the exercise of the trustees' discretion will be regarded as income from a business undertaking or trading activity. This distribution will be taken into account in the determination of the basic exemption (see **10.4.4**).

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<sup>176</sup> ITC 1675 (1998) 62 SATC 219; *Burgess v CIR* 1993 4 SA 161 (A) 181; ITC 770 (1953) 19 SATC 216-7; ITC 615 (1946), 14 SATC 399 at 402; *Modderfontein Deep Levels Ltd and another v Feinstein* 1920 TPD 288.

<sup>177</sup> *De Beers Holdings (Pty) Ltd v CIR* 1986 1 SA 8 (SCA) at 31.

<sup>178</sup> For more information on the "trade" requirement, see Interpretation Note 33 "Assessed Losses: Companies: The 'Trade' and 'Income from Trade' Requirements".

<sup>179</sup> *Platt v CIR* 1922 AD 42.

<sup>180</sup> The term "beneficiary" is defined in section 1(1).

## 10.4 Permissible business undertakings or trading activities

### 10.4.1 Integral and directly related business undertaking or trading activity

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 of the SBFE, namely, the provision of funding for SMMEs;<sup>181</sup>
- must be carried out or conducted on a basis substantially the whole of which is directed towards the recovery of cost;<sup>182</sup> and
- does not result in unfair competition in relation to taxable entities.<sup>183</sup>

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

The word “integral” is described in the *Dictionary.com* –<sup>184</sup>

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 –<sup>185</sup>

“without anything else being involved or in between”.

The word “related” is described in the *Dictionary.com* as –<sup>186</sup>

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

A business undertaking or trading activity will not be regarded as related to an SBFEs sole or principal object if it does not directly contribute to achieving the sole or principal object of the SBFE, which must be the provision of funding for SMMEs. Whether an activity contributes to achieving the SBFEs 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 achieving of the approved sole or principal object of an SBFE.

An unrelated business undertaking or trading activity would be an undertaking or activity conducted by an SBFE that is not directly related to the performance of the SBFEs approved sole or principal object. Any income derived from activities that are not integral and directly related to the sole or principal object of the SBFE are taxable less the basic exemption.

The use by an SBFE of the profits derived from any unrelated business undertaking or trading activity does not make the activity directly related to the performance by the SBFE or its sole or principal object. The use of assets to generate income, for example, the provision of various services or assets such as computers, printers, internet access, email, telephone, reception services for SMMEs at a monthly market-related fee, is not a related trading activity but income from a taxable trading activity.

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<sup>181</sup> Section 10(1)(cQ)(ii)(aa)(A).

<sup>182</sup> Section 10(1)(cQ)(ii)(aa)(B).

<sup>183</sup> Section 10(1)(cQ)(ii)(aa)(C).

<sup>184</sup> [www.dictionary.com/browse/integral](http://www.dictionary.com/browse/integral) [Accessed 16 September 2021].

<sup>185</sup> <https://dictionary.cambridge.org/dictionary/english/directly> [Accessed 16 September 2021].

<sup>186</sup> [www.dictionary.com/browse/related](http://www.dictionary.com/browse/related) [Accessed 16 September 2021].

It is a requirement that substantially the whole (see 8.5) of the integral and directly related business undertaking or trading activity must be conducted on a cost-recovery basis. 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. 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. In *C v Commissioner of Taxes* Goldin J stated the following on the meaning of “cost”:<sup>187</sup>

“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 –<sup>188</sup>

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

Trollip JA held in *SIR v Eaton Hall (Pty) Ltd* that –<sup>189</sup>

“...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’ ”.

The business undertaking or trading activity should not result in unfair competition with other taxable entities. An SBFE 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. An SBFE has an advantage in that it is not required to sacrifice a portion of its profit in the form of tax. Each case will be considered on its own merits to determine whether an SBFE has an unfair advantage. Various factors could be taken into account in such determination such as –

- whether the SBFE 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.

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<sup>187</sup> 1973 (4) SA 449 (R), 35 SATC 241 at 246 and 247.

<sup>188</sup> At 247.

<sup>189</sup> 1975 (4) SA 953 (A), 37 SATC 343 at 347.



### 10.4.2 Occasional business undertaking or trading activity

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.<sup>190</sup>

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

The *Longman Dictionary* describes “occasional” as –<sup>191</sup>

“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.

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 such as a dinner, dance, auction or a golf day that take place on an annual basis with the assistance of helpers or volunteers who are not compensated for their services. Fundraising activities will not be regarded as occasional if there is a frequency and continuity, and if such activities are pursued in a manner similar to commercial activities of taxpaying entities.

The word “substantial” is described in the *BusinessDictionary.com* as follows:<sup>192</sup>

“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.

The *Dictionary.com* describes “compensation” as –<sup>193</sup>

“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”.

The absence of compensation does not exclude the repayment of reasonable and necessary out-of-pocket expenditure to volunteers in assisting in the carrying on of the SBFEs occasional business undertakings or trading activities.

### 10.4.3 Ministerial approval

A business undertaking or trading activity may be approved by the Minister of Finance by notice in the *Government Gazette* by taking into account the –<sup>194</sup>

- the scope and benevolent nature of the undertaking or activity;
- the direct connection and interrelationship of the undertaking or activity with the sole or principal object of the SBFE;
- the profitability of the undertaking or activity; and
- the level of economic distortion that may be caused by the tax-exempt status of the SBFE carrying out the undertaking or activity.

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<sup>190</sup> Section 10(1)(cQ)(ii)(bb).

<sup>191</sup> [www.ldoceonline.com/dictionary/occasionally](http://www.ldoceonline.com/dictionary/occasionally) [Accessed 16 September 2021].

<sup>192</sup> [www.businessdictionary.com/definition/substantial.html](http://www.businessdictionary.com/definition/substantial.html) [Accessed 16 September 2021].

<sup>193</sup> [www.dictionary.com/browse/compensation](http://www.dictionary.com/browse/compensation) [Accessed 16 September 2021].

<sup>194</sup> Section 10(1)(cQ)(ii)(cc).

This category is intended to cater for exceptional business undertakings and trading activities, which fall outside the permissible categories of exemption and is therefore rarely invoked.

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

#### 10.4.4 Basic exemption

The receipts and accruals of an SBFE carrying on a business undertaking or trading activity not falling within the ambit of the permissible business undertaking or trading activity categories is taxable subject to the basic exemption. The basic exemption is determined as a threshold and applies to the total receipts and accruals derived from all non-qualifying business undertakings or trading activities.

The basic exemption is calculated as an amount equal to the greater of 5% of the total receipts and accruals of the SBFE derived during the relevant year of assessment<sup>195</sup> or R200 000.<sup>196</sup> The receipts and accruals referred to in the calculation of the threshold amount include amounts of a capital nature such as donations.

There is therefore a limit on the amount of receipts and accruals derived by an SBFE from the carrying on of a business undertaking or trading activity, which is exempt from income tax under the basic exemption because the SBFE receives only the benefit of either the greater of 5% or R200 000. The receipts and accruals from a business undertaking or trading activity, which exceeds the basic exemption threshold is subject to income tax (see **10.5**).

The basic exemption calculation merely determines the amount or threshold of the basic exemption to be applied to the receipts and accruals derived by the SBFE from carrying on a business undertaking or trading activity, which do not qualify for exemption. The calculation and application of the basic exemption to the receipts and accruals derived by an SBFE from carrying on business undertakings or trading activities cannot create a loss since it is not a deduction.

#### Example 8 – Basic exemption

*Facts:*

An approved SBFE had impermissible business undertakings during the 2021 year of assessment. The total receipts and accruals of the SBFE for the 2021 year of assessment were as follows:

	R
Donations and bequests	1 000 000
Income from permissible trading activities	300 000
Income from impermissible trading activities	<u>220 000</u>
Total receipts and accruals	<u>1 520 000</u>

<sup>195</sup> Section 10(1)(cQ)(ii)(dd)(A).

<sup>196</sup> Section 10(1)(cQ)(ii)(dd)(B).

*Result:*

The basic exemption 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 R1 520 000 is R76 000. Since this amount is less than the alternative threshold amount of R200 000, the SBFE will be entitled to an exemption of up to R200 000 in respect of its impermissible trading receipts and accruals that did not qualify for exemption under section 10(1)(cQ)(ii)(aa) to (cc). Its impermissible trading receipts of R220 000 will therefore be exempt to the extent of R200 000 under section 10(1)(cQ)(ii)(dd) while the excess of R20 000 will be subject to income tax at a rate of 28%.

## 10.5 Rate of tax

An SBFE liable to income tax on receipts and accruals not qualifying for exemption will pay tax at a rate of 28% or as prescribed annually in the Rates and Monetary Amounts and Amendment of Revenue Laws Act, on its taxable income, irrespective of whether it is incorporated as an NPC, formed as a trust or established as an association of persons (see 3).

### Example 9 – Determination of taxable income of an SBFE and tax payable

*Facts:*

An NPC providing funding for SMMEs has been approved by the Commissioner as an SBFE. The SBFE owns an office block from which it conducts its sole or principal object. The SBFE does not use the entire office block for its operational purposes and lets an unused floor to an unconnected third party at market-related rates for the full year. During the 2021 year of assessment, the SBFE derived income from, amongst others, the following activities:

- An investment made of R300 000 of its surplus funds from which interest income of R30 000 was derived.<sup>197</sup>
- The SBFE held a golf day to raise funds, which it advanced to SMMEs. This fundraising activity yielded R50 000.

During the same year, the SBFE provided funding of R300 000 to the following:

- RTY CC, a qualifying micro business, for purposes of purchasing trading stock.
- BNM CC, a qualifying micro business, for purposes of purchasing machinery.
- SDF (Pty) Ltd, a qualifying SBC, for purposes of acquiring land for erecting a retail store.

The following information is reflected in the financial statements of the SBFE for the year of assessment ending 28 February 2021:

<b>Receipts and accruals</b>	<b>R</b>
Donations	1 000 000
Grants	500 000
Rental income	300 000
Interest on investment of surplus funds	30 000
Proceeds from fundraising	50 000
Royalties – distribution from trust	<u>30 000</u>
<b>Total receipts and accruals</b>	<b><u>1 910 000</u></b>

<sup>197</sup> To comply with the distribution requirement the SBFE will be required to distribute to SMMEs at least R7 500 within but not later than 28 February 2022 year of assessment.

<b>Expenditure</b>	R
Funding provided	300 000
Rental expenses (rates, repairs, garden services) (direct expenditure)	50 000
Salaries (general (indirect) expenditure)	60 000
Accounting fees (general (indirect) expenditure)	10 000
Fundraising expenses	<u>12 000</u>
<b>Total expenditure</b>	<b><u>432 000</u></b>

**Note:** No portion of the general (indirect) expenditure of R70 000 has been incurred in the production of the investment income or the royalty income.

*Result:*

**Step 1 – Determine receipts and accruals exempt from tax: exempt section 10(1)(cQ)(i)**

	R
Donations	1 000 000
Grants	500 000
Interest on investment of surplus funds	<u>100 000</u>
	<b><u>1 600 000</u></b>

**Step 2 – Identify receipts and accruals from other business undertakings or trading activities: exempt section 10(1)(cQ)(ii)**

**Income of an occasional nature – exempt section 10(1)(cQ)(ii)(bb)**

	R
Proceeds from fundraising	<u>50 000</u>
<b>Total receipts and accruals exempt from tax (Step 1 + Step 2)</b>	<b><u>1 650 000</u></b>

**Income falling outside permissible business or trading categories**

Rental income	300 000
Royalties – distribution from trust	<u>30 000</u>
<b>Total receipts and accruals not exempt from tax</b>	<b><u>330 000</u></b>

**Step 3 – Calculation of basic exemption – section 10(1)(cQ)(ii)(dd)**

The basic exemption is limited to the greater of –

(a) 5% of total receipts and accruals of R1 980 000<sup>198</sup> = R99 000; or

(b) R200 000

Basic exemption is R200 000

**Step 4 – Apply basic exemption to receipts and accruals from business undertakings or trading activities not exempt**

The allocation is on a *pro rata* basis in relation to the total receipts and accruals from trading activities subject to income tax using the following formula:

Receipts and accruals from a trading activity / Total receipts and accruals not exempt from income tax × Basic exemption

**Application of formula to rental income**

$300\,000 / 330\,000 \times 200\,000 = R181\,818$

<sup>198</sup> Total receipts and accruals = 1 600 000 + 330 000 + 50 000.

### Application of formula to royalty income

$$30\,000 / 330\,000 \times 200\,000 = R18\,182$$

### Step 5 – Determine receipts and accruals subject to tax after deduction of basic exemption

	Rental R	Royalty R	Total R
Receipts and accruals from trade	300 000	30 000	330 000
Less: Basic exemption ( <i>pro rata</i> ) (step 4)	<u>(181 818)</u>	<u>(18 182)</u>	<u>(200 000)</u>
<b>Total receipts and accruals from trading activities subject to tax</b>	<u>118 182</u>	<u>11 818</u>	<u>130 000</u>

**Note:** This step is necessary as the basic exemption applies to receipts and accruals not qualifying for exemption, before calculating allowable deductions. A portion of the expenditure incurred must therefore be allocated to that portion of the receipts and accruals that relate to the basic exemption, as it does not qualify under section 23(f), since it will be in the production of exempt income.

### Step 6 – Allocate direct expenditure incurred in respect of taxable trading activities to “exempt” and “taxable” total receipts and accruals

Expenditure incurred in the production of taxable total receipts and accruals from trading activities must be apportioned between the “exempt” and “taxable” portions using the following formula:

$$\text{Total receipts and accruals subject to tax} / \text{Total receipts and accruals from trading activity} \times \text{Direct expenditure}$$

### Application of formula to rental income

Calculate (direct) expenditure attributable to taxable portion of rental income:

$$118\,182 / 300\,000 \times 50\,000 = R19\,697$$

$$\text{Direct deductible expenditure attributable to “taxable” portion of rental income} = R19\,697$$

### Step 7 – Calculate taxable portion of receipts and accruals from the office block before allowable general expenditure

Total receipts and accruals subject to tax (step 5)	R 118 182
Less: Allowable expenditure (step 6)	<u>(19 697)</u>
<b>Taxable receipts and accruals before deduction of general expenditure</b>	<u>98 485</u>

### Step 8 – Calculate general (indirect) expenditure

Expenditure incurred that does not specifically relate to a particular source of income but which can be attributed to various sources of receipts and accruals must be apportioned on a *pro-rata* basis using the following formula:

$$\text{Specific source of receipts and accruals} / \text{Total receipts and accruals} \times \text{General expenditure}$$

**Step 9 – Source of receipts and accruals to which general expenditure is to be apportioned (based on formula in step 8)**

	Total receipts R
Donations	1 500 000
Rental	300 000
Proceeds from fundraising	<u>50 000</u>
<b>Total receipts and accruals (excluding investment and royalty)</b>	<u><b>1 850 000</b></u>

**Application of formula (step 8) to rental income**

$$300\,000 / 1\,850\,000 \times 70\,000 = R11\,351$$

**Note:** For purposes of this Note, the formula has only been applied to rental income, but the formula must be applied to all other sources of receipts and accruals.

**Proportionate general expenditure to be deducted from specific source of receipts and accruals**

Specific source of receipts and accruals	Total Receipts R	Allocated Expenditure R
Rent	300 000	11 351
Proceeds from fundraising	<u>50 000</u>	<u>1 892</u>
<b>Total</b>	<u><b>80 000</b></u>	<u><b>13 243</b></u>

**Step 10 – Allocation of general (indirect) expenditure between “taxable” and “exempt” portion of rental income**

Total receipts and accruals from letting of the office block subject to tax (step 5) / Total receipts and accruals from rental × Allocated expenditure (step 9)

$$118\,182 / 300\,000 \times 11\,351 = R4\,472$$

**Step 11 – Determine taxable income from the office block**

Total receipts and accruals from rental subject to tax (step 5)	R 118 182
Less: Direct expenditure determined (step 6)	<u>(19 697)</u>
	98 486
Less: General (indirect) expenditure determined (step 10)	<u>(4 472)</u>
<b>Taxable rental income</b>	<u><b>94 014</b></u>

**Step 12 – Calculation of total taxable income**

Taxable income from the office block (step 11)	R 94 014
Taxable income from trust distribution (Royalties) (step 5)	<u>11 818</u>
<b>Total taxable income</b>	<u><b>105 832</b></u>

**Step 13 – Calculate income tax payable**

Taxable income R105 832 at 28% (2020/2021)

<b>Income tax payable</b>	<b>R29 633</b>
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## 11. Exemption from other taxes

In addition to being exempt from the payment of income tax on specified receipts and accruals (see 10), SBFES will also, enjoy the benefit of being exempt from other taxes and duties.<sup>199</sup>

### 11.1 Donations tax

Donations tax is payable on the value of any property disposed of by donation by any resident<sup>200</sup> (the donor) to another person (the donee)<sup>201</sup> at a rate of –

- 20% of 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;<sup>202</sup> and
- 25% of that value to the extent that it exceeds R30 million.<sup>203</sup>

A donation comprises any gratuitous disposal of property including any gratuitous waiver or renunciation of a right, for example, the waiver of debt.<sup>204</sup> 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.<sup>205</sup> 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.<sup>206</sup>

Donations made by or to an SBFES are exempt from the payment of donations tax.<sup>207</sup>

### 11.2 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.<sup>208</sup> Although dividends tax is part of the Act, it is a separate tax from income tax.<sup>209</sup>

Dividends tax is levied at the rate of 20%<sup>210</sup> of the amount of a dividend paid by a company that is a resident.<sup>211</sup>

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.<sup>212</sup>

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<sup>199</sup> For more information on any of these taxes and duties, see *Taxation in South Africa*.

<sup>200</sup> The term “resident” is defined in section 1(1).

<sup>201</sup> The term “donee” is defined in section 55(1).

<sup>202</sup> Section 64(1)(a)(i).

<sup>203</sup> Section 64(1)(a)(ii).

<sup>204</sup> The term “donation” is defined in section 55(1).

<sup>205</sup> Section 58(1).

<sup>206</sup> Section 59.

<sup>207</sup> Section 56(1)(h).

<sup>208</sup> 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.

<sup>209</sup> For more information, see *Comprehensive Guide to Dividends Tax*.

<sup>210</sup> Section 64E(1). The rate of dividends tax increased from 15% to 20% on any dividend paid on or after 22 February 2017.

<sup>211</sup> A reduced or nil rate may apply under specific circumstances.

<sup>212</sup> 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

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.<sup>213</sup>

Generally, a company that declares and pays 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 which case, the company paying the dividend is potentially liable for the dividends tax unless an exemption applies.

It is not the responsibility of the company or regulated intermediary<sup>214</sup> paying the dividend to determine who the beneficial owner of a dividend is and whether the 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. These exemptions apply to all entities included in the definition of “company”.<sup>215</sup>

A dividend paid to an SBFE, which is a resident company is exempt from dividends tax.<sup>216</sup> This exemption applies only if the SBFE 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 SBFE 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.<sup>217</sup>

The Commissioner has not issued forms to be used for purposes of a declaration or written undertaking referred to above but has prescribed the required wording and minimum information required.<sup>218</sup>

The obligation lies with an SBFE who 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.

It is important for any SBFE that holds investments through a trust to determine whether it has a vested right to a dividend before it is paid by the company 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 a trust will be regarded as the beneficial owner. Should the trust be the beneficial owner of the dividend, the 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 year of assessment may be able to claim a refund of the dividends tax withheld.<sup>219</sup>

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Act. A listed share could include a share in a foreign company whose shares are listed on a South African exchange.

<sup>213</sup> The term “beneficial owner” is defined in section 64D.

<sup>214</sup> 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.

<sup>215</sup> Section 1(1).

<sup>216</sup> Sections 64F(1)(i) and 64FA(1)(a).

<sup>217</sup> Sections 64G(2)(a) and 64H(2)(a).

<sup>218</sup> For more information, see *Business Requirements Specifications: Administration of Dividends Tax*.

<sup>219</sup> For more information on the definition “beneficial owner”, see *Comprehensive Guide to Dividends Tax*.



An SBFE receiving a dividend that is exempt or partially exempt from dividends tax<sup>220</sup> is not required to submit to SARS a Dividends Tax Return (DTR02).<sup>221</sup>

Certain sections were introduced in order to counter the potential use of SBFEs in schemes, which essentially seek to convert dividends that are subject to dividends tax to exempt dividends.<sup>222</sup>

### 11.3 Capital gains tax

“Capital gains tax” is not a separate tax but represents the portion of income tax payable on a “taxable capital gain”<sup>223</sup> included in taxable income under section 26A. A taxable capital gain or assessed capital loss is determined under the Eighth Schedule.<sup>224</sup>

Any capital gain or capital loss made by an SBFE on the disposal of an asset falling into one of the following three categories must be disregarded:<sup>225</sup>

- Category 1: Non-trading assets. This category applies to assets that are not used by an SBFE in carrying on any business undertaking or trading activity. It covers assets that are not “used” but are “held”, such as investments in the nature of shares, or participatory interests in collective investment schemes.<sup>226</sup>
- Category 2: Minimal-trading assets. This category applies when substantially the whole of the use of the asset by an SBFE was directed at a purpose other than carrying on a business undertaking or trading activity.<sup>227</sup> An example of such an asset is one that is used 10% of the time for trading purposes and 90% of the time for funding SMMs. The term “substantially the whole of the use” is explained in **8.5**. Such assets do not fall into the first category because 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, a proportion based on time, floor area or a combination of the two may be appropriate.
- Category 3: Permissible trading assets. This category applies when substantially the whole of the use of the asset by the SBFE was directed at carrying on a business undertaking or trading activity that qualifies for exemption (see **10.4**).<sup>228</sup>

Any capital gain or capital loss made on the disposal of an asset used in a trading activity or business undertaking that does not fall within the ambit of the permissible business or trading activities must not be disregarded.

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<sup>220</sup> Section 64F or 64FA.

<sup>221</sup> Section 64K(1A) was amended by section 1 of the Tax Administration Laws Amendment Act 22 of 2018 with effect from 17 January 2019.

<sup>222</sup> For example, section 64EB.

<sup>223</sup> The term “taxable capital gain” is defined in section 1(1) and is the amount determined under paragraph 10 of the Eighth Schedule.

<sup>224</sup> See *ABC of Capital Gains Tax for Companies* for a very basic overall understanding of the subject, *Tax Guide for Share Owners*, which contains a detailed commentary on most aspects of CGT affecting the holding of shares, and *Comprehensive Guide to Capital Gains Tax* for a very detailed explanation on CGT including a paragraph on SBFEs.

<sup>225</sup> Paragraph 63B of the Eighth Schedule was inserted by section 90(1) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 March 2015.

<sup>226</sup> Paragraph 63B(1)(a) of the Eighth Schedule.

<sup>227</sup> Paragraph 63B(1)(b)(i) of the Eighth Schedule.

<sup>228</sup> Paragraph 63B(1)(b)(ii) of the Eighth Schedule.

Any taxable capital gain, which is equal to the net capital gain<sup>229</sup> multiplied by the inclusion rate of 80% for an SBFEE,<sup>230</sup> must be included in the SBFEE's taxable income and will be taxed at the rate of tax applicable to SBFEEs (see **10.5**).

## **12. Other tax issues**

### **12.1 Provisional tax**

Provisional tax<sup>231</sup> is dealt with in the Fourth Schedule.<sup>232</sup> 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 taxpayer<sup>233</sup> is required to estimate taxable income for a year of assessment and calculate provisional tax payable on that estimate.

SBFEEs are excluded from the definition of "provisional taxpayer" in the Fourth Schedule and are not required to submit provisional tax returns.<sup>234</sup> Any liability to income tax on taxable income will become payable on assessment.

### **12.2 Estate duty**

Estate duty is levied under the Estate Duty Act 45 of 1955 (Estate Duty Act) at a 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.<sup>235</sup>

No exemption for estate duty is provided for bequests to SBFEEs. Any property bequeathed to an SBFEE will therefore not qualify to be excluded from the value of the estate.

### **12.3 Transfer duty**

Transfer duty is levied under the Transfer Duty Act 40 of 1949 (Transfer Duty Act) on a sliding scale on the value of any property<sup>236</sup> acquired by any person.<sup>237</sup> The rates vary from 0% to 13% for all persons. The person acquiring the property (the transferee) is normally the person who is liable for the payment of transfer duty.

Certain transfer duty exemptions may apply in different circumstances.<sup>238</sup> There, however, is no specific exemption, which applies to an SBFEE. One of the main exemptions provides that if a supply of property is subject to VAT, it will be exempt from transfer duty.<sup>239</sup>

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<sup>229</sup> The term "net capital gain" is defined in paragraph 1 and is the amount determined under paragraph 8 of the Eighth Schedule.

<sup>230</sup> Paragraph 10(c) of the Eighth Schedule. The inclusion rate of 80% applies to years of assessment commencing on or after 1 March 2016.

<sup>231</sup> The term "provisional tax" is defined in paragraph 1 of that Schedule.

<sup>232</sup> For comprehensive information on provisional tax, see *Taxation in South Africa and Guide for Provisional Tax*.

<sup>233</sup> The term "provisional taxpayer" is defined in paragraph 1 of the Fourth Schedule.

<sup>234</sup> Paragraph (ee) of the exclusions to the definition of "provisional taxpayer" in paragraph 1 of the Fourth Schedule.

<sup>235</sup> Section 2(2) and at the rate set out in the First Schedule to the Estate Duty Act.

<sup>236</sup> The term "property" is defined in section 1(1) of the Transfer Duty Act.

<sup>237</sup> For further information on transfer duty in general and the processing of transactions on eFiling, see *Guide for Transfer Duty via eFiling* and *Transfer Duty Guide*.

<sup>238</sup> Section 9 of the Transfer Duty Act.

<sup>239</sup> Section 9(15) of the Transfer Duty Act.

Subject to any exemption that may apply, an SBFE will be liable to pay transfer duty on the acquisition of any property from any person that is not a VAT vendor. Transfer duty will also be payable when property is acquired from a vendor that did not use the property for enterprise purposes under the VAT Act. This situation will apply, for example, to a property that was used for private purposes, exempt supplies or other non-taxable purposes by the vendor immediately before being supplied.

## 12.4 Securities transfer tax

The Securities Transfer Tax Act 25 of 2007 (STT Act) provides that a securities transfer tax (STT) must be levied at the rate of 0.25%<sup>240</sup> on the taxable amount<sup>241</sup> of the transfer<sup>242</sup> of every security<sup>243</sup> issued by a close corporation or company incorporated in South Africa as well as foreign companies listed on an exchange.<sup>244</sup>

The Securities Transfer Tax Administration Act 26 of 2007 (STT Administration Act) contains the administration provisions governing the payment of STT. Any STT payment must be made electronically through SARS e-STT system.<sup>245</sup>

The exemptions from STT are contained in section 8(1) of the STT Act. There, however, is no specific exemption for STT for SBFEs.

## 12.5 Employees' tax

Employees' tax is dealt with in the Fourth Schedule. 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 (see 8.9) 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 liability<sup>246</sup> of an employee (see 8.4), calculated on an annual basis 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 remuneration to any person.

An SBFE is not exempt from the obligation to deduct or withhold employees' tax. The SBFE must register as an employer for purposes of employees' tax. The PAYE to be deducted or withheld is calculated according to the tax deduction tables prescribed by the Commissioner.

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<sup>240</sup> Section 2(1) of the STT Act.

<sup>241</sup> Sections 3(1), 4, 5 and 6 of the STT Act determine the relevant taxable amount.

<sup>242</sup> The term "transfer" is defined in section 1 of the STT Act and, save for certain exclusions, includes the transfer, sale, assignment, cession or disposal in any manner of a security or the cancellation or redemption of that security.

<sup>243</sup> The term "security" is defined 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.

<sup>244</sup> The term "exchange" means and "exchange" as defined in section 1 of the Financial Markets Act 19 of 2012 and licensed under section 9 of that Act.

<sup>245</sup> Sections 3(2) and 5 of the STT Administration Act. 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 External Reference Guide – Securities Transfer Tax*.

<sup>246</sup> Paragraph 28 of the Fourth Schedule.

An SBFE, which is an employer, must register for employees' tax within 21 business days of becoming an employer.<sup>247</sup> Registration is done by completing the prescribed application form EMP 101e and submitting it to SARS. The application form EMP 101e is available at all SARS branch offices as well as on the SARS website.

A registered employer must complete and submit the monthly return EMP 201 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 employees' 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.

## 12.6 Unemployment insurance fund contributions

The unemployment insurance fund (UIF)<sup>248</sup> gives short-term relief to workers when they become unemployed or unable to work because of maternity, adoption leave, or illness. It also provides relief to the dependents of a deceased contributor.<sup>249</sup>

The unemployment insurance system in South Africa is governed by the Unemployment Insurance Act 63 of 2001 (Unemployment Insurance Act) 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 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 periods.

An SBFE 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 Labour<sup>250</sup> 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.

## 12.7 Skills development levy

Skills development levy (SDL) is a compulsory levy to fund education and training under the Skills Development Levies Act 9 of 1999 (SDL Act).<sup>251</sup> SARS administers the collection of this levy, which is levied based broadly on 1% of the payroll of employers. Employers providing training to employees may receive grants from the relevant Sector Education and Training Authorities (SETAs).

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<sup>247</sup> Paragraph 15(1) of the Fourth Schedule read with Chapter 3 of the TA Act.

<sup>248</sup> For more information, see the *Guide for Employers in respect of the Unemployment Insurance Fund*.

<sup>249</sup> Section 2 of the Unemployment Insurance Act.

<sup>250</sup> Information is available on the Department of Labour's website at [www.labour.gov.za](http://www.labour.gov.za).

<sup>251</sup> For more information, see the *Quick Reference Guide for Skills Development Levy*.

Employers whose annual payroll will not exceed R500 000 in the following 12 months are exempt from paying the levy.<sup>252</sup>

## 12.8 Value-added tax

Value-added tax is an indirect tax levied under the VAT Act and is based on the consumption of goods and services in the economy. Value-added tax must be included in the selling price of every taxable supply of goods or services made by certain traders (vendors) carrying on an enterprise in South Africa. A vendor is a person who is registered, or required to be registered for VAT.

Value-added tax is currently levied at a standard rate of 15% on most supplies 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. Supplies attracting VAT at either the standard or zero rate are called “taxable supplies”. Certain goods are also exempt when supplied in, or imported into South Africa. Value-added tax is payable on imported services only if those services are acquired for exempt, private or other non-taxable purposes.

Value-added tax 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.

The term “small business funding entity” used for purposes of income tax is not used in the VAT Act and there are no specific rules intended for an SBFE contained in the VAT Act. However, in light of the requirements to be approved as an SBFE for purposes of income tax, an SBFE may qualify as an “association not for gain” for purposes of VAT,<sup>253</sup> regardless of whether it qualifies for the exemption of certain receipts and accruals under section 10(1)(cQ). Further, since an SBFE is not a PBO, it will not qualify to be a “welfare organisation”<sup>254</sup> for purposes of VAT.

Considering that an SBFE exists to provide funding (money) for SMMEs as its sole or principal object an SBFE would typically not qualify as an enterprise for purposes of VAT. The failure to qualify as an enterprise is because loans constitute exempt supplies and the provision of money by way of donation does not qualify as a supply of “goods” or “services”. An SBFE, however, may still qualify to register for VAT to the extent that, in addition to the provision of funding, it also makes supplies of goods or services for a consideration in carrying on other enterprise activities falling within the scope of VAT.

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<sup>252</sup> Section 4(b) of the SDL Act.

<sup>253</sup> Paragraph (b) of the definition of “association not for gain” in section 1(1) of the VAT Act.

<sup>254</sup> The term “welfare organisation” is defined in section 1(1) of the VAT Act.

### 12.8.1 Association not for gain

An “association not for gain” is essentially a religious institution or other society, association or organisation that is not carried on for profit and is required to use any property or income solely in the furtherance of its aims and objects.<sup>255</sup>

An SBFE qualifying as an association not for gain and that meets the requirements for compulsory or voluntary VAT registration is treated like any other business that makes taxable supplies and will be liable to register and account for VAT according to the normal VAT rules that apply to all vendors. There, however, are a few special provisions that apply to associations not for gain.<sup>256</sup>

### 12.8.2 Registration

A person cannot register for VAT<sup>257</sup> if no supplies of goods or services are made, or if supplies are made for no consideration, or if only exempt supplies are made. Examples of supplies that are exempt from VAT include the rental of dwellings, certain supplies of donated goods or services, certain educational services, financial services and public transport by road or rail.<sup>258</sup> An SBFE may therefore register for VAT only to the extent that it carries on other enterprise activities falling within the scope of VAT, that are over and above the activities of providing funds (money) for SMMEs.

Any person, including an association not for gain,<sup>259</sup> is required to register for purposes of VAT if an enterprise is carried on and taxable supplies in excess of R1 million are made in any consecutive 12-month period or are expected to be made within a 12-month period under a written contract.

Alternatively, if the entity does not meet the compulsory registration threshold of R1 million, it may choose to register voluntarily if taxable supplies in excess of R50 000 have been made in a consecutive 12-month period, or if it complies with certain other requirements for voluntary registration prescribed in the relevant regulation.

### 12.8.3 Donations

The characteristics of a donation<sup>260</sup> are as follows:

- It includes a gratuitous payment of an amount of money or the gratuitous supply of goods or services to an association not for gain.
- The donation must be for the purposes of carrying on, or the carrying out, of the purposes of that association not for gain.
- There may not be any identifiable direct valuable benefit arising in the form of a supply of goods or services to the donor or a connected person in relation to the donor.
- A payment made by a public authority or municipality does not qualify as a donation.

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<sup>255</sup> The term “association not for gain” is defined in section 1(1) of the VAT Act.

<sup>256</sup> For more information on these special rules and a more comprehensive discussion on the VAT treatment of an association not for gain, see *VAT 414 – Guide for Associations not for Gain and Welfare Organisations*.

<sup>257</sup> For more information on VAT registration, see *VAT 404 – Guide for Vendors*.

<sup>258</sup> Section 12 of the VAT Act.

<sup>259</sup> The term “association not for gain” includes a “welfare organisation”.

<sup>260</sup> The term “donation” is defined in section 1(1) of the VAT Act.

A donation made by a donor to an association not for gain is specifically excluded from the definition of “consideration” and is not regarded as payment made for a supply of goods or services. Consequently, there will be no output tax payable by the donee if any money, goods or services are received as a donation, and the donor will not be entitled to deduct any input tax on the amounts donated.

Generally, the donor will not be entitled to deduct any input tax on any cash donations made or on any goods or services donated to an SBF. An SBF receiving a cash donation will not declare any output tax on that receipt. The following supplies by an SBF are exempt from VAT:

- Financial services.
- The subsequent sale of goods or services received as a donation by an SBF.
- The sale of goods manufactured by an SBF if at least 80% of the value of the materials used to manufacture the goods consists of donated goods.

### **13. Administrative provisions under the Tax Administration Act**

The TA Act<sup>261</sup> 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.<sup>262</sup>

Some administrative provisions that apply only to, and are unique to, the administration of a specific tax type remain in the Act imposing 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.<sup>263</sup> If there is any inconsistency between the TA Act and any other tax Act, the other Act prevails.<sup>264</sup>

General administrative provisions contained in the TA Act relating to, for example, record-keeping (see **16**), returns (see **17**), assessments and dispute resolution (see **18**), interest, refunds and anti-avoidance will therefore apply to SBFs.

### **14. Furnishing of information**

The Commissioner may in enforcing the provisions of the Act, submit a written request to any person to furnish information about any SBF and may require that person to –<sup>265</sup>

- answer any questions relating to the SBF;
- make books of account, records or other documents relating to the SBF available for inspection; or
- meet with the Commissioner’s representative and produce for examination any documents relating to the SBF.

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<sup>261</sup> The TA Act came into effect on 1 October 2012.

<sup>262</sup> For comprehensive information relating to taxpayers’ obligations and entitlements under the TA Act, see *SARS Short Guide to the Tax Administration Act, 2011 (Act No. 28 of 2011)*.

<sup>263</sup> Section 4(2) of the TA Act.

<sup>264</sup> Section 4(3) of the TA Act.

<sup>265</sup> Section 46(1) of the TA Act.

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 posed by SARS is guilty of an offence and on conviction is subject to a fine or imprisonment for a period not exceeding two years.<sup>266</sup>

## 15. Changes in registered particulars

An SBFEE must inform SARS of changes in its registered particulars to ensure that SARS has the most accurate and current information. An SBFEE must communicate to SARS any changes in postal, physical or electronic addresses, representative taxpayer<sup>267</sup> and banking particulars.<sup>268</sup>

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.<sup>269</sup>

## 16. Record-keeping

All SBFEEs are required to keep records for five years from the date of the submission of a return.<sup>270</sup> A return<sup>271</sup> 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.<sup>272</sup>

The record retention periods for records, books of account or documents required to be kept and retained are as follows:

- Five years from the date of the submission of a return.<sup>273</sup>
- 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.<sup>274</sup>
- 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, decision becomes final, or the applicable five-year period has elapsed, whichever is the later.<sup>275</sup>
- A person notified of, or 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.<sup>276</sup>

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<sup>266</sup> Section 234(h)(i) and (ii) of the TA Act.

<sup>267</sup> The term “representative taxpayer” is defined in section 1(1).

<sup>268</sup> Section 23 of the TA Act.

<sup>269</sup> Section 234(a) of the TA Act.

<sup>270</sup> Section 29(3) of the TA Act.

<sup>271</sup> The term “return” is defined in section 1 of the TA Act.

<sup>272</sup> Section 32 of the TA Act.

<sup>273</sup> Section 29(2)(a) read with section 29(3)(a) of the TA Act.

<sup>274</sup> Section 29(2)(b) of the TA Act.

<sup>275</sup> Section 32(b) of the TA Act.

<sup>276</sup> Section 32(a) of the TA Act.



- Indefinitely if a document is relevant for future years of assessments 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 income 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.

The following are 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

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, an SBFEE is required to keep and retain its records in their original form, in an orderly fashion and in a safe place.<sup>277</sup>

The electronic form of record-keeping<sup>278</sup> is regulated by the Electronic Record-Keeping Rules.<sup>279</sup> The rules require that electronic records must be kept in their original form,<sup>280</sup> 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.

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.<sup>281</sup>

## 17. Income tax returns

The Commissioner annually gives public notice in the *Government Gazette* of the persons that must furnish an income tax return.<sup>282</sup>

The prescribed Income Tax Return for Exempt Organisations (IT12EI) applicable to SBFEEs must be submitted on an annual basis. It may be obtained from –

- the eFiling website;

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<sup>277</sup> Section 30 of the TA Act.

<sup>278</sup> For further information, see *Electronic Communications Guide*.

<sup>279</sup> See Government Notice 787 in *Government Gazette* 35733 of 1 October 2012.

<sup>280</sup> 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.

<sup>281</sup> Section 234(e) of the TA Act.

<sup>282</sup> Section 66(1).

- the TEU;
- any SARS branch office; or
- the SARS National Contact Centre.

A return must be a full and true return<sup>283</sup> and be signed by the SBFEs or by the SBFEs duly authorised representative. The person signing the return will be regarded as being cognisant of the statements made in the return.<sup>284</sup>

Non-receipt of an income tax return does not affect the obligation to submit an income tax return.<sup>285</sup>

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.<sup>286</sup>

### **17.1 Taxpayer reference number**

A taxpayer reference number is allocated on completion of registration for purposes of income tax.<sup>287</sup> The taxpayer reference number must be included when filing a return or any document with SARS.

### **17.2 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.

Income tax returns may be submitted manually or electronically on the eFiling website.

### **17.3 Year of assessment**

An SBFE, which is a trust, will have a year of assessment<sup>288</sup> 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.<sup>289</sup>

An SBFE, which is an NPC or an association of persons established under a constitution or any other written instrument<sup>290</sup> 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.

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<sup>283</sup> Section 25(2) of the TA Act.

<sup>284</sup> Section 25(3) of the TA Act.

<sup>285</sup> Section 25(4) of the TA Act.

<sup>286</sup> Section 234(d) of the TA Act.

<sup>287</sup> The term “taxpayer reference number” is defined in section 1 of the TA Act and means the number referred to in, and allocated under section 24 of the same Act.

<sup>288</sup> The term “year of assessment” is defined in section 1(1).

<sup>289</sup> For more information, see Interpretation Note 19 “Year of Assessment of Natural Persons and Trusts: Accounts Accepted to a Date other than the Last Day of February”.

<sup>290</sup> An association of persons is for purposes of income tax regarded as a “company”. See paragraph (d) of the definition of “company” in section 1(1).

## 17.4 Supporting documentation

It is not a requirement for supporting documents to be submitted together with the income tax return. The SBFE will be notified if supporting documentation is required to substantiate any aspect of the income tax return.

An SBFE 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 –<sup>291</sup>

- 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 or payment or debit.

The accounts must be signed by a person responsible for the SBFE in a fiduciary capacity (see 8.1) and by the person who prepared them on behalf of the SBFE.

## 17.5 Financial statements

An SBFE, which is an NPC, may be required to be audited or independently reviewed under the Companies Act taking into account, for example, the category of the company and its public-interest score.<sup>292</sup>

## 18. Objection and appeal

Any decision of SARS in the exercise of its discretion under section 30C is subject to objection and appeal.<sup>293</sup>

The Commissioner's discretion under section 30C will be exercised to determine whether an entity may be approved as an SBFE.

An SBFE may object to any decision or an assessment within 30 business days<sup>294</sup> from the date of the decision or assessment<sup>295</sup> in accordance with Chapter 9 of the TA Act read with the "rules"<sup>296</sup> as published in the Government Notice 550 in *Government Gazette* 37819 of 11 July 2014.<sup>297</sup>

The objection must be made on the prescribed form and specify in detail the grounds on which it is made.<sup>298</sup> SARS will consider the objection and may disallow the objection or allow the objection in completely or in part.

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<sup>291</sup> Section 28 of the TA Act.

<sup>292</sup> Section 30(2) of the Companies Act read with regulations 27, 28 and 29 of the Companies Regulations, 2011.

<sup>293</sup> Section 3(4)(b).

<sup>294</sup> The term "business day" is defined in section 1 of the TA Act.

<sup>295</sup> For more information, see Interpretation Note 15 "Exercise of Discretion in Case of Late Objection or Appeal".

<sup>296</sup> The rules for objections and appeals are formulated under section 103 of the TA Act.

<sup>297</sup> For more information on the resolution of tax disputes, see *Dispute Resolution Guide: Guide on the Rules Promulgated in terms of Section 103 of the Tax Administration Act, 2011*

<sup>298</sup> Rule 7 deals with objections.

If on disallowance of the objection the SBFE is dissatisfied with SARS's decision, it may appeal against the disallowance. Such appeal must be in writing and lodged with SARS within the prescribed period.<sup>299</sup>

## **19. Conclusion**

An entity whose sole or principal object is the provision of funding for SMMEs potentially qualifies for approval as an SBFE. The entity must be approved by the Commissioner as an SBFE under section 30C(1) if it complies with the prescribed requirements and conditions set out in that section.

The Commissioner may withdraw the approval of an SBFE, which fails to comply with the prescribed requirements and may then be subject to tax and penalties.

An approved SBFE is subject to partial taxation on its receipts and accruals in accordance section 10(1)(cQ) and will also enjoy the benefit of being exempt from other taxes and duties.

An SBFE is required to comply with administrative provisions contained in the TA Act and other taxes and duties such as PAYE, UIF and SDL.

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<sup>299</sup> Rule 10.

## Annexure A – Section 10(1)(cQ)

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

- (cQ) the receipts and accruals of any small business funding entity approved by the Commissioner in terms of section 30C, 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 small business funding entity;
      - (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 small business funding entity;
      - (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 small business funding entity 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—
      - (A) 5 per cent of the total receipts and accruals of that small business funding entity during the relevant year of assessment; or
      - (B) R200 000;

## Annexure B – Section 30C

**30C. Small business funding entities.**—(1) The Commissioner must approve a small business funding entity for the purposes of section 10(1)(cQ) if—

- (a) that entity is a trust, an association of persons or a non-profit company as defined in section 1 of the Companies Act that has been incorporated, formed or established in the Republic;
- (b)
  - (i) the sole or principal object of that entity is the provision of funding for small, medium and micro-sized enterprises; and
  - (ii) the funding contemplated in subparagraph (i) is—
    - (aa) provided by that small business funding entity for the benefit of, or is widely accessible to small, medium and micro-sized enterprises;
    - (bb) provided on a non-profit basis and with an altruistic or philanthropic intent; and
    - (cc) not intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of that entity, otherwise than by way of reasonable remuneration payable to that fiduciary or employee;
- (c) that small business funding entity has submitted to the Commissioner a copy of the constitution or written instrument under which that small business funding entity has been established;
- (d) the constitution or written instrument contemplated in paragraph (c) provides that—
  - (i)
    - (aa) the small business funding entity must have a committee, a board of management or similar governing body consisting of at least three natural persons who are not connected persons in relation to each other to accept the fiduciary responsibility of that small business funding entity;
    - (bb) not more than fifty per cent of the members of the committee or a board of management contemplated in item (aa) may be employees or directors of any entity providing funding to that small business funding entity or persons who are connected persons in relation to any such employee or director;
  - (ii) any single person may not directly or indirectly control the decision-making powers relating to that small business funding entity;
  - (iii) the small business funding entity may not directly or indirectly distribute any of its funds or assets to any person other than in the course of furthering its sole or principal object;
  - (iv) the small business funding entity may not directly or indirectly distribute any of its funds or assets to any employee in relation to that entity or a person that is a connected person in relation to any such employee or to a person contemplated in subparagraph (i);
  - (v) the small business funding entity is required to utilise substantially the whole of its funds for its sole or principal object for which it has been established;
  - (vi) the small business funding entity must within 12 months after the end of the relevant year of assessment distribute or incur the obligation to distribute at least 25 per cent of all amounts received or accrued in respect of assets held, other than any amount received or accrued in respect of the disposal of any of those assets, during that year of assessment;
  - (vii) a member of a committee, a board of management or similar governing body of the small business funding entity may not directly or indirectly have any personal or private interest in that small business funding entity;
  - (viii) substantially the whole of the activities of the small business funding entity must be directed to the furtherance of the sole or principal object of that small business funding entity;

- (ix) the small business funding entity may not pay to any employee, office bearer, member or other person any remuneration, as defined in the Fourth Schedule, which is excessive, having regard to what is generally considered reasonable in the sector and in relation to the service rendered;
- (x) the small business funding entity must as part of its dissolution transfer its assets to—
  - (aa) another small business funding entity approved by the Commissioner in terms of this section;
  - (bb) a public benefit organisation contemplated in paragraph (a)(i) of the definition of public benefit organisation in section 30(1) that is approved by the Commissioner as a public benefit organisation in terms of that section;
  - (cc) an institution, board or body which is exempt from tax under section 10(1)(cA)(i); or
  - (dd) the government of the Republic in the national, provincial or local sphere;
- (xi) the persons contemplated in paragraph (d)(i) will submit any amendment of the constitution or written instrument of the small business funding entity to the Commissioner within 30 days of its amendment;
- (xii) the small business funding entity will comply with such reporting requirements as may be determined by the Commissioner from time to time; and
- (xiii) the small business funding entity is not knowingly and will not knowingly become a party to, and does not knowingly and will not knowingly permit itself to be used as part of, an impermissible avoidance arrangement contemplated in Part IIA of Chapter III, or a transaction, operation or scheme contemplated in section 103(5).

(2) Where the Commissioner is—

- (a) satisfied that any small business funding entity approved in terms of subsection (1) has during any year of assessment in any material respect; or
- (b) during any year of assessment satisfied that any small business funding entity approved in terms of subsection (1) has on a continuous or repetitive basis,

failed to comply with this section, or the constitution or written instrument under which that small business funding entity was established to the extent that it relates to this section, the Commissioner must notify the small business funding entity that the Commissioner intends to withdraw approval of the small business funding entity if corrective steps are not taken by the small business funding entity within the period stated in the notice.

(3) If no corrective steps are taken by the small business funding entity as contemplated in subsection (2), the Commissioner must withdraw approval of that small business funding entity with effect from the commencement of the year of assessment contemplated in subsection (2).

(4) If the Commissioner has withdrawn the approval of a small business funding entity as contemplated in subsection (3) the small business funding entity must within six months after the date of the withdrawal of approval (or such longer period as the Commissioner may allow) transfer, or take reasonable steps to transfer, its remaining assets to any small business funding entity, public benefit organisation, institution, board or body or the government of the Republic, as contemplated in subsection (1)(d)(x).

(5) If a small business funding entity is wound up or liquidated, the small business funding entity must, as part of the winding-up or liquidation, transfer its assets remaining after the satisfaction of its liabilities to any small business funding entity, public benefit organisation, institution, board or body or the government of the Republic, as contemplated in subsection (1)(d)(x).

(6) If a small business funding entity fails to transfer, or to take reasonable steps to transfer, its assets as contemplated in subsection (4) or (5), 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 that small business funding entity must for the purposes of this Act be deemed to be an amount of taxable income which accrued to that small business funding entity during the year of assessment in which the withdrawal of approval in terms of subsection (4) or the winding-up or liquidation contemplated in subsection (5) took place.

(7) Any person who is in a fiduciary capacity responsible for the management of any small business funding entity and who intentionally fails to comply with any provision of this section or of the constitution, or other written instrument under which that small business funding entity 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.