



SOUTH AFRICAN REVENUE SERVICE

INTERPRETATION NOTE NO. 22

DATE: 11 March 2004

ACT : TRANSFER DUTY ACT, NO 40 OF 1949 (the Act)
SECTION : SECTIONS 9(1)(c) and 9(1A)
SUBJECT : EXEMPTION: PUBLIC BENEFIT ORGANISATIONS AND STATUTORY BODIES

1. Purpose

The purpose of this interpretation note is to consider the provisions of sections 9(1)(c) and 9(1A) of the Act and to address some of the uncertainties that may have arisen since the amendment or introduction of these sections.

2. Background

2.1 Section 9(1)(c) of the Act was amended by section 3(1)(b) of the Taxation Laws Amendment Act, No 30 of 2000. Prior to this amendment section 9(1)(c) provided an exemption from transfer duty in respect of the acquisition of property by religious, charitable and educational institutions of a public character. Two conditions were applicable:

- First, the institution had to be exempt from income tax in terms of section 10(1)(f) of the Income Tax Act, No 58 of 1962.
- Secondly, the property must have been acquired exclusively for religious, charitable or educational purposes.

Section 9(1)(j) of the Act provided an exemption for organisations that provide residential accommodation to aged or retired persons. To qualify the organisation had to be exempt from income tax in terms of section 10(1)(cF) of the Income Tax Act.

2.2 Sections 10(1)(f) and 10(1)(cF) of the Income Tax Act were repealed with effect from 15 July 2001 and new legislation was introduced to regulate the tax exempt status of public benefit organisations ("PBOs"). Section 9(1)(c) of the Act had to be amended accordingly. Section 9(1)(j) of the Act was deleted and a new subsection (1A) was introduced.

Note: Sections 10(1)(f) and 10(1)(cF) were amended by section 21(1)(a) of Act No 30 of 2000. Sections 9(1)(c), 9(1)(j) and 9(1A) were amended by section 3(1)(b),(c) and (d) of Act No 30 of 2000.

3. The law

Section 9(1)(c) of the Act reads as follows:

“9. Exemptions from duty.—(1) No duty shall be payable in respect of the acquisition of property by –

(a)...

(b)...

(c) (i) a public benefit organisation which is exempt from tax in terms of section 10(1)(cN) of the Income Tax Act, 1962 (Act 58 of 1962); or

(ii) any institution, board or body, which is exempt from tax in terms of section 10(1)(cA)(i) of that Act, which has as its sole or principal object the carrying on of any public benefit activity contemplated in section 30 of that Act,

in respect of property acquired by such public benefit organisation, institution, board or body, the whole, or substantially the whole, of which will be used for the purposes of one or more public benefit activity carried on by such public benefit organisation, institution, board or body, as the case may be: Provided that if any such property or any portion thereof is subsequent to the acquisition thereof used for some purpose other than exclusively in carrying on any public benefit activities, duty shall become payable in respect of the acquisition of that property or that portion thereof, and the date upon which that property or that portion thereof was first used for that other purpose shall for the purposes of section 3(1) and section 4 be deemed to be the date of acquisition thereof;”

Section 9(1A) of the Act provides as follows:

“(1A) No duty shall be payable in respect of the registration of any property transferred by any public benefit organisation which is exempt from tax in terms of the provisions of section 10(1)(cN) of the Income Tax Act, 1962, to any other entity which is controlled by that public benefit organisation in order to comply with the provisions of the proviso to subsection (3) of section 30 of that Act;”

4. Application of the law

4.1 Section 9(1)(c) of the Act

In order to meet the current requirements for the exemption from the payment of transfer duty in terms of section 9(1)(c)(i) and (ii) of the Act, the organisation must satisfy the following requirements:

4.1.1 It must be a PBO, institution, board or body which is exempt from tax in terms of –

(i) section 10(1)(cN) of the Income Tax Act; or

- (ii) section 10(1)(cA)(i) of the Income Tax Act which has as its sole or principal object the carrying on of any public benefit activity contemplated in section 30 of that Act.

4.1.2 It must utilise the whole or substantially the whole of the property so acquired for the purpose of one or more public benefit activities carried on by such PBO, institution, board or body. The concept “substantially the whole” is interpreted to mean 90% or more. In order to conform to the provisions of section 30 of the Act and to overcome certain practical difficulties SARS will accept a maximum usage of 15% in respect of non-public benefit activities, provided the application is accompanied by proper motivated reasons and confirmation that the percentage will not, at any time in the future, exceed 15%. This percentage is calculated on the use of the property based on the surface area of the property. Any portion of the property not specifically used for approved public benefit activities or other purposes, must be excluded from the calculation.

4.2 Section 9(1A) of the Act

4.2.1 In order to qualify for exemption from transfer duty in terms of section 9(1A) of the Act the organisation must –

- be a PBO which is exempt from income tax in terms of section 10(1)(cN) of the Income Tax Act;
- transfer the property to any other entity which is controlled by that PBO; and
- confirm that the transfer of the property to the separate entity has been done in order to comply with the provisions of the proviso to section 30(3) of that Act.

4.3 Section 10(1)(cN) of the Income Tax Act

To qualify for exemption from income tax in terms of section 10(1)(cN), a PBO must comply with the provisions of section 30 of the Income Tax Act and obtain formal approval of the exemption from the Commissioner for the South African Revenue Service.

5. Procedure

- 5.1 Upon receipt of the organisation’s application for exemption from income tax, the application will be considered for approval. This application must be made on Form EI 1 and be accompanied by the relevant documentation. (See paragraph 10 for more details.)
- 5.2 The reply from the Commissioner to the applicant will indicate the section of the Income Tax Act in respect of which the exemption from income tax has been approved.
- 5.3 As a result of the change in the legislation affecting PBOs, an organisation that was previously exempt from income tax must re-apply to the Commissioner for exemption from income tax. Due to practical

constraints, all of these re-applications cannot be processed immediately, and transitional measures have been introduced as provided for under the legislation.

- 5.4 Where the application for exemption from transfer duty relates to a newly established organisation or an organisation which has not previously applied for exemption or where the exemption from income tax has not yet been approved (see paragraph 6.1.3), the organisation must complete the relevant application form and submit it together with the relevant documentation to the Tax Exemption Unit, with a request that the exemption receive priority attention in light of the application for transfer duty exemption.

6. Practical examples

An exemption from transfer duty is not a blanket exemption but a specific exemption in respect of a transaction. Each transaction in respect of the acquisition of property is considered on its own particular merits and a separate application form for exemption from transfer duty must, therefore, be submitted in respect of each transaction.

6.1 Repealed legislation

- 6.1.1 In terms of the new legislation organisations have until 31 December 2004 to re-apply for exemption and in terms of section 30(4) of the Income Tax Act, the Commissioner has a period of 5 years from 15 July 2001 within which to evaluate the applications. During this period the previous exemption will still be applicable (see paragraph 8 above).

Where an exemption from income tax has been granted in terms of either section 10(1)(f) or section 10(1)(cF) of the Income Tax Act, this must be accepted for purposes of a claim for a transfer duty exemption.

Example 1: On 18 August 2003 a home caring for abandoned children lodged an application for an exemption from transfer duty in respect of property acquired for purposes of erecting an orphanage. Confirmation was submitted that the organisation was exempt from income tax in terms of section 10(1)(f) of the Income Tax Act. (The letter issued by the Commissioner was dated 8 January 1968.) The organisation had not yet re-applied for exemption from income tax in terms of section 10(1)(cN) of the Income Tax Act. (It has until 31 December 2004 to re-apply.)

The application for exemption from transfer duty should be considered, as the exemption in terms of section 10(1)(f) is still applicable.

- 6.1.2 It must be noted that most of the established religious organisations were never formally exempted by the Commissioner as it has always been accepted that they were religious institutions of a public character as contemplated in section 10(1)(f) of the Income Tax Act. Furthermore, it

was not a requirement of this section that the Commissioner must formally approve this exemption. In other words, a religious institution of a public character was automatically exempt and formal approval was not required. Where congregations of such established religious institutions apply for transfer duty exemption, it will be accepted that they are exempt from income tax in terms of the provisions of section 10(1)(f).

- 6.1.3 Where an organisation was previously exempt from income tax in terms of section 10(1)(cB) of the Income Tax Act and claims exemption from transfer duty, the application may not be considered unless the organisation submits a letter from the Commissioner confirming the exemption from income tax in terms of section 10(1)(cN) (even though the transitional period of 5 years has not elapsed). In such a case the application will receive priority attention. This is because organisations that were previously exempt in terms of section 10(1)(cB) did not qualify for transfer duty exemption.

Example 2: An organisation conducting cultural activities was granted an exemption in terms of section 10(1)(cB)(i)(dd) of the Income Tax Act on 18 March 1989. On 28 September 2003 an application for transfer duty exemption is lodged in respect of a property acquired to build a theatre to be used to hold theatrical productions for scholars. The organisation had re-applied for exemption from income tax in terms of section 10(1)(cN) and submitted the application form (EI 1) (noting that it is conducting the approved public benefit activity set out in paragraph 6 of Part 1 of the Ninth Schedule to the Income Tax Act), together with a written undertaking (form EI 2). The organisation has not yet received a response to its application.

The transfer duty exemption may not be considered unless the letter approving the exemption in terms of section 10(1)(cN) is submitted. The Unit dealing with exemptions should be approached with a request to review the application urgently in light of the application for a transfer duty exemption.

Alternatively, the transfer duty could be paid under protest and once the letter of confirmation of the income tax exemption is received, a refund may be considered.

6.2 New legislation

6.2.1 Section 9(1)(c)(i) of the Act

The amendment to section 9(1)(c)(i) of the Act by section 3(1)(b) of the Taxation Laws Amendment Act, No 30 of 2000 and the inclusion of subparagraph (i) by section 3(1)(a) of the Taxation Laws Amendment Act,

No 30 of 2002, effectively broadened the category of organisations qualifying for exemption from transfer duty and no longer confines it to religious, charitable or educational institutions.

A PBO as defined in section 30(1) of the Income Tax Act can only take the form of a trust, a company incorporated under the provisions of section 21 of the Companies Act, No 61 of 1973, or an association of persons. The PBO must be approved as such by the Commissioner in terms of section 30 and must have as its sole object the carrying on of one or more approved public benefit activities. The list of public benefit activities approved by the Minister of Finance is contained in Part 1 of the Ninth Schedule to the Income Tax Act. They are divided into the following categories:

- Welfare and Humanitarian
- Health Care
- Land and Housing
- Education and Development
- Religion, Belief or Philosophy
- Cultural
- Conservation, Environment and Animal Welfare
- Research and consumer rights
- Sport
- Providing funds, assets or other resources
- General

To qualify for consideration for a transfer duty exemption, the following requirements must be met:

- (i) The letter approving the exemption from income tax in terms of section 10(1)(cN) must be submitted.
- (ii) The whole or substantially the whole of the property must be used for the purposes of conducting one or more public benefit activity as set out in Part I of the Ninth Schedule to the Income Tax Act.

6.2.2 Section 9(1)(c)(ii) of the Act

Subparagraph (ii) has been added to section 9(1)(c) of the Act by section 3(1)(a) of the Taxation Laws Amendment Act, No 30 of 2002 to provide for the exemption of statutory bodies which are exempt from income tax in terms of section 10(1)(cA)(i) of the Income Tax Act and which have as their sole or principal object the carrying on of any public benefit activity contemplated in section 30 of the Income Tax Act.

These bodies established by or in terms of law include organisations that:

- Conduct scientific, technical or industrial research, such as medical, water, animal and agricultural research councils.
- Provide necessary or useful commodities, amenities or services to the State or members of the general public. This would include—
 - cultural institutions such as museums, art galleries; libraries, national monuments, heritage sites, etc;
 - nature conservation bodies/institutions and parks boards;
 - botanical institutions; and
 - public schools, universities, technikons and colleges.

NOTE

Public schools (primary and secondary) are established in terms of the South African Schools Act, No 84 of 1996. It has up to now been accepted that they are exempt from income tax in terms of section 10(1)(cA)(i) of the Income Tax Act and it has not been a requirement that each primary and secondary school apply for approval of the exemption. If an application for exemption from transfer duty is received from such an entity, confirmation from the relevant educational authority confirming that the school is registered as a public school will suffice.

Independent schools which are registered as such in terms of the South African Schools Act, No 84 of 1996, fall within the ambit of sections 10(1)(cN) and 30 of the Income Tax Act. Should an independent school apply for a transfer duty exemption the relevant letter confirming the exemption from income tax in terms of section 10(1)(cN) must be submitted.

Other educational institutions, other than the statutory bodies mentioned above, fall within the requirements of section 30 of the Income Tax Act. In this regard, refer to the approved public benefit activities reflected under paragraph 4 of Part I of the Ninth Schedule to the Income Tax Act.

- Carry on activities designed to promote commerce, industry or agriculture such as the Sector Education and Training Authorities (SETAS).

This section requires formal approval of the exemption from income tax by the Commissioner. Where such a body submits a claim for a transfer duty exemption, the letter issued by the Commissioner approving the relevant exemption must be submitted, together with confirmation that the whole or substantially the whole (see paragraph 4.1.2 above) of the property is or will be utilised for the purpose of conducting one or more

approved public benefit activity as set out in Part I of the Ninth Schedule to the Income Tax Act.

6.2.3 Section 9(1A) of the Act

This is a new subparagraph that has been added to section 9(1) of the Act by section 3(1)(d) of the Taxation Laws Amendment Act, No 30 of 2000.

One of the requirements contained in section 30 of the Income Tax Act is that an exempt PBO is not permitted to carry on trading activities other than to the extent permitted by section 30(3)(b)(iv) of that Act. Where the PBO carries on trading activities which affect its exempt status, the PBO may transfer the business activity to a separate taxable entity controlled by it so as not to forfeit the exemption from income tax. Where the property is transferred to a private company, all the issued shares must be held by the PBO.

Example 3: A PBO owns immovable property from which rental income is derived. So as not to jeopardise its tax exempt status the PBO transfers the property to a private company all the shares of which are held by the PBO. The transaction is exempt from transfer duty in terms of section 9(1A) of the Act.

Note: Due to the fact that the property is not used for purposes of carrying on public benefit activities, transfer duty should have been paid on this property at the time of acquisition, or alternatively transfer duty would have been payable on the date the property was no longer utilised for public benefit activities (see paragraph 7 below).

7. Non-compliance

Where the transaction has qualified for exemption from transfer duty in terms of section 9(1)(c) of the Act and the property or portion thereof is subsequently used for a purpose other than exclusively carrying on any public benefit activities, transfer duty becomes payable at the time the property was used for other purposes than the relevant PBO activities. Section 9(1)(c) deems the date of acquisition to be the date the property is used for any purpose other than for the purpose of carrying on one or more public benefit activity.

In terms of section 2 of the Act, transfer duty is payable on the value of the property at the time of acquisition. Transfer duty will, therefore, become payable on the market value of the property on the date the property is used for the first time for any purpose other than to exclusively carry on one or more public benefit activities.

In the event that the duty is not paid within 6 months from the date of change of use, a penalty of 10% pa for each completed month is payable.

Example 3: A PBO acquired residential property with a value of R150 000 on 18 December 2001 for purposes of providing a shelter for street children. An exemption from transfer duty was granted in respect of the transaction.

On 27 May 2002 the shelter acquired bigger accommodation and no longer used the residence acquired on 18 December 2001. As from 1 June 2002 the property has been let out. The market value at this point in time was R200 000. Transfer duty will, therefore, become payable on 1 June 2002 on a value of R200 000.

Note: The PBO will either have to forfeit its exempt status if it falls outside the trading parameters or transfer the property to a separate taxable entity (see paragraph 6.2.3 above).

8. Transitional measures for the exemption from income tax in respect of PBOs

- 8.1 Section 21(2)(a) of the Taxation Laws Amendment Act, No 30 of 2000 and section 63(1) of the Taxation Laws Amendment Act, No 30 of 2002 state that any organisation whose receipts and accruals were previously exempt from income tax in terms of paragraphs (cB), (cC), (cD), (cF), (cI), (cJ), (f) and (fA) of section 10(1) of the Income Tax Act, will continue to enjoy exemption from the payment of income tax provided that the organisation re-applies for the exemption in terms of section 30 of the Income Tax Act, or provides a written undertaking in terms of the same section, before 31 December 2004.
- 8.2 This transitional exemption will apply until written notification by the Commissioner of his/her decision in terms of section 30 of the Income Tax Act.
- 8.3 Section 30(4) of the Income Tax Act contains a transitional measure to ease the administrative burden on both the PBOs and the Commissioner. Where the founding document of a PBO does not comply with the provisions of section 30, it will be deemed to comply for a period of 5 years provided a written undertaking that the organisation will comply with the provisions of that Act has been submitted. This in effect means that the Commissioner has a period of 5 years, from 15 July 2001 within which to evaluate the applications.

9. Transitional measures for the exemption from payment of transfer duty

- 9.1 An organisation that qualifies for the transitional exemption from income tax (as explained in paragraph 8 above) will retain its exempt status for transfer duty purposes provided that –
 - the organisation was previously exempt from income tax in terms of section 10(1)(f) or 10(1)(cF);

- the organisation solely carries on public benefit activities as contemplated in Part I of the Ninth Schedule to the Income Tax Act; and
- the organisation has re-applied for exemption from income tax in terms of section 30 of the Income Tax Act and submitted a written undertaking in terms of the same section **before 31 December 2004**.

9.2 The transitional exemption will apply until the Commissioner has informed the PBO of his/her decision regarding the re-application for the exemption from income tax, in terms of section 10(1)(cN).

10. The Tax Exemption Unit

For further information, the Tax Exemption Unit may be contacted.

Postal Address:	The Tax Exemption Unit P O Box 11955 HATFIELD 0028
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Application for exemption forms (EI 1 and EI 2), a tax exemption guide for PBOs as well as additional information are available on the SARS website www.sars.gov.za. In order to obtain the relevant information, select "Income Tax" on the Home Page and on the Income Tax Menu, select "Public Benefit Organisations".