



# **Tax Exemption Guide for Institutions, Boards or Bodies**

Income Tax



*South African Revenue Service*

# Tax Exemption Guide for Institutions, Boards or Bodies

## Preface

This guide provides general guidance on the exemption from income tax of qualifying institutions, boards or bodies under section 10(1)(cA)(i). These institutions, boards or bodies enjoy preferential tax treatment after they have been granted approval by the Commissioner and continue to comply with the relevant requirements and conditions as set out in the Act. Any institution, board or body approved by the Commissioner under section 10(1)(cA)(i) carrying on PBAs in Part II in South Africa may also qualify for approval under section 18A.

The guide deals with the following taxes and duties that may affect institutions, boards or bodies:

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

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 the Tax Administration Act. Should an advance tax ruling be required, visit the SARS website [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 guides, interpretation notes, forms, returns and tables referred to in this guide are the latest versions available on the SARS website unless the context indicates otherwise.

For more information, assistance and guidance you may –

- visit the **SARS website**;
- contact your nearest SARS branch office; preferably after making an appointment via the **SARS website**;
- have a virtual consultation with a SARS consultant by making an appointment via the **SARS website**;
- contact the SARS National Contact Centre on 0800 00 7277;
  - if calling locally, on 0800 00 7277; or

- if calling from abroad, on +27 11 602 2093 (only between 8h00 and 16h30 South African time); or
- contact your own tax advisor or tax practitioner.

Comments on this guide may be e-mailed to [policycomments@sars.gov.za](mailto:policycomments@sars.gov.za).

**Leveraged Legal Products**  
**SOUTH AFRICAN REVENUE SERVICE**  
25 June 2022

### **Disclaimer**

The use of an entity in an example in this guide is not confirmation of its tax-exempt status. Whether an entity qualifies for approval as an institution, board or body and whether its receipts and accruals are exempt under section 10(1)(cA)(i) will be confirmed by the Commissioner only on completion of the application process. While every precaution has been taken to ensure the accuracy of the information in this guide, SARS will not be liable to any person or entity for inaccurate information, omissions or opinions contained in this guide.

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## Glossary

In this guide unless the context indicates otherwise –

- “**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;
- “**co-ordinating body**” means the regulating or controlling body of a group of section 18A-approved institutions, boards or bodies sharing the same objectives and governance provisions contemplated in section 18A(6);
- “**DSI**” means the Department of Science and Innovation;
- “**founding document**” means the written instrument or legislation under which an institution, board or body is established and governed;
- “**institution, board or body**” means an institution, board or body (other than a company as defined in the Companies Act, any co-operative, close corporation, trust or water services provider) established by or under any law contemplated in section 10(1)(cA)(i);
- “**Interpretation Act**” means the Interpretation Act 33 of 1957;
- “**Minister**” means the Minister of Finance;
- “**Part I**” and “**Part II**” mean Part I and Part II of the Ninth Schedule;
- “**PBA**” means a “public benefit activity” listed in Part I and any other activity determined by the Minister by notice in the *Government Gazette* to be of a benevolent nature, having regard to the needs, interests and well-being of the general public;
- “**PFMA**” means the Public Finance Management Act 1 of 1999;
- “**Schedule**” means a Schedule to the Act;
- “**section**” means a section of the Act;
- “**section 18A-approved institution, board or body**” means any institution, board or body approved by the Commissioner under section 10(1)(cA)(i) carrying on PBAs in Part II in South Africa, or any other activity determined by the Minister by notice in the *Government Gazette* for the purposes of section 18A, which meets the requirements in section 18A(1A), if applicable, and which also has been approved by the Commissioner under section 18A(1)(a)(ii);
- “**section 18A receipt**” means a special prescribed receipt issued under section 18A(2) by a section 18A-approved institution, board or body entitling a taxpayer to a tax deduction for *bona fide* donations made;
- “**TA Act**” means the Tax Administration Act 28 of 2011;
- “**the Act**” means the Income Tax Act 58 of 1962;
- “**the Constitution**” means the Constitution of the Republic of South Africa, 1996; and
- any other word or expression bears the meaning ascribed to it in the Act.

## 1. Introduction

Section 10(1)(cA)(i) and (ii) respectively provide an absolute exemption from income tax of the receipts and accruals (see **8**) of any –

- institution, board or body established by or under any law (see **2**) engaged in specified prescribed activities (see **3**); and
- association, corporation or company all the shares of which are held by any such institution, board or body. The approval of this exemption will not be discussed in this guide.<sup>1</sup>

The exemption under section 10(1)(cA)(i) will, however, apply only to the extent that such institution, board or body –

- has been approved by the Commissioner subject to any conditions deemed necessary (see **6**) to ensure that the activities of that institution, board or body are wholly or mainly directed to the furtherance of its sole or principal object (see **3.1**);<sup>2</sup> and
- complies by law or under its constitution with the prescribed requirements (see **5**).

Any institution, board or body approved by the Commissioner under section 10(1)(cA)(i) carrying on PBAs in Part II in South Africa may potentially qualify for approval under section 18A subject to the requirements of that section being met (see **10**). An institution, board or body bears the onus of proving<sup>3</sup> that it complies with the requirements relative to the exemption and approval under section 18A and must retain the necessary supporting evidence.

## 2. Institution, board or body established by or under any law

In order to qualify for exemption, the institution, board or body must –

- be established –
  - *by* (see **2.2**) any law (see **2.1**); or
  - *under* any law (see **2.3**); and
- in the furtherance of its sole or principal object, engage in specified prescribed activities (see **3**).

The words “institution”, “board” or “body” referred to in section 10(1)(cA)(i) are not defined in the Act. The words separately have a number of dictionary meanings that are not conclusive in the interpretation of that section.<sup>4</sup>

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<sup>1</sup> See *Tax Exemption Guide for Companies Wholly Owned by Institutions, Boards or Bodies* for general guidance on the exemption from income tax of qualifying wholly owned associations, corporations or companies of institutions, boards or bodies under section 10(1)(cA)(ii).

<sup>2</sup> Paragraph (a) of the first proviso to section 10(1)(cA).

<sup>3</sup> Section 102 of the TA Act.

<sup>4</sup> See *C: SARS v Terraplas South Africa (Pty) Ltd* [2014] 3 All SA 11 (SCA), 76 SATC 377 at 385 in which the following was stated: “Any one of a number of dictionary meanings of a word is not necessarily conclusive in the interpretation of words and phrases in statutes and documents. Meanings have to be determined contextually.”

## 2.1 Meaning of any law

Section 10(1)(cA)(i) refers to “any law”. Although the word “any” is of wide and unqualified generality, it may be restricted by the subject matter or the context.<sup>5</sup>

The Interpretation Act defines “law” as –<sup>6</sup>

“any law, proclamation, ordinance, Act of Parliament, or other enactment having the force of law”.

The court considered the ambit of the words “any law” in section 10(1)(cA)(i) in ITC 1788 and held the following:<sup>7</sup>

“To give recognition to creatures created by foreign statutes without any qualification or definition might seriously endanger the object of the entire Income Tax Act.

The entities which the legislature clearly had in mind to exempt from the tax are those to which Mr *Spilg* referred: parastatals created by statutes passed by the South African Parliament, such as the South African Bureau of Standards.”

Thus, the expression “any law” used in section 10(1)(cA)(i) means any law, such as, the Constitution, which is the supreme law of South Africa, or an Act that has been passed by the Parliament<sup>8</sup> of South Africa. An Act of Parliament, refers only to national legislation<sup>9</sup> and not to provincial legislation.<sup>10</sup> Provincial legislation will therefore not be considered for the purposes of the exemption under this section. Furthermore, the reference to “any law” in section 10(1)(cA)(i) excludes any entities created by foreign statutes.

Unwritten law, such as, common and indigenous law also falls outside the ambit of the words “any law” used in section 10(1)(cA)(i).

## 2.2 Established by any law

The expression “established by any law” means that an institution, board or body is directly established by specific national legislation.

The name of an institution, board or body is normally mentioned in the relevant national legislation and its objects, functions and activities are regulated by the specific national legislation by which that institution, board or body is directly established.

### **Example 1 – The following are non-exhaustive examples of institutions, boards, or bodies established by any law**

- The Companies Act establishes the Companies and Intellectual Property Commission (CIPC), the Companies Tribunal, and the Takeover Regulation Panel as juristic persons.
- The Pharmacy Act 53 of 1974 establishes the South African Pharmacy Council as a juristic person.

<sup>5</sup> *CIR v Ocean Manufacturing Ltd* 1990 (3) SA 610 (A), 52 SATC 151 at 161.

<sup>6</sup> Section 2 of that Act.

<sup>7</sup> (2004) 67 SATC 161 (G) at 164.

<sup>8</sup> See the definition of “Parliament” in section 2 of the Interpretation Act.

<sup>9</sup> The term “national legislation” is defined in section 239 of the Constitution and generally means legislation made under an Act of Parliament.

<sup>10</sup> The term “provincial legislation” is defined in section 239 of the Constitution and generally means legislation made under a provincial Act.

- The National Environmental Management Biodiversity Act 10 of 2004 establishes the South African Biodiversity Institute as a juristic person.

### 2.3 Established *under any law*

In contrast to the expression “*by any law*” providing for a specific institution, board or body to be established, the expression “*established under any law*” means that the specific national legislation provides in general for the establishment of a type of institution, board or body to fulfil specified functions.

The specific name of the institution, board or body is not normally mentioned in the national legislation, and the relevant national legislation may prescribe that the establishment of such an institution, board or body must be published by the relevant Minister in a *Government Gazette*.

These institutions, boards or bodies usually have constitutions which may include provisions prescribed by national legislation regulating, for example, the objects, powers, functions, governance, duties and financial matters relating to such institutions, boards or bodies.

#### **Example 2 – The following are non-exhaustive examples of institutions, boards or bodies established *under any law***

- A bargaining council may apply for registration by submitting to the Registrar of Labour Relations certain documents prescribed in the Labour Relations Act 66 of 1995 and by adopting a constitution that meets the requirements as set out in that Act. A bargaining council is regarded for the purposes of income tax as an institution, board or body established under the Labour Relations Act, 1995.
- The Minister of Higher Education and Training may, by notice in the *Gazette* and for a period specified in the notice, establish a sector education and training authority (SETA) with a constitution for any national economic sector under the Skills Development Act 97 of 1998.
- The Minister of Correctional Services may establish and review the establishment of, among other things, correctional centres and remand detention facilities under the Correctional Services Act 111 of 1998 by notice in the *Gazette*.
- Fire protection associations are established under the National Veld and Forest Act 101 of 1998.

The expression established *under any law* should, however, not be interpreted too widely. For example, a state-owned company, which is incorporated under the Companies Act, is not established under any law. The Companies Act is merely a general enabling Act conferring legal personality on associations complying with the requirements of that Act.<sup>11</sup> The Companies Act therefore does not establish or bring into being a specifically named company but merely empowers the registration of companies under that Act by the CIPC. Other examples of general enabling Acts include the Co-operatives Act 14 of 2005, and the Close Corporations Act 69 of 1984. A company (see 9.1), co-operative (see 9.2) and a close corporation (see 9.3) are specifically excluded from the application of the exemption under section 10(1)(cA)(i).

<sup>11</sup> RC Williams “Companies Part I” 4(1) (Second Edition) *LAWSA* [online] (My LexisNexis: 30 November 2012) in footnote 10.

### 3. Prescribed activities carried on by an institution, board or body

An institution, board or body must in the furtherance of its sole or principal object –

- conduct scientific, technical or industrial research (see 3.2);<sup>12</sup>
- provide necessary or useful commodities, amenities or services to the State including any provincial administration or members of the general public (see 3.3);<sup>13</sup> or
- carry on activities designed to promote commerce, industry or agriculture or any branch thereof (see 3.4).<sup>14</sup> Such activities include the rendering of financial assistance by way of loans or otherwise.

The use of the disjunctive word “or” means that the institution, board or body may carry on either one or a combination of the above-prescribed activities in the furtherance of its sole or principal object.

#### 3.1 The carrying on of prescribed activities in the furtherance of the sole or principal object of an institution, board or body

The concept “furtherance of the sole or principal object” is fundamental to section 10(1)(cA)(i). The words “furtherance”, “sole”, “principal” and “object” are not defined in the Act. The words should therefore be interpreted according to their ordinary meaning as applied to the subject matter with regard to which they are used.<sup>15</sup>

The *CollinsDictionary.com* describes “furtherance” of something as –<sup>16</sup>

“the activity of helping it to be successful or be achieved.”

The following words are described in the *Dictionary.com*:

- “Sole” as “being the only one; only”.<sup>17</sup>
- “Principal” as “first or highest in rank, importance, value, chief”.<sup>18</sup>
- “Objective” as “something that one’s efforts or actions are intended to attain, accomplish, purpose, goal, target”.<sup>19</sup>

In ITC 1569,<sup>20</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.”

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<sup>12</sup> Section 10(1)(cA)(i)(aa).

<sup>13</sup> Section 10(1)(cA)(i)(bb).

<sup>14</sup> Section 10(1)(cA)(i)(cc).

<sup>15</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 4 to 7.

<sup>16</sup> [www.collinsdictionary.com/dictionary/english/furtherance](http://www.collinsdictionary.com/dictionary/english/furtherance) [Accessed 25 June 2022].

<sup>17</sup> [www.dictionary.com/browse/sole#](http://www.dictionary.com/browse/sole#) [Accessed 25 June 2022].

<sup>18</sup> [www.dictionary.com/browse/principal#](http://www.dictionary.com/browse/principal#) [Accessed 25 June 2022].

<sup>19</sup> [www.dictionary.com/browse/objective](http://www.dictionary.com/browse/objective) [Accessed 25 June 2022].

<sup>20</sup> (1993) 56 SATC 86 (C) at 90.

The “object” of an institution, board or body is not the subjective goals of its controllers but the activities, which it is mandated by its founding document (see 4) to perform and is the aim, intention, purpose, thing sought to be accomplished and the goal to be obtained.

The only or predominate object of the institution, board or body is therefore advanced, progressed or achieved when any of the prescribed activities are carried on. The institution, board or body should therefore firstly carry on its sole or principal object and in the course of furthering that object carry on the prescribed activities.

The word “activities” in this context refers to the prescribed activities an institution, board or body must carry on in the furtherance of its sole or principal object and not to any other activities.

Since an institution, board or body qualifying for the exemption under section 10(1)(cA)(i) receives tax privileges, the expression “sole or principal object” must be considered strictly having regard to the facts of each case.<sup>21</sup>

### **3.2 Conduct scientific, technical or industrial research**

Section 10(1)(cA)(i) may apply if an institution, board or body conducts scientific, technical, or industrial research in the furtherance of its sole or principal object. This wording requires that an institution, board or body must itself organise and carry out research. It will be acceptable for an institution, board or body to undertake research on behalf of another company<sup>22</sup> provided this is in the furtherance of the sole or principal object of that institution, board or body.

The words “conduct”, “scientific”, “technical”, “industrial” and “research” are not defined in the Act. The meaning of these words in the context of section 10(1)(cA)(i) is considered below.

#### **3.2.1 Conduct**

The word “conduct” is described in the *Longman Dictionary of Contemporary English* as –<sup>23</sup>

“to carry out a particular activity or process, especially in order to get information or prove facts, conduct a survey / investigation / review etc., conduct an experiment / a test”.

#### **3.2.2 Research**

The word “research” used in section 10(1)(cA)(i) is not limited to the technical activities comprising “research and development” as defined for purposes of section 11D. It has a wider meaning of work that involves studying something and trying to discover facts about it.

The term “research” is described by the Organisation for Economic Co-operation and Development as –<sup>24</sup>

“any creative systematic activity undertaken in order to increase the stock of knowledge, including knowledge of man, culture and society, and the use of this knowledge to devise new applications”.

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<sup>21</sup> *CIR v D & N Promotions (Pty) Ltd* 1995 (2) SA 296 (A), 57 SATC 178 at 182.

<sup>22</sup> See section 11D(4)(c)(i)(aa).

<sup>23</sup> [www.ldoceonline.com/dictionary/conduct](http://www.ldoceonline.com/dictionary/conduct) [Accessed 25 June 2022].

<sup>24</sup> <https://stats.oecd.org/glossary/detail.asp?ID=2312> [Accessed 25 June 2022].

Generally, research is divided into two broad categories, namely, basic and applied research. These categories are described in the *Frascati Manual*<sup>25</sup> as follows:

“Basic research is experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundation or phenomena and observable facts, without any particular application or use in view. Applied research is original investigation undertaken in order to acquire new knowledge. It is, however, directed primarily towards a specific, practical aim or objective.”

Any research conducted by an institution, board or body must for purposes of the exemption under section 10(1)(cA)(i) be of a scientific, technical or industrial nature.

### 3.2.3 Scientific research

Scientific research suggests a systematic way of doing something by using experiments or tests. The DSI describes “basic scientific research” as –<sup>26</sup>

“fundamental theoretical or experimental investigative research to advance knowledge without a specifically envisaged or immediately practical application. It is the quest for new knowledge and the exploration of the unknown”.

Discoveries made through basic scientific research generally tend to be the foundation for the advances in science, engineering and technology and most disruptive technologies.<sup>27</sup>

### 3.2.4 Technical research

The *BusinessDictionary.com* describes “technical research” as follows:<sup>28</sup>

“Applied research oriented toward engineering disciplines (but not to a specific product or process) and aimed at developing tools and test equipment and procedures, and at providing solutions to specific technical problems.”

Applied science according to the *Web’s Largest Resource for Definitions and Translations* is –<sup>29</sup>

“... a discipline that applies existing scientific knowledge to develop more practical applications, such as technology or inventions. Applied science is typically engineering, which develops technology.”

Technical research usually applies existing well-known methods and technology and is aimed at any scientific or technological advancement.

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<sup>25</sup> The manual is also known as the *Proposed Standard Practice for Surveys of Research and Development*. The manual provides an international basis for a common language for talking about research and development and its outcomes.

<sup>26</sup> “Basic Sciences Development and Support Framework” (2016) available online at [www.dst.gov.za/index.php/resource-center/strategies-and-reports](http://www.dst.gov.za/index.php/resource-center/strategies-and-reports) [Accessed 25 June 2022].

<sup>27</sup> Disruptive technologies are described by DSI as technologies that change the market dynamics as well as national and global competitiveness over a very short period. For example, the change of communication using cell phones.

<sup>28</sup> [www.businessdictionary.com/definition/technical-research.html](http://www.businessdictionary.com/definition/technical-research.html) [Accessed 25 June 2022].

<sup>29</sup> [www.definitions.net/definition/applied+science](http://www.definitions.net/definition/applied+science) [Accessed 25 June 2022].

### 3.2.5 Industrial research

Industrial research generally refers to research aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services.<sup>30</sup>

According to the DSI, industrial research is vital and generally related and motivated by scientific research.<sup>31</sup>

“This situation is extremely relevant in many engineering areas such as wind tunnels for fluid dynamic measurements, wave tanks for coastal experimentation, pilot chemical plants, hydrodynamic testing channels, seismic testing facilities, engine / turbine testing, crash testing facilities, high-speed experimental transport lines (i.e. magnetic levitation railways, solar planes, etc.), nano-manufacturing facilities, industrial robotics, etc. All of them are very complex and expensive facilities to be designed and built by using multidisciplinary teams in large multi-annual industrial-driven projects. The case of studying the effect of climate change on coastal areas, the testing of atmospheric pollution models, new ideas for innovative propulsion techniques or moving 3D printing techniques to actual component manufacturing, etc. benefit from close interaction with scientific research.”

**Example 3 – The following are non-exhaustive examples of institutions, boards or bodies established by or under any law which in the furtherance of their sole or principal object conduct scientific, technical or industrial research**

- The Academy of Science South Africa Act 67 of 2001 establishes a juristic person known as the Academy of Science of South Africa. The Academy is the only academy of science recognised by Government. The objectives of the Academy are, among other things, to promote common ground in scientific thinking across all disciplines, including the physical, mathematical and life sciences, as well as human, social and economic sciences, to encourage and promote innovative and independent scientific thinking, and to link South Africa with scientific communities of the highest levels, in particular within the Southern African Development Community, the rest of Africa and internationally.
- The Council for Mineral Technology is established as a juristic person known as Mintek by the Mineral Technology Act 30 of 1989. The objects of Mintek are to promote mineral technology and to foster the establishment and expansion of industries in the fields of minerals and products derived therefrom through research, development and technology transfer.
- The Human Sciences Research Council Act 17 of 2008 establishes the Human Sciences Research Council as a juristic person. The object of the Council is, among other things, to initiate, undertake and foster strategic basic research and applied research in human sciences, to gather, analyse and publish data relevant to developmental challenges in South Africa, help build research capacity and infrastructure for the human sciences, and respond to the needs of vulnerable and marginalised groups in society by researching and analysing developmental problems thereby contributing to the improvement of the quality of their lives.

<sup>30</sup> [www.innoviscop.com/en/definitions/industrial-research](http://www.innoviscop.com/en/definitions/industrial-research) [Accessed 25 June 2022].

<sup>31</sup> JV Wood, G León, G von Gruenewalt *et al* A South African Research Infrastructure Roadmap November 2013 available online at [www.dst.gov.za/images/pdfs/SARIR%20Report%20Ver%20202.pdf](http://www.dst.gov.za/images/pdfs/SARIR%20Report%20Ver%20202.pdf) [Accessed 25 June 2022].

- The Technology Innovation Act 26 of 2008 to support the State in stimulating and intensifying technological innovation to improve economic growth and the quality of life of all South Africans by developing and exploiting technological innovations establishes the Technology Innovation Agency as a juristic person.
- The South African National Space Agency Act 36 of 2008 establishes the South African National Space Agency as a juristic person. The object of the agency is, among other things, to promote the peaceful use of space, support the creation of an environment conducive to industrial development in space technology, foster research in space science, communications, navigation and space physics, and advance scientific, engineering and technological competencies and capabilities through human capital development outreach programmes and infrastructure development.

### 3.3 Provision of necessary or useful commodities, amenities or services to the State or members of the general public

An institution, board or body in the furtherance of its sole or principal object may provide necessary or useful commodities, amenities, or services to the State including any provincial administration or members of the general public. This suggests a wide range of activities that may be conducted by the institution, board or body.

The words “provide”, “necessary”, “useful”, “commodities”, “amenities”, “services”, “State” and the expression “members of the general public” are not defined in the Act. A discussion of the meaning of these words in the context of section 10(1)(cA)(i) is considered below.

#### 3.3.1 Provide

The *Lexico.com* describes “provide” as –<sup>32</sup>

“1. [with object] Make available for use; supply.

1.1 (provide someone with) Equip or supply someone with (something useful or necessary)”.

The institution, board or body itself must provide, which implies that it must make available for use, equip or supply the State including any provincial administration or members of the general public with necessary or useful commodities, amenities or services.

#### 3.3.2 Necessary

The *Longman Dictionary of Contemporary English* describes “necessary” as –<sup>33</sup>

“something that you need to have or do, essential”.

In the present context the commodities, amenities or services must therefore be essential or very important to the State, any provincial administration, or members of the general public.

#### 3.3.3 Useful

The word “useful” is described in the *Dictionary.com* as –<sup>34</sup>

“1. being of use or service; serving some purpose; advantageous, helpful, or of good effect: a useful member of society.

2. of practical use, as for doing work; producing material results; supplying common needs”.

<sup>32</sup> [www.lexico.com/en/definition/provide](http://www.lexico.com/en/definition/provide) [Accessed 25 June 2022].

<sup>33</sup> [www.ldoceonline.com/dictionary/necessary](http://www.ldoceonline.com/dictionary/necessary) [Accessed 25 June 2022].

<sup>34</sup> [www.dictionary.com/browse/useful](http://www.dictionary.com/browse/useful) [Accessed 25 June 2022].

An institution, board or body must therefore itself equip or supply commodities, amenities or services, which serve some purpose, are helpful, or advantageous to the State, any provincial administration, or members of the general public.

### 3.3.4 Commodities

The *Free Dictionary* provides the following explanation of the word “commodity”:<sup>35</sup>

“Commodities are bulk goods and raw materials, such as grains, metals, livestock, oil, cotton, coffee, sugar, and cocoa, which are used to produce consumer products. The term also describes financial products, such as currency or stock and bond indexes.”

Commodities may be categorised as soft or hard commodities.<sup>36</sup> *Investopedia* provides the following explanation of the types of commodities:<sup>37</sup>

“Soft commodities are less well defined than hard commodities. Soft commodities are best understood as grown commodities. Coffee, cocoa, orange juice, sugar, canola, corn, lumber, wheat, lean hog, feeder cattle and so on all go through a growth cycle which ends in harvesting - usually for further processing. This is in contrast to the hard commodities that include mined metals (copper, gold, silver, etc.) and energy extraction (crude oil, natural gas and products refined from them). Hard commodities are waiting in the earth for extraction, as opposed to being planted and nurtured to maturity. Hard commodities can also be found in similar geological deposits around the world, whereas soft commodities depend on regional climate conditions to grow. As there is no definitive list of what is and is not a soft commodity, alternative classifications have cropped up.”

### 3.3.5 Amenities

The *Free Dictionary* describes “amenities” as follows:<sup>38</sup>

1. The quality of being pleasant or attractive, agreeableness.
2. Something that contributes to physical or material comfort.
3. A feature that increases attractiveness or value, especially a piece of real estate or a geographic location.”

The *BusinessDictionary.com* describes “amenities” as follows:<sup>39</sup>

“Additional features (such as high quality fixtures, proximity to shopping centers or schools, striking or unique design) that enhance the desirability, and often the appraisal value, of a property.”

According to the *Merriam-Webster Dictionary* basic amenities are things considered essential to make life easier and more pleasant. This meaning is illustrated by the following example:<sup>40</sup>

“The government intends to provide the isolated town with basic amenities, such as roads, running water, and electricity.”

Amenities may therefore include bridges, flyovers, refuse removal, railways, roadways, or other utilities used by the general public. In South Africa, basic amenities include the provision of electricity infrastructure, piped water and basic housing.

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<sup>35</sup> <https://financial-dictionary.thefreedictionary.com/commodity> [Accessed 25 June 2022].

<sup>36</sup> B Goodall Investment Planning/Part I – Investment Options/Commodities Financial Planning [online] (My LexisNexis: April 2018) in paragraph 13.4.

<sup>37</sup> [www.investopedia.com/terms/s/softcommodity.asp](http://www.investopedia.com/terms/s/softcommodity.asp) [Accessed 25 June 2022].

<sup>38</sup> [www.thefreedictionary.com/amenity](http://www.thefreedictionary.com/amenity) [Accessed 25 June 2022].

<sup>39</sup> [www.businessdictionary.com/definition/amenities.html](http://www.businessdictionary.com/definition/amenities.html) [Accessed 25 June 2022].

<sup>40</sup> [www.merriam-webster.com/dictionary/basic%20amenities](http://www.merriam-webster.com/dictionary/basic%20amenities) [Accessed 25 June 2022].

### 3.3.6 Services

The Constitution places the responsibility on government to ensure that basic services are progressively expanded to all South Africans. Basic services, amongst other things, include:<sup>41</sup>

- Housing
- Education
- Health care
- Social welfare
- Transport
- Electricity and energy
- Water
- Sanitation
- Refuse and waste removal

The *BusinessDictionary.com* describes “services” as follows:<sup>42</sup>

“Intangible products such as accounting, banking, cleaning, consultancy, education, insurance, expertise, medical treatment, or transportation. Sometimes services are difficult to identify because they are closely associated with a good; such as the combination of a diagnosis with the administration of a medicine. No transfer of possession or ownership takes place when services are sold, and they (1) cannot be stored or transported, (2) are instantly perishable, and (3) come into existence at the time they are bought and consumed.”

A service therefore refers to a valuable action, deed, or effort performed to satisfy a need or to fulfill a demand,<sup>43</sup> by a government system or private organisation responsible for a particular type of activity, or providing a particular thing that people need.<sup>44</sup>

A service provided by an institution, board or body may therefore include anything done, or to be done as an action of labour, work or an action of help. For example, communication services, correctional services, educational services, electricity services, emergency services, health services, military services, policing services, postal services, revenue collection services and transportation services.

### 3.3.7 State

The Constitution describes South Africa as –<sup>45</sup>

“one, sovereign, democratic state”.

The word “state” is used to describe different concepts, for example, a country can be referred to as a state, or it can refer to the government of a country to distinguish it from ordinary people.

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<sup>41</sup> <http://etu.org.za/toolbox/docs/government/basic.html> [Accessed 25 June 2022].

<sup>42</sup> [www.businessdictionary.com/definition/services.html](http://www.businessdictionary.com/definition/services.html) [Accessed 25 June 2022].

<sup>43</sup> [www.businessdictionary.com/definition/service.html](http://www.businessdictionary.com/definition/service.html) [Accessed 25 June 2022].

<sup>44</sup> <http://dictionary.cambridge.org/dictionary/english/service> [Accessed 25 June 2022].

<sup>45</sup> Section 1 of the Constitution.

In the Constitutional Court case of *Minister of Defence and Military Veterans v Thomas*<sup>46</sup> the meaning of the word “state” was considered. The court referred to the judgment in the *Holeni v Land and Agricultural Development Bank of SA*,<sup>47</sup> which held the following:

“The State as a concept does not have a universal meaning. Its precise meaning always depends on the context within which it is used. Courts have consistently refused to accord it any inherent characteristics and have relied, in any particular case, on practical considerations to determine its scope. In a plethora of legislation, no consistency in meaning has been maintained.”

Government is understood as the authority, which directs and controls the affairs of a state.<sup>48</sup> It is the exclusive power in which the administration of a state is vested. The government of South Africa is in accordance with the Constitution<sup>49</sup> constituted as national,<sup>50</sup> provincial<sup>51</sup> and local<sup>52</sup> spheres of government,<sup>53</sup> which are distinctive, interdependent and interrelated. The different levels of government thus all have legislative and executive authority in their own spheres. The Constitutional Court held in *Minister of Defence and Military Veterans v Thomas*<sup>54</sup> that within its constitutional sphere of competence each sphere of government reigns supreme.

The national sphere of government is the central government administration and consists of the national parliament and the different state departments as determined by the President.<sup>55</sup> The provincial sphere of government consists of the nine provincial legislatures and the respective provincial departments.<sup>56</sup> The local sphere of government consists of municipalities.<sup>57</sup>

An institution, board or body must provide the necessary or useful commodities, amenities or services to the State, including any provincial administration, or members of the general public. The meaning and effect of “include”<sup>58</sup> was considered in ITC 1878<sup>59</sup> in which reference was made to its dictionary meaning as well as a number of previous judgements, which considered its effect. Vally J pointed out that it was well established that our courts have recognised that the term “includes” is sometimes employed as an exhaustive list, but “as a general rule, it is a term of extension”.<sup>60</sup> Thus, it brings within the ambit of a term circumstances that would ordinarily not be regarded as falling within its scope.

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<sup>46</sup> 2016 (1) SA 103 (CC).

<sup>47</sup> 2009 (4) SA (437) (SCA).

<sup>48</sup> [www.lexico.com/en/definition/government](http://www.lexico.com/en/definition/government) [Accessed 25 June 2022].

<sup>49</sup> Section 40(1) of the Constitution.

<sup>50</sup> Chapter 5 of the Constitution.

<sup>51</sup> Chapter 6 of the Constitution.

<sup>52</sup> Chapter 7 of the Constitution.

<sup>53</sup> The receipts and accruals of the government of South Africa in the national, provincial or local sphere are exempt under section 10(1)(a).

<sup>54</sup> 2016 (1) SA 103 (CC).

<sup>55</sup> See Schedule 1 of the Public Service Act 103 of 1994 for a list of national departments.

<sup>56</sup> See Schedule 2 of the Public Service Act 103 of 1994 for a list of provincial departments.

<sup>57</sup> The Local Government: Municipal Structures Act 117 of 1998 regulates the establishment of municipalities.

<sup>58</sup> Also see *CSARS v Glencore Operations SA (Pty) Ltd* [2021] ZASCA 111 in 45 and 46 as well as 50 to 53.

<sup>59</sup> (2015) 77 SATC 349 (J).

<sup>60</sup> In [26].

After reviewing the history of the use of the term, Vally J concluded that:<sup>61</sup>

“Thus, the word “include” used in a statute is often used to extend or enlarge the meaning of a thing or concept. It brings within the scope of the thing or concept others that are not ordinarily or naturally part of the thing or concept.”

The State is constituted as the national, provincial and local sphere of government. Thus, although reference is made only to “any provincial administration”<sup>62</sup> it is considered that an institution, board or body is permitted to provide necessary or useful commodities, amenities or services to any sphere of government, including the local sphere.

**Example 4 – An example of an institution, board or body established by any law, which in the furtherance of its sole or principal object provides necessary or useful services to the provincial administration**

- The National Health Act 61 of 2003 establishes in each province a Provincial Health Council. The Council must advise the relevant member of the Executive Council, on among other things, policy concerning any matter that will protect, improve and maintain the health of the population, proposed legislation relating to health matters before it is introduced in the relevant provincial legislature, norms and standards for the establishment of health establishments, and guidelines for the management of health districts.

### 3.3.8 Members of the general public

The *CollinsDictionary.com* describes “general public” as follows:<sup>63</sup>

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

The words “general public” refers to the general population as a whole,<sup>64</sup> which may include all the people in a geographic area or the country, rather than people who belong to a small and exclusive group. The words may also refer to a particular part of a community or population, but this will depend on the context in which the term is used. Normally in such cases, there is an indication of which part of the community or population is being referred to, for example, poor and needy persons, persons in distress, and the elderly or unemployed youth.

The requirement does not stipulate that any particular member or members of a particular part of the general public must benefit from the activities provided by an institution, board or body. The requirement is merely that an institution, board or body must provide necessary or useful commodities, amenities or services to members of the general public, which could include any person within the general population.

<sup>61</sup> In [29].

<sup>62</sup> Section 10(1)(cA)(i)(bb).

<sup>63</sup> [www.collinsdictionary.com/dictionary/english/general-public](http://www.collinsdictionary.com/dictionary/english/general-public) [Accessed 25 June 2022].

<sup>64</sup> See *CIR v Plascon Holdings Ltd* 1964 (2) SA 464 (A), 26 SATC 101 at 109.

**Example 5 – The following are non-exhaustive examples of institutions, boards or bodies established by or under any law, which in the furtherance of their sole or principal object provide necessary or useful commodities, amenities or services to the State or members of the general public**

- The Minister responsible for water affairs may under the National Water Act 36 of 1998, on own initiative, or after receiving a proposal establish a catchment management agency, give it a name and identify and determine its water management area. A catchment management agency is a body corporate. The Minister must publish a notice in the *Gazette* setting out the proposed establishment of the catchment management agency. The functions of a catchment management agency, among other things, will be to manage and monitor permitted water usage within its management area, and conserve and protect the water resources and resource quality within its water management area.
- The South African Heritage Resources Agency is established as a body corporate by the National Heritage Resources Act 25 of 1999 to co-ordinate the identification and management of the national estate, which comprises heritage resources of cultural significance or other special value for the present community and for future generations such as places, buildings, structures and equipment of cultural significance, places to which oral traditions are attached or which are associated with living heritage, historical settlements and townscapes, landscapes and natural features of cultural significance, geological sites of scientific or cultural importance, archaeological and palaeontological sites, graves, and burial grounds.
- The PFMA establishes the Accounting Standards Board as a juristic person. The objects of the Board are, among other things, to set Standards of Generally Recognised Accounting Practice (GRAP) for departments, public entities, constitutional institutions, municipalities as well as other entities under the ownership or control of a municipality, Parliament and the provincial legislatures.
- The National Development Agency Act 108 of 1998 establishes a juristic person known as the National Development Agency. The primary object of the Agency is to contribute towards the eradication of poverty and its causes by granting funds to civil society organisations for the purposes of carrying out projects or programmes aimed at meeting development needs of poor communities, and strengthening the institutional capacity of other civil society organisations involved in direct service provision to poor communities.

### 3.4 Carries on activities designed to promote commerce, industry or agriculture or any branch thereof

An institution, board or body in the furtherance of its sole or principal object may carry on activities designed to promote commerce, industry or agriculture or any branch thereof, including the rendering of financial assistance by way of loans or otherwise.

The expression “carries on” is not defined in the Act. Its ordinary dictionary meaning is “*engage in (an activity)*”.<sup>65</sup> In this context, the expression “carries on” implies that the institution, board or body must itself in the furtherance of its sole or principal object carry on activities designed to promote commerce, industry or agriculture or any branch thereof. Thus, it would be expected that an institution, board or body would use its funds in carrying on those activities designed to promote commerce, industry or agriculture.

#### 3.4.1 Commerce

The word “commerce” is described in *Investopedia* as follows:<sup>66</sup>

“Generally, commerce refers to the exchange of goods, services or something of value, between businesses or entities. From a broad perspective, nations are concerned with managing commerce in a way that enhances the well-being of citizens, by providing jobs and producing beneficial goods and services”.

#### 3.4.2 Industry

Statistics South Africa defines “industry” as –<sup>67</sup>

“the set of all production units engaged primarily in the same or similar kinds of productive activity”.

The *BusinessDictionary.com* describes “industry” as follows:<sup>68</sup>

“1. The manufacturing or technically productive enterprises in a particular field, country, region, or economy viewed collectively, or one of these individually. A single industry is often named after its principal product; for example, the auto industry.

2. Any general business activity or commercial enterprise that can be isolated from others, such as the tourist industry or the entertainment industry.”

Examples of industries include the agricultural and fishing industry, automotive industry, chemical industry, construction industry, defense industry, education industry, energy industry, entertainment industry, manufacturing industry, metal industry, textile and clothing industry, and the tourism industry.

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<sup>65</sup> M Wait, S Hawker and C Soanes *Oxford Dictionary, Thesaurus and Wordpower Guide* (2001) Oxford University Press.

<sup>66</sup> [www.investopedia.com/terms/c/commerce.asp](http://www.investopedia.com/terms/c/commerce.asp) [Accessed 25 June 2022].

<sup>67</sup> Statistics South Africa “Standard Industrial Classification of all Economic Activities” 7 ed (October 2012) available online at [www.statssa.gov.za/classifications/codelists/Web\\_SIC7a/SIC\\_7\\_Final\\_Manual\\_Errata.pdf](http://www.statssa.gov.za/classifications/codelists/Web_SIC7a/SIC_7_Final_Manual_Errata.pdf) [Accessed 25 June 2022].

<sup>68</sup> [www.businessdictionary.com/definition/industry.html](http://www.businessdictionary.com/definition/industry.html) [Accessed 25 June 2022].

**Example 6 – The following are non-exhaustive examples of institutions, boards or bodies established by or under any law, which in the furtherance of their sole or principal object carry on activities designed to promote commerce, industry or any branch thereof**

- The Civil Aviation Act 13 of 2009 establishes the South African Civil Aviation Authority as a juristic person. The object of the Authority is, among other things, to control and regulate civil aviation safety and security, oversee the functioning and development of the civil aviation industry, and promote civil aviation safety and security.
- The Estate Agency Affairs Board is a juristic person established by the Estate Agency Affairs Act 112 of 1976. Having regard to the public interest, the objects of the Board are to maintain and promote the standard of conduct of estate agents, and regulate the activities of estate agents.
- The National Films and Video Foundation is a juristic person established by the National Film and Video Foundation Act 73 of 1997. The objects of the Foundation are, among other things, to develop and promote the film and video industry, to provide and encourage the provision of opportunities for persons, especially from disadvantaged communities, to get involved in the film and video industry, to encourage the development and distribution of local, film and video products, and to support the nurturing and development of and access to the film and video industry.

### 3.4.3 Agriculture

LAWSA describes “agriculture” as –<sup>69</sup>

“the science and art of cultivating the soil, including the gathering of the crops and the rearing of livestock.”

(Footnotes omitted.)

South Africa has a dual agricultural economy, with both well-developed commercial farming and smaller-scale communal farming generally located in the former homeland areas.<sup>70</sup> Farming activities range from intensive crop production to cattle ranching and sheep farming. Farming is by far the largest agricultural sector in the country. Game ranching is the fastest-growing sector of agriculture in South Africa.

The term “agricultural product” defined in the Marketing of Agricultural Act 47 of 1996 includes agricultural fresh produce such as flowers, ornamental plants, vegetables, fruit and herbs and agricultural livestock produce such as cattle, sheep, goats, pigs, horses, meat, cured hides and skins, and game. Other agricultural production goods include timber, fertilizers, animal hides, leather, industrial chemicals (starch, sugar, alcohols and resins), fibers (cotton, wool, hemp, silk and flax), fuels (methane from biomass, ethanol, biodiesel), cut flowers, ornamental and nursery plants, tropical fish and birds for the pet trade, and both legal and illegal drugs (biopharmaceuticals, tobacco, marijuana, opium, cocaine).<sup>71</sup>

<sup>69</sup> MA Kidd and M Lewis “Agriculture” 1 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 13 January 2014) in paragraph 185.

<sup>70</sup> Dr A Goldblatt “Agriculture: Facts & Trends South Africa” WWF available online at [http://awsassets.wwf.org.za/downloads/facts\\_brochure\\_mockup\\_04\\_b.pdf](http://awsassets.wwf.org.za/downloads/facts_brochure_mockup_04_b.pdf) [Accessed 25 June 2022].

<sup>71</sup> [www.sciencedaily.com/terms/agriculture.htm](http://www.sciencedaily.com/terms/agriculture.htm) [Accessed 25 June 2022].

**Example 7 – The following are non-exhaustive examples of institutions, boards or bodies established by or under any law, which in the furtherance of their sole or principal object carry on activities designed to promote agriculture or any branch thereof**

- The National Forests Act 84 of 1998 establishes the National Forests Advisory Council. The object of the Council is, among other things, to advise the Minister responsible for forests on any matter related to forestry in South Africa such as the management of natural forests, woodlands and plantations.
- The South African National Parks (SANP) established by the National Parks Act 57 of 1976 continues to exist as a juristic person despite the repeal of the National Environmental Management: Protected Areas Act 57 of 2003. SANP must, among other things, manage all existing national parks and any kind of protected area, manage world heritage sites, participate in international, regional and national environmental, conservation, and cultural heritage to protect, conserve and control those national parks and other protected areas.
- The National Environmental Management Biodiversity Act 10 of 2004 establishes the South African National Biodiversity Institute as a juristic person. The Institute, among other things, must monitor and report regularly to the Minister responsible for national environmental management on the status of South Africa's biodiversity, the conservation status of all listed threatened or protected species and listed ecosystems, the status of all listed invasive species, monitor and report regularly to the Minister on the environmental impact of all categories of genetically modified organisms, must manage, control and maintain all national botanical gardens, and must establish facilities for horticulture display, environmental education, visitor amenities and research.
- The South African Bureau of Standards (SABS) continues to exist as a juristic person by the Standards Act 8 of 2008. The objects of the SABS are, among other things, to develop, promote and maintain South African National Standards, promote quality in connection with commodities, products and services, and render conformity services.

#### **3.4.4 Financial assistance**

The concept “financial assistance” is described in the *BusinessDictionary.com* as follows:<sup>72</sup>

“Loans, loan guaranties, subsidies, tax allowances, cost sharing arrangements, or outright grants provided by third-parties (usually home or foreign government agencies).”

The word “including” referred to in this prescribed activity is indicative that an institution, board or body is not required to render financial assistance only by way of loans (see **3.3.7**).

The words “or otherwise” are described in the *Merriam-Webster Dictionary* as –<sup>73</sup>

“used to refer to something that is different from something already mentioned”.

Having regard to the above, the activity of rendering financial assistance is not limited to loans but may include a wide range of activities such as grants, subsidies or financial advice in order to promote commerce, industry or agriculture or any branch thereof.

<sup>72</sup> [www.businessdictionary.com/definition/financial-assistance.html](http://www.businessdictionary.com/definition/financial-assistance.html) [Accessed 25 June 2022].

<sup>73</sup> [www.merriam-webster.com/dictionary/or%20otherwise](http://www.merriam-webster.com/dictionary/or%20otherwise) [Accessed 25 June 2022].

**Example 8 – The following are non-exhaustive examples of institutions, boards or bodies established by or under any law, which in the furtherance of their sole or principal object carry on activities, which may include the rendering of financial assistance, designed to promote commerce, industry or agriculture or any branch thereof**

- The Land and Agricultural Bank, trading as Land Bank, established by the Land and Agricultural Development Bank Act 15 of 2002 provides financial services to the commercial farming sector. Government established the Land Bank for the specific purpose of financing agri-business as well as financial products to promote new entrants into the agriculture industry. The Land Bank offers long, medium and short-term loans, deposits, guarantees, establishment loans, and instalment finance products and services to the commercial farming sector.<sup>74</sup>
- The Lotteries Act 57 of 1997 establishes the National Lotteries Commission as a juristic person. The Commission must ensure that the National Lottery and sports pools are conducted with all due propriety and strictly in accordance with the Constitution, and all other applicable law, and ensure that the interests of every participant in the National Lottery are adequately protected. The Commission may conduct research on worthy causes that may be funded without lodging an application prescribed under that Act. The Commission may also invite applications for grants from worthy causes.
- The Social Housing Act 16 of 2008 establishes the Social Housing Regulatory Authority as a juristic person. The Regulatory Authority must promote the development and awareness of social housing, provide advice and support to the Department of Human Settlements in its development of policy for the social housing sector and facilitate national social housing programmes, advise the Minister of Housing on developments in the social housing sector, promote an enabling environment for the growth and development of the social housing sector, provide best practice information and research on the status of the social housing sector, and support provincial governments with the approval of project applications by social housing institutions.

#### **4. Founding document**

An institution, board or body applying for the exemption from income tax must have a founding document. The nature of the founding document will depend on whether the institution, board or body has been established *by* (see 2.2) or *under* any law (see 2.3).

Any institution, board or body established –

- *by* South African law will have national legislation establishing such an institution, board or body. The specific Act will provide the name of the institution, board or body being established and prescribe, among other things, its objects, functions, governance, administration, management and financial reporting requirements; or
- *under* South African law may have a separate constitution containing the provisions prescribed in the relevant national legislation or Regulation. The national legislation may provide for the establishment of the type of institution, board or body without publishing its name.

<sup>74</sup> <https://bizconnect.standardbank.co.za/sector-news/agriculturearticles/grants,-funding-and-incentives-for-agriculture-in-south-africa.aspx> [Accessed 25 June 2022].

The founding document must be submitted to the Commissioner as part of the application for the exemption (see 12).

## 5. Prescribed requirements

An institution, board or body is required by law or under its constitution to comply with the following prescribed requirements discussed in 5.1 to 5.3.<sup>75</sup>

### 5.1 Prohibition on distributions

An institution, board or body is not permitted to distribute any amount<sup>76</sup> to any person.<sup>77</sup> The prohibition on distributions is an absolute prohibition. The requirement is therefore not subject to the discretion of the Commissioner and cannot in general or in a particular instance be waived, deferred or reduced. Even if a minimal amount is distributed or a distribution occurs as an isolated or once-off event, the institution, board or body may be subject to the withdrawal of the exemption (see 7).

The reference to “any person” is not limited to natural persons, since the definition of “person” does not exclude companies, other incorporated entities, associations of persons, or statutory bodies. Foreign partnerships are, however, specifically excluded.<sup>78</sup> A South African partnership is not a legal entity<sup>79</sup> and the definition of “person” does not include a partnership, a partnership is not a person at common law<sup>80</sup> and therefore would not be a person for income tax purposes. The individual partners are persons for income tax purposes.

The words “distribute” and “amount” are not defined in the Act.

The *Cambridge Dictionary* describes “distribute” as –<sup>81</sup>

“to give something out to several people, or to spread or supply something.”

The meaning of “amount”<sup>82</sup> was judicially considered in *WH Lategan v CIR*<sup>83</sup> in relation to its use in the definition of “gross income” and the following *dictum* of Watermeyer J has been cited with approval in a number of other cases:<sup>84</sup>

“In my opinion, the word ‘amount’ must be given a wider meaning, and must include not only money but the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value.”

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<sup>75</sup> Paragraph (b) of the first proviso to section 10(1)(cA).

<sup>76</sup> Section 10(a) of the Taxation Laws Amendment Act 23 of 2020 deleted the words “of its profits or gains” and substituted it with the word “amount”. The amendment is effective from 20 January 2021. The deleted words, according to the *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2020*, were consistent with the wording contained in the repealed Companies Act 61 of 1973 the amendment therefore achieves alignment with the current Companies Act.

<sup>77</sup> Paragraph (b)(i) of the first proviso to section 10(1)(cA).

<sup>78</sup> See the definition of “person” in section 1(1).

<sup>79</sup> *Michalow, NO v Premier Milling Co Ltd* 1960 (2) SA 59 (W) at 61.

<sup>80</sup> *Chipkin (Natal) (Pty) Ltd v C: SARS* 2005 (5) SA 566 (SCA), 67 SATC 243 at 246.

<sup>81</sup> <https://dictionary.cambridge.org/dictionary/english/distribute> [Accessed 25 June 2022].

<sup>82</sup> See *Comprehensive Guide to Capital Gains Tax*.

<sup>83</sup> 1926 CPD 203, 2 SATC 16 at 19.

<sup>84</sup> See also *CIR v Butcher Bros (Pty) Ltd* 1945 AD 301, 13 SATC 21 at 34 and *CIR v People’s Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A), 52 SATC 9 at 21.

In *Cactus Investments (Pty) Ltd v CIR*<sup>85</sup> the court held that in order to comprise an “amount”, rights of a non-capital nature must be “capable of being valued in money”. Similarly, in the *People’s Stores* case<sup>86</sup> the court held that in order to be included in gross income an amount must be of such a nature that a value can be attached to it in money. In *Stander v CIR*<sup>87</sup> the court held that an amount must be capable of being turned into money or money’s worth. However, this view was soundly rejected in the landmark case of *C: SARS v Brummeria Renaissance (Pty) Ltd & others*.<sup>88</sup> In that case, it was held that it did not follow that if a receipt or accrual cannot be turned into money, it had no money value. The “turn into money” test was merely one of the tests for determining whether an accrual had a money value. The court confirmed that the test was objective, not subjective.

Non-exhaustive examples of a distribution of any amount to any person will exclude –

- any expenditure such as the purchasing of assets, the paying off debts or any funds expended in the operations of the institution, board or body in the furtherance of its sole or principal object;
- investments (see **5.2**);
- any *bona fide* donations (see **10.3**) made by an institution, board or body (see **11.1.1**); or
- the transfer of any remaining assets on dissolution (see **5.3**).

## 5.2 Use of funds

An institution, board or body is required to use its funds solely (see **3.1**) for investment or the object for which such an institution, board or body has been established.<sup>89</sup>

The word “funds” is described in the *BusinessDictionary.com* as follows:<sup>90</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.”

Having regard to the above, “funds” refers to the financial resources, namely, money available to a business for spending in the form of cash, liquid securities and credit lines.<sup>91</sup> Non exhaustive examples of “funds” derived by an institution, board or body may include government subsidies or grants, donations, dividends, interest, capital gains or from carrying on the activities for which it was established.

*Investopedia* explains an investment as follows:<sup>92</sup>

“An investment is an asset or item acquired with the goal of generating income or appreciation. In an economic sense, an investment is the purchase of goods that are not consumed today but are used in the future to create wealth. In finance, an investment is a monetary asset purchased with the idea that the asset will provide income in the future or will later be sold at a higher price for a profit.

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<sup>85</sup> 1999 (1) SA 315 (SCA), 61 SATC 43.

<sup>86</sup> *CIR v People’s Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A), 52 SATC 9.

<sup>87</sup> 1997 (3) SA 617 (C), 59 SATC 212 at 218/9.

<sup>88</sup> *C: SARS v Brummeria Renaissance (Pty) Ltd & others* 2007 (6) SA 601 (SCA), 69 SATC 205.

<sup>89</sup> Paragraph (b)(ii) of the first proviso to section 10(1)(cA).

<sup>90</sup> [www.businessdictionary.com/definition/funds.html](http://www.businessdictionary.com/definition/funds.html) [Accessed 25 June 2022].

<sup>91</sup> See the meaning of “financial resources” in *BusinessDictionary.com* available online at [www.businessdictionary.com/definition/financial-resources.html](http://www.businessdictionary.com/definition/financial-resources.html) [Accessed 25 June 2022].

<sup>92</sup> [www.investopedia.com/terms/i/investment.asp](http://www.investopedia.com/terms/i/investment.asp) [Accessed 25 June 2022].

The term ‘investment’ can refer to any mechanism used for generating future income. In the financial sense, this includes the purchase of bonds, stocks or real estate property. Additionally, a constructed building or other facility used to produce goods can be seen as an investment. The production of goods required to produce other goods may also be seen as investing.

Taking an action in the hopes of raising future revenue can also be considered an investment. For example, when choosing to pursue additional education, the goal is often to increase knowledge and improve skills in the hopes of ultimately producing more income.”

The funds of an institution, board or body may be invested as desired provided the investment does not amount to an indirect distribution of profits or the award of an impermissible benefit. It is expected that fiduciaries should act with prudence, integrity and reasonable care.

The “object” refers to the sole or principal object of the institution, board or body set out in its founding document (see 4).

### 5.3 Dissolution

On dissolution the remaining assets of an institution, board or body established –

- *under* any law must be transferred to another institution, board or body having similar objects and which is exempt from income tax under section 10(1)(cA)(i);<sup>93</sup> or
- *by* law must be transferred to –<sup>94</sup>
  - another institution, board or body having similar objects and which is exempt from income tax under section 10(1)(cA)(i); or
  - the State (see 3.3.7).

Normally a process of winding-up precedes the formal process of dissolution of an institution, board or body. During the winding-up of an institution, board or body all, the assets 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. Any assets or the proceeds of realised assets, remaining after such payments have been made must be distributed in accordance with the provisions contained in the founding document (see 4) governing the institution, board or body. On dissolution of an institution, board or body all of its assets should therefore have been realised and transferred.

An institution, board or body may not, on dissolution, distribute 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. The institution, board or body is required on dissolution to transfer its remaining assets in accordance with the provisions of section 10(1)(cA).

The *Free Dictionary* describes “similar” as follows:<sup>95</sup>

“Having a resemblance in appearance or nature; alike though not identical.”

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<sup>93</sup> Paragraph (b)(iii)(aa) of the first proviso to section 10(1)(cA).

<sup>94</sup> Paragraph (b)(iii)(bb) of the first proviso to section 10(1)(cA).

<sup>95</sup> [www.thefreedictionary.com/similar](http://www.thefreedictionary.com/similar) [Accessed 25 June 2022].

Any institution, board or body benefitting from the dissolution of another institution, board or body must be formally exempt by the Commissioner under section 10(1)(cA)(i) and must have similar, although not necessarily identical, objects to those of the institution, board or body being dissolved. An institution, board or body may choose to whom it will distribute its remaining assets on dissolution, without prior approval from the Commissioner, provided the recipient meets the dissolution requirements.

Failure to transfer, or to take reasonable steps to transfer the remaining assets as required on dissolution will result in the accumulated net revenue not distributed being deemed to be taxable income accruing to the institution, board or body during the year of assessment<sup>96</sup> (see **17.3**) in which dissolution took place.<sup>97</sup>

The concept “accumulated net revenue” is not defined in the Act. The *Dictionary.com* describes “accumulated” as –<sup>98</sup>

“to gather or collect, often in gradual degrees”.

The words “net revenue” are described in the *BusinessDictionary.com* is as follows:<sup>99</sup>

“Gross total minus any returns and any other negative revenue.”

The amount of accumulated net revenue is therefore the total undistributed profits or revenue, which can include amounts of a capital or revenue nature.

The term “taxable income” is defined as –<sup>100</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 institution, board or body guilty of such a transgression will therefore not be allowed to deduct any further tax allowances or deductions from its accumulated net revenue, since its accumulated net revenue is deemed to be taxable income, which is after allowances and deductions.

### **Example 9 – Non-compliance with the dissolution requirement**

*Facts:*

A national public entity established by national legislation to render or make available legal aid and legal advice, provide legal representation to persons at state expense, and to provide education and information concerning legal rights was approved by the Commissioner as an institution, board or body. Its receipts and accruals are accordingly exempt from income tax under section 10(1)(cA)(i).

<sup>96</sup> The term “year of assessment” is defined in section 1(1).

<sup>97</sup> Paragraph (b) of the second proviso to section 10(1)(cA).

<sup>98</sup> [www.dictionary.com/browse/accumulated](http://www.dictionary.com/browse/accumulated) [Accessed 25 June 2022].

<sup>99</sup> [www.businessdictionary.com/definition/net-revenue.html](http://www.businessdictionary.com/definition/net-revenue.html) [Accessed 25 June 2022].

<sup>100</sup> Section 1(1).

A decision was taken to dissolve the national public entity and its remaining assets were transferred to a Bursary Scheme Trust, which provides scholarships, and bursaries to law students attending South African universities. The Bursary Scheme Trust was approved by the Commissioner as a public benefit organisation under section 30.

The year-end of the national public entity is 28 February. The national public entity was finally wound up on 21 December 2020. The assets remaining after winding-up amounted to R300 000, representing accumulated net income of R50 000 and capital profits of R250 000 realised on sale of capital assets. The total accumulated net revenue of R300 000 was accordingly distributed to the Bursary Scheme Trust.

*Result:*

The remaining assets of the national public entity were transferred on dissolution to an approved PBO, which is contrary to the dissolution requirement, namely, that the remaining assets must be distributed to some other institution, board or body exempt under section 10(1)(cA)(i) and having objects similar to those of the national public entity. The PBO is not an institution, board or body exempt under section 10(1)(cA)(i) and does not have objects similar to the national public entity. The national public entity did not comply with the dissolution requirement and is therefore taxable on the amount of R300 000 during the 2021 year of assessment.

## 6. Conditions prescribed by the Commissioner

The Commissioner has discretion to approve the exemption subject to conditions deemed necessary to ensure that the activities of an institution, board or body are wholly or mainly directed to the furtherance of its sole or principal object (see 3.1).<sup>101</sup> Since the facts and circumstances pertaining to each institution, board or body may differ, each case will be considered on its own merits.

In some instances, it may be impracticable or unfeasible for legislation or constitutions created in accordance with provisions prescribed in legislation or Regulation to be amended to incorporate the prescribed requirements (see 5). In such circumstances, the exemption may be subject to conditions the Commissioner deems necessary to ensure that the activities of an institution, board or body are wholly or mainly directed to the furtherance of its sole or principal object. The prescribed requirements may therefore, among other things, be set out as conditions in the letter issued by the Commissioner confirming the exemption. The letter will be binding on the institution, board or body and non-compliance with its terms will result in the same penalties and actions as if the conditions were contained in the founding document (see 4) of that institution, board or body.

The determination whether an activity is *wholly* or *mainly* directed to the furtherance of its sole or principal object will be a question of fact. The activity need not be *wholly* directed to the furtherance of its sole or principal object, as long as the activity is *mainly* directed for that purpose. In practice, SARS requires that more than 50% of an activity, measured, for example, based on time or area usage, be directed to the furtherance of its sole or principal object.

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<sup>101</sup> Paragraph (a) of the first proviso to section 10(1)(cA).

## 7. Withdrawal of the exemption

The Commissioner may withdraw the exemption of any institution, board or body if satisfied that such institution, board or body has during any year of assessment failed to comply with section 10(1)(cA)(i). The exemption will be withdrawn with effect from the commencement of the year of assessment in which non-compliance or failure by an institution, board or body occurred.

The Commissioner must, however, in accordance with section 5 of the Promotion of Administrative Justice Act 3 of 2000 provide adequate reasons relating to the non-compliance or failure to comply with section 10(1)(cA)(i) before the exemption is withdrawn.

The Supreme Court of Appeal in *Minister of Environmental Affairs & Tourism v Phambili Fisheries & another*<sup>102</sup> considered what constitutes adequate reasons. The court relied on an Australian judgment in which the following remarks were stated:

“Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.”

The decision by the Commissioner to withdraw the exemption under section 10(1)(cA) is subject to objection and appeal (see **18**).

An institution, board or body whose approval has been withdrawn will be liable for income tax and other taxes and duties in the same way as any other taxpayer. An institution, board or body will be regarded as a company for income tax purposes and therefore will be liable to tax according to company tax rates.<sup>103</sup>

## 8. Receipts and accruals exempt from income tax

The receipts and accruals of any institution, board or body approved by the Commissioner are exempt from income tax under section 10(1)(cA). The exemption granted under section 10(1)(cA) is an absolute exemption. All receipts and accruals falling within gross income,<sup>104</sup> being the total amount, in cash or otherwise, received by or accrued to or in favour of an institution, board or body, will be exempt from income tax under section 10(1)(cA). The type of receipts or accruals envisaged are those, which are included in the definition of “gross income”. Receipts or accruals of a capital nature which are not deemed to be included in gross income would not be included in the receipts and accruals referred to in the opening words of section 10(1)(cA), 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 taxable income. Paragraph 63 of the Eighth Schedule contains the rules for disregarding capital gains and losses of a fully exempt person (see **11.7**).

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<sup>102</sup> 2003 (6) SA 407 (SCA), [2003] 2 All SA 616 (SCA).

<sup>103</sup> See paragraph (a) of the definition of “company” in section 1(1).

<sup>104</sup> Section 1(1).

## 9. Entities specifically excluded from the exemption

Section 10(1)(cA)(i) excludes specific entities from the exemption from income tax, namely, a company as defined in the Companies Act, any co-operative, close corporation, trust or water services provider.

### 9.1 A company

A “company” defined in the Companies Act is a juristic person incorporated under that Act, a domesticated company,<sup>105</sup> or a juristic person that immediately before 1 May 2011 was –<sup>106</sup>

- registered under the repealed Companies Act 61 of 1973 other than an external company;<sup>107</sup> or
- registered under the Close Corporations Act 69 of 1984 if it has subsequently been converted under Schedule 2 of the Companies Act;<sup>108</sup> or
- in existence and recognised as an existing company under the previous Companies Act 61 of 1973;<sup>109</sup> or
- deregistered under the previous Companies Act and has subsequently been re-registered under the Companies Act.

The following types of companies may be formed or incorporated under the Companies Act:<sup>110</sup>

- A profit company,<sup>111</sup> which is a –<sup>112</sup>
  - state-owned company (SOC Ltd)<sup>113</sup> listed as a public entity in the relevant Schedules to the PFMA, or is owned by a municipality;<sup>114</sup>
  - private company [(Pty) Ltd] incorporated generally for purposes of making financial gain and whose MOI prohibits the offer of its shares to the public and restricts the transferability of its shares;<sup>115</sup>
  - personal liability company (Inc.) typically incorporated associations of professional persons;<sup>116</sup> or
  - public company (Ltd).<sup>117</sup>

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<sup>105</sup> A domesticated company is defined in section 1 of the Companies Act and is a foreign company whose registration has been transferred to South Africa subject to certain conditions and requirement set out in the Companies Act.

<sup>106</sup> See the definition of “company” in section 1 of the Companies Act.

<sup>107</sup> The term “external company” is defined in section 1 of the Companies Act and is a foreign company that is carrying on business, or non-profit activities, as the case may be, within South Africa, subject to requirements set out in the Companies Act.

<sup>108</sup> That Schedule sets out the conditions and requirements relating to the conversion of close corporations to companies.

<sup>109</sup> Schedule 5 of the Companies Act contains transitional arrangements to facilitate the effective transition of pre-existing companies from the previous Companies Act to the Companies Act. Under Item 2(1) of Schedule 5 of the Companies Act, all existing companies will continue to exist as if they were incorporated under the Companies Act.

<sup>110</sup> See section 8(1) of the Companies Act.

<sup>111</sup> See the definition of “profit company” in section 1 of the Companies Act.

<sup>112</sup> See section 8(2) of the Companies Act.

<sup>113</sup> See the definition of “state-owned company” in section 1 of the Companies Act.

<sup>114</sup> A municipality contemplated in the Local Government: Municipal Systems Act 32 of 2000.

<sup>115</sup> See the definition of “private company” in section 1 of the Companies Act.

<sup>116</sup> See the definition of “personal liability company” in section 1 of the Companies Act.

<sup>117</sup> See the definition of “public company”.

- A non-profit company (NPC) incorporated generally, for a public benefit object and whose income and property may not be distributed to its incorporators, members, directors, officers or persons except for the payment of reasonable remuneration.<sup>118</sup>

A company is incorporated by the adoption of the founding document known as the memorandum of incorporation (MOI) and becomes a juristic person from the date it is registered and issued with a registration certificate by the CIPC as evidence of the incorporation and registration of that company.<sup>119</sup>

## 9.2 A co-operative

The term “co-operative” is defined in the Act and means –<sup>120</sup>

“any association of persons registered in terms of section 27 of the Co-operatives Act, 1981 (Act No. 91 of 1981) or section 7 of the Co-operatives Act, 2005 (Act No. 14 of 2005)”.

The Co-operatives Act 91 of 1981 has been repealed. However, a co-operative registered under that Act may continue to operate as if the Act has not been repealed subject to the transitional provisions of section 97 of the Co-operatives Act 14 of 2005. Under the transitional provisions, a co-operative registered under the repealed Co-operatives Act was required within three years from 2 May 2007<sup>121</sup> to amend its constitution to the extent necessary to comply with the requirements of the Co-operatives Act, 2005, and submit its constitution to the Registrar of Co-operatives for registration.

The term co-operative is defined in the Co-operatives Act, 2005, as –<sup>122</sup>

“an autonomous association of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles”.

The Co-operatives Act, 2005, and Regulations<sup>123</sup> provide a regulatory framework for co-operatives by setting out the requirements and procedures for the functioning and operations of various forms of co-operative,<sup>124</sup> for example, primary, secondary, and tertiary co-operatives and the national apex co-operative as well as different kinds,<sup>125</sup> for example, housing, worker, social, agricultural, burial, financial services, consumer, marketing and supply, and services co-operatives.

A co-operative for purposes of income tax is dealt with as if it were a company.<sup>126</sup>

<sup>118</sup> See definition of “non-profit company” in section 1 of the Companies Act.

<sup>119</sup> Section 19 of the Companies Act.

<sup>120</sup> See section 1(1).

<sup>121</sup> The date the Co-operatives Act 14 of 2005 came into effect. See Government Notice Regulation 6 *Government Gazette* 29830 of 30 April 2007.

<sup>122</sup> See section 1(1) of that Act.

<sup>123</sup> See Government Notice Regulation 366 of 30 April 2007.

<sup>124</sup> See section 4(1) of that Act. Also, see definitions of primary, secondary and tertiary co-operative in section 1(1) of the Co-operatives Act, 2005.

<sup>125</sup> See section 4(2) of that Act.

<sup>126</sup> See paragraph (c) of the definition of “company” in section 1(1).

### 9.3 A close corporation

The term “close corporation” is defined in the Act and means –<sup>127</sup>

“a close corporation within the meaning of the Close Corporations Act 69 of 1984”.

A close corporation (CC)<sup>128</sup> formed in accordance with the Close Corporations Act 69 of 1984 is a juristic person and continues to exist until it is deregistered or dissolved.<sup>129</sup>

The members<sup>130</sup> (restricted to ten natural persons or a trustee of an *inter vivos* trust or testamentary trust)<sup>131</sup> of a CC have an interest in that CC.<sup>132</sup> A CC is required to have a founding statement<sup>133</sup> which must contain particulars as prescribed under that Act and must be signed by every person who is a member of that CC. The former Registrar of Close Corporations on registration of the founding statement assigned a registration number to the CC and issued a certificate that the CC was incorporated.<sup>134</sup>

No new CCs were registered with effect from 1 May 2011 (the implementation date of the Companies Act). Furthermore, the conversion from a company to a CC will also not be allowed. CCs currently registered can continue to operate.

For purposes of income tax, a CC is dealt with as if it is a company.<sup>135</sup>

### 9.4 A trust

The term “trust” is defined in the Act and means –<sup>136</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”.

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* in Chapter 14.

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<sup>127</sup> See section 1(1).

<sup>128</sup> See section 22(1) of the Close Corporations Act, 1984.

<sup>129</sup> See section 2(2) of the Close Corporations Act, 1984.

<sup>130</sup> See the definition of “member” in section 1(1) of the Close Corporations Act, 1984. Also, see sections 2(1), 28 and 29(2) of that Act.

<sup>131</sup> See section 29(2) of the Close Corporations Act, 1984.

<sup>132</sup> See the definition of “member’s interest” in section 1(1) of the Close Corporations Act, 1984. Also, see section 30 of that Act.

<sup>133</sup> See the definition of “founding statement” in section 1(1) of the Close Corporations Act, 1984. Also, see section 12 of that Act.

<sup>134</sup> See section 14(1) of the Close Corporations Act, 1984.

<sup>135</sup> See paragraph (f) of the definition of “company” in section 1(1).

<sup>136</sup> See section 1(1).

## 9.5 A water services provider

The term “water services provider” is defined in the Act and means a person who provides water supply services and sanitation services and who is a –<sup>137</sup>

- public entity regulated under the PFMA, for example, Amatola Water Board, Bloem Water, Magalies Water, Overberg Water, Rand Water, and Umgeni Water;<sup>138</sup>
- wholly owned subsidiary or entity of a public entity if the operations of the subsidiary or entity are ancillary or complementary to the operations of that public entity;<sup>139</sup>
- company contemplated in paragraph (a) of the definition of “company”, which is wholly owned by one or more municipalities;<sup>140</sup> or
- board or institution having powers similar to a water board<sup>141</sup> established under the Water Services Act 108 of 1997,<sup>142</sup> and would have fallen within the ambit of the definition of “local authority”<sup>143</sup> prior to the coming into operation of section 3(1)(h) of the Revenue Laws Amendment Act 20 of 2006.

A water services provider generally provides water services to consumers, a municipality or council responsible for ensuring access to water services.

The receipts and accruals of a qualifying water services provider are exempt from income tax under section 10(1)(t)(ix).

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<sup>137</sup> See section 1(1).

<sup>138</sup> A public entity is defined in section 1 of the PFMA and means a “national or provincial public entity”. Public entities are classified into different Schedules based on their nature and level of autonomy. Schedule 2 to that Act lists the Major Public Entities while Schedule 3 lists Other Public Entities.

<sup>139</sup> The subsidiary or entity must have an issued share capital, and the holder of the shares in the subsidiary or entity must be a public entity regulated under the PFMA. Such a wholly owned subsidiary or entity of a public entity will, however, qualify as a water services provider only if its operations are ancillary or complementary to the operations of the public entity, being the holder of all the shares.

<sup>140</sup> To qualify as a water services provider a “company” contemplated in paragraph (a) of the definition of “company” must have an issued share capital, and the holders of the shares in that company, must be one or more municipalities.

<sup>141</sup> See *Explanatory Memorandum on the Revenue Laws Amendment Bill, 2006*.

<sup>142</sup> The Water Services Act does not provide for the establishment of a water services provider, nor does it prescribe the manner in which it must be constituted or the conditions, which must be included in the founding, document.

<sup>143</sup> The term “local authority” was defined in section 1(1) and included certain named water boards. The definition of “local authority” became outdated and was deleted by section 3(1)(h) of the Revenue Laws Amendment Act 20 of 2006. The amendment had the effect that the receipts and accruals of a water services provider falling within the ambit of the definition in section 1(1) qualified for exemption only under section 10(1)(t)(ix).

## 10. Section 18A approval

Any taxpayer making a *bona fide* donation (see **10.3**) in cash (see **10.4.1**) or of property in kind (see **10.4.2**) is entitled to a deduction from taxable income (see **10.6**) provided the donation is actually paid or transferred during the year of assessment<sup>144</sup> to any institution, board or body carrying on PBAs in Part II in South Africa and approved by the Commissioner purposes of section 18A.<sup>145</sup>

### 10.1 Public benefit activities

The Ninth Schedule is divided into two Parts, namely, Part I and Part II (see **Annexure C**). Part I lists a number of PBAs for purposes of approval as a public benefit organisation under section 30.<sup>146</sup> The PBAs approved by the Minister for purposes of section 18A are listed in Part II. Not all the PBAs listed in Part I are included in Part II.

The PBAs listed in Part II are categorised as follows:

- Welfare and Humanitarian (paragraph 1)
- Health Care (paragraph 2)
- Education and Development (paragraph 3)
- Conservation, Environment and Animal Welfare (paragraph 4)<sup>147</sup>
- Land and Housing (paragraph 5)<sup>148</sup>

See **Annexure C** for a complete list of PBAs falling under each of the above categories.

The institution, board or body to qualify for section 18A purposes must carry on these PBAs in South Africa.

The Minister may from time to time by notice in the *Government Gazette* approve additional PBAs. The Minister may also by regulation prescribe additional requirements that an institution, board or body carrying on any specific PBA identified by the Minister in the regulations, must comply with before any donation made to that institution, board or body will be allowed as a tax deduction under section 18A. For example, the granting of loans to emerging micro enterprises to improve capacity to start and manage businesses referred to in PBA 1(p)(iii) as well as the provision of loans, for study, research and teaching contemplated in PBA 3(o) are subject to conditions that the Minister may prescribe by way of regulation. The Minister has, as yet, not published any conditions or requirements relating to those PBAs.

The Minister has, however, published conditions and requirements relating to the provision of scholarships, bursaries and awards for study, research, and teaching contemplated in PBA 3(o) in Government Gazette Notice Regulation 302 in *Government Gazette* 29491 of 28 February 2003 (see **Annexure E**).<sup>149</sup>

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<sup>144</sup> Section 18A(1).

<sup>145</sup> Section 18A(1)(a)(ii).

<sup>146</sup> See *Tax Exemption Guide for Public Benefit Organisations in South Africa* for comprehensive information on the approval of public benefit organisations under section 30.

<sup>147</sup> Limited PBAs in Part I are included in this category in Part II.

<sup>148</sup> Limited PBAs in Part I are included in this category in Part II.

<sup>149</sup> The regulations relate specifically to PBA 4(o) in Part I. However, the Minister declared in Government Notice Regulation 333 in *Government Gazette* 24941 of 8 April 2005 that those regulations also apply to PBA 3(o) in Part II.

Any additional PBAs or requirements prescribed by the Minister must be approved by Parliament and formally incorporated into the Ninth Schedule or the Act within 12 months after the date of publication by the Minister of those PBAs or requirements, as the case may be, in the *Gazette*.<sup>150</sup>

**Example 10– The following are non-exhaustive examples of institutions, boards or bodies carrying on PBAs in Part II in South Africa**

- A public school is defined in the South African Schools Act 84 of 1996. The governance of every public school is vested in its governing body that may perform functions and obligations as prescribed in that Act. A public school is regarded for the purposes of income tax as an institution established under law providing necessary and useful services to the State and members of the general public. A public school may therefore qualify for the exemption under section 10(1)(cA)(i). The provision of education by a “school” as defined in the South African Schools Act, 1996, may be regarded as carrying on PBA 3(a) in Part II.
- A public higher education institution is established or declared as a public higher education institution under the Higher Education Act 101 of 1997. The Minister of Higher Education and Training may by notice in the *Gazette* establish a specific university, university of technology or college. A public higher education institution is regarded for the purpose of income tax as an institution established under law providing necessary and useful services to the State and members of the general public. A public higher education institution may therefore qualify for the exemption under section 10(1)(cA)(i). The provision of “higher education” by a “higher education institution” as defined in the Higher Education Act, 1997, may be regarded as carrying on PBA 3(b) in Part II.
- A public college is defined in the Further Education and Training Colleges Act 16 of 2006 and established by the Minister of Higher Education and Training by notice in the *Gazette*. A public college is regarded for the purposes of income tax as an institution established under law providing necessary and useful services to the State and members of the general public. A public college may therefore qualify for the exemption under section 10(1)(cA)(i). A “public college” as defined in the Continuing Education and Training Colleges Act, 2006, providing “continuing education and training” which is registered under that Act may be regarded as carrying on PBA 3(d) in Part II.

## 10.2 Control measures

A section 18A-approved institution, board or body is required to maintain proper control over the application and spending of donations received for which section 18A receipts are issued.

A section 18A receipt may be issued only for a donation, which is solely and exclusively, used for PBAs in Part II in South Africa.

A section 18A-approved institution, board or body carrying on a combination of PBAs, some of which are non-section 18A-approved in Part I, and some of which are section 18A-approved in Part II, may issue section 18A receipts for donations received solely to carry on PBAs in Part II.<sup>151</sup> The section 18A-approved institution, board or body must therefore ring-fence the PBAs in Part II. Donations for which section 18A receipts will be issued must be received subject to the prerequisite that they will be used solely on a PBA in Part II in South Africa.

<sup>150</sup> Section 18A(1B).

<sup>151</sup> Section 18A(2A)(a).

Donations received must therefore be controlled in such a manner that their usage is restricted to only those PBAs in Part II. The records of the section 18A-approved institution, board or body must clearly identify the donations received for PBAs in Part II and the use to which those donations were applied. The section 18A-approved institution, board or body carrying on a combination of PBAs in Part I and Part II must obtain an audit certificate confirming that all donations received or accrued during the year for which it issued section 18A receipts were used solely in carrying on PBAs in Part II.<sup>152</sup> The section 18A-approved institution, board or body is required to retain the audit certificate as part of its records.<sup>153</sup> The failure to obtain and retain an audit certificate may be one of the facts giving the Commissioner reasonable grounds for invalidating the section 18A receipts of the institution, board or body (see **10.9**)

If the Commissioner has reasonable grounds for believing that any accounting officer<sup>154</sup> or accounting authority<sup>155</sup> contemplated in the PFMA or an accounting authority contemplated in the Local Government: Municipal Finance Management Act 56 of 2003,<sup>156</sup> as the case may be, of any section 18A-approved institution, board or body to which either of those Acts applies, has issued or allowed a section 18A receipt to be issued in contravention of section 18A(2A) or used a donation for which a section 18A receipt was issued for a purpose other than to solely carry on PBAs in Part II, the Commissioner must notify National Treasury and the Provincial Treasury (if applicable).<sup>157</sup>

The Commissioner may also inform the accounting officer or accounting authority by written notice that unless corrective steps are taken within the period specified in the notice, receipts issued by that sphere of government will, from a date specified in the notice, not qualify as a valid section 18A receipt. Those donations will therefore not qualify for a deduction from the taxable income of the donor.

Failure by the accounting officer or accounting authority, whichever is applicable, to submit an audit certificate may be one of the facts giving the Commissioner reasonable grounds for invalidating the section 18A receipts of the institution, board or body (see **10.9**).

**Example 11 – Audit certificate requirement of a section 18A-approved institution, board or body**

*Facts:*

A body established as a juristic person by national legislation to conduct research, development and technology transfer to promote agriculture has been approved by the Commissioner as an institution, board or body under section 10(1)(cA)(i).

<sup>152</sup> See Interpretation Note 112 “Section 18A: Audit Certificate”.

<sup>153</sup> Section 18A(2B).

<sup>154</sup> The term “accounting officer” is defined in section 1 of the PFMA as a person mentioned in section 36 of that Act. The accounting officer of a department is the head of such department and the accounting officer of a constitutional institution listed in Schedule 1 to that Act is the chief executive officer, or any other person designated for this purpose in writing by National Treasury.

<sup>155</sup> The term “accounting authority” is defined in section 1 of the PFMA as a body or person mentioned in section 49 of that Act. The accounting authority for a public entity is, depending on the facts, the board or controlling body of the entity, the chief executive officer of the department or the person in control of the department, or any other person designated for this purpose by specific legislation.

<sup>156</sup> The term “accounting officer” is defined in section 1(1) of the Local Government: Municipal Finance Management Act 56 of 2003 and requires a municipality or municipal entity to have an accounting officer who must be accountable under that Act.

<sup>157</sup> Section 18A(5B).

In addition to conducting research activities, which qualify under PBA 8(a) in Part I, the body provides scholarships, bursaries and awards to deserving students for study or research in agriculture, contemplated in PBA 3(o) in Part II. The Commissioner has also granted the body approval under section 18A.

In accordance with the national legislation establishing and governing the body, the Auditor-General is required to audit the body's accounts.

*Result:*

The section 18A-approved institution, board or body is required to obtain and retain an audit certificate from the Auditor-General confirming that all donations received or accrued during the year of assessment in which that body issued section 18A receipts were used solely in carrying on PBA 3(o) in Part II.

### **10.3 Bona fide donations**

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

The term “donation” is defined and means –<sup>158</sup>

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

Trollip JA summed up the common law meaning of a donation in *Ovenstone v SIR* when he stated the following:<sup>159</sup>

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

In *Welch’s Estate v C: SARS* Marais JA stated the following on the meaning of a donation:<sup>160</sup>

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

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

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

<sup>158</sup> Section 55(1).

<sup>159</sup> 1980 (2) SA 721 (A), 42 SATC 55 at 73.

<sup>160</sup> 2005 (4) SA 173 (SCA), 66 SATC 303 at 312 and 314.

The shorter OED gives the following meaning to the word:

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

In *Estate Sayle v CIR* the court stated the following:<sup>161</sup>

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

In *The Master v Thompson’s Estate* the court confirmed that a transaction would not be a donation when something is received in return or when there is some consideration.<sup>162</sup>

A donation is therefore a gratuitous disposal by the donor out of liberality or generosity, under which the donee is enriched and the donor impoverished. It is a voluntary gift freely given to the donee. There must be no *quid pro quo*, no reciprocal obligations and no benefit for the donor. If the donee gives any consideration, at all, it is not a donation and the amount paid by the donor will not qualify for a deduction under section 18A.

## 10.4 Types of donations

A donation can be in the form of cash or of property in kind which was actually paid or transferred by the donor to the section 18A-approved institution, board or body in a year of assessment.

### 10.4.1 Cash donation

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

#### **Example 12 – Non-exhaustive examples of payments or transfers not qualify as tax-deductible donations:**

- Amounts paid for school or university fees, school or university entrance fees or compulsory school or university levies.
- The value of free rent, water and electricity provided by a lessor to a section 18A-approved institution, board or body.
- Payments of debt owned by a section 18A-approved institution, board or body, for example, the cost of vehicle repairs paid directly to the service station or panel beaters by a donor on behalf of that institution, board or body.
- Prizes and sponsorships donated for fundraising events.
- Promissory notes.
- Pledges.
- Payments made in future instalments.

<sup>161</sup> 1945 AD 388, 13 SATC 170 at 173.

<sup>162</sup> 1961 (2) SA 20 (FC), 24 SATC 157 at 165.

#### 10.4.2 Donation of property in kind

A donation of property in kind is made in a form other than cash. Donations of property made in kind may include the following:<sup>163</sup>

- A financial instrument provided it is –
  - a share in listed company; or
  - issued by an “eligible financial institution”<sup>164</sup> as defined in section 1 of the Financial Sector Regulation Act 9 of 2017.<sup>165</sup>
- Trading stock forming part of the business undertaking or trading activity conducted by the taxpayer. Such trading stock may include livestock or produce donated by a farmer or goods such as computers, foodstuffs, furniture medical supplies and motor vehicles.
- An asset other than trading stock used by the taxpayer in conducting the taxpayer’s trade. Examples of such assets include cash registers, computers, crockery, delivery vehicles, furniture, garden equipment, kitchen utensils and office equipment.
- An asset, which is not trading stock and is not used in the business of the taxpayer. Example of such assets include personal assets or assets bought by the taxpayer such as computers, furniture, sport equipment and vehicles.
- Property purchased, manufactured, erected, installed or constructed by or on behalf of the taxpayer. Examples of such property include carpets or cupboards installed, security fencing and buildings such as classrooms erected by or on behalf of the taxpayer for purposes of conducting any PBAs in Part II.

A donation of property in kind for which a section 18A receipt has been issued must be used by a section 18A-approved institution, board or body in carrying on PBAs in Part II in South Africa.

No deduction will be allowed for any donation of any property in kind which –

- creates or is subject to any fiduciary right, usufruct or other similar rights; or
- constitutes an intangible asset or financial instrument, unless the financial instrument meets the requirements described above.

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

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<sup>163</sup> Section 18A(3).

<sup>164</sup> This definition includes a financial institution licensed or required to be licensed as a bank under the Banks Act, a financial institution registered as a long-term insurer under the Long-term Insurance Act 52 of 1998 or a short-term insurer under the Short-term Insurance Act 53 of 1998 or licensed or required to be licensed under the Insurance Act 18 of 2017, a market infrastructure, and a financial institution prescribed in Regulations for the purposes of this definition.

<sup>165</sup> Section 18A(3B)(b) was amended by section 35(1)(e) of the Taxation Laws Amendment Act 23 of 2018 and deemed to have come into operation on 1 April 2018.

## 10.5 Value of a donation of property in kind

The amount deductible by any taxpayer for any donation of property in kind, other than immovable property of a capital nature for which the lower of market value or municipal value exceeds cost, is deemed to be as follows:<sup>166</sup>

- A financial instrument which is trading stock of the taxpayer, the lower of fair market value on the date of the donation or the amount which has been taken into account for that year of assessment for the value of that trading stock under section 22(8)(C).<sup>167</sup>
- Any other trading stock of the taxpayer (including any livestock or produce of a farmer), the amount which has been taken into account for that year of assessment for the value of that trading stock forming part of trading stock of the taxpayer under section 22(8)(C) or paragraph 11 of the First Schedule, as appropriate.
- An asset used in the taxpayer's trade, the lower of the fair market value on the date of donation of the property or the cost to the taxpayer of such property less any allowance (other than an investment allowance) deducted from the income of that taxpayer for that asset.
- Property that is not trading stock of the taxpayer and not a business asset, the lower of the fair market value on the date of the donation or the cost to the taxpayer of such asset less depreciation using the 20% reducing balance method in the case of deterioration of movable property.<sup>168</sup>
- Property that is purchased, manufactured, erected, assembled, installed or constructed by or on behalf of the taxpayer to form the subject of the donation, the lower of the fair market value on the date of the donation or the cost to the taxpayer of such property.

Any deduction claimed by any taxpayer for any donation of immovable property of a capital nature when the lower of market value or municipal value exceeds cost must be determined using the following formula:<sup>169</sup>

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

In which formula –

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

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<sup>166</sup> Section 18A(3).

<sup>167</sup> For guidance on the application and interpretation of section 22(8), see Interpretation Note 65 “Trading Stock – Inclusion in Income when Applied, Distributed or Disposed of Otherwise than in the Ordinary Course of Trade”.

<sup>168</sup> See section 8(5)(bB)(i).

<sup>169</sup> Section 18A(3A) was inserted by section 52(1)(g) of the Taxation Laws Amendment Act 31 of 2013 with effect from 1 March 2014 and applicable to amounts paid or transferred during years of assessment commencing on or after that date.

## 10.6 Allowable deduction from the taxable income of a taxpayer

The allowable deduction from the taxable income of a taxpayer that is a portfolio of a collective investment scheme<sup>170</sup> for all qualifying donations paid or transferred during the year of assessment is determined according to the following formula:<sup>171</sup>

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

In which formula –

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

For all other taxpayers the allowable deduction from the taxable income may not exceed 10% of the taxable income excluding any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit and severance benefit of the taxpayer as calculated before allowing any deduction for donations under section 18A or section 6quat(1C).<sup>172</sup>

Any excess amount of a donation made which is disallowed solely for the reason that it exceeds the amount of the deduction allowable for a year of assessment may be carried forward for purposes of section 18A. The excess amount carried forward will be deemed a donation actually paid or transferred in the next succeeding year of assessment subject to the 10% limitation.<sup>173</sup> Any excess remaining can be further rolled over but always subject to the 10% limitation.<sup>174</sup>

### Example 12 – Carry-forward treatment for excess deductible donations

	Year 1 R	Year 2 R
Taxable income	1 000 000	1 500 000
Donation made	150 000	0
Maximum amount potentially allowable as deduction (10% of taxable income)	100 000	150 000
Deduction claimed	100 000	50 000 (amount carried forward)
Amount carried forward	50 000	0

<sup>170</sup> The term “collective investment scheme” is defined in section 1 of the Collective Investment Schemes Control Act 45 of 2002.

<sup>171</sup> Section 18A(1)(A).

<sup>172</sup> Section 18A(1)(B). This section was amended by section 35(1)(a) of the Taxation Laws Amendment Act 23 of 2018 and deemed to have come into operation on 1 March 2018.

<sup>173</sup> Proviso to section 18A(1)(B).

<sup>174</sup> The carry-forward treatment applies to donations paid or transferred during years of assessment commencing on or after 1 March 2014.

## 10.7 Tax-deductible donations

Any claim for a tax deduction from the taxable income of a taxpayer will be allowed only if supported by –<sup>175</sup>

- a section 18A receipt issued by a section 18A-approved institution, board or body; or
- an employees' tax certificate (IRP 5 certificate).<sup>176</sup>

A taxpayer may therefore make a donation directly to a section 18A-approved institution, board or body or through a payroll-giving programme operated by an employer.<sup>177</sup>

### 10.7.1 Donations made directly to a section 18A-approved institution, board or body

The section 18A-approved institution, board or body must issue the section 18A receipt in the year of assessment in which the donation is actually paid or transferred by the taxpayer.

The deduction of donations made directly to a section 18A-approved institution, board or body for which it has issued a section 18A receipt is claimed by the taxpayer annually on assessment of the income tax return.

### 10.7.2 Donations made through a payroll-giving programme

A payroll-giving programme operated by an employer enables employees to donate from their salaries on a monthly basis to any section 18A-approved institution, board or body.

A section 18A-approved institution, board or body must issue a section 18A receipt to the employer for the total amount of donations paid by the employer on behalf of the employees. Section 18A receipts may be issued to the employer on a monthly basis or for a period that either coincides with the interim (1 March to 31 August) or annual (1 March to 28 / 29 February) period for which the employer is required to submit a reconciliation declaration to SARS for employees' tax purposes (see **19**).

## 10.8 Section 18A receipts

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

A section 18A receipt will be valid if it contains the following detail:<sup>178</sup>

- The reference number issued to the section 18A-approved institution, board or body by the Commissioner for purposes of section 18A.
- The date the donation is received by the section 18A-approved institution, board or body.
- The name and address of the section 18A-approved institution, board or body issuing the section 18A receipt to which enquiries may be directed.
- The name and address of the donor.
- The amount of the donation or the nature of the donation if not in cash.

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<sup>175</sup> Section 18A(2).

<sup>176</sup> The term "employees' tax certificate" is defined in paragraph 1 of the Fourth Schedule.

<sup>177</sup> The term "employer" is defined in paragraph 1 of the Fourth Schedule.

<sup>178</sup> Section 18A(2)(a).

- A certification to the effect that the section 18A receipt is issued for purposes of section 18A and that the donation has or will be used exclusively for the object of the section 18A-approved institution, board or body.

SARS does not make section 18A receipts available to section 18A-approved institutions, boards or bodies. Section 18A-approved institutions, boards or bodies must create their own receipts ensuring that all the above details appear on the receipt. See **Annexure D** for an example of a section 18A receipt.

## 10.9 Abuse of section 18A approval

There will be adverse consequences for a section 18A-approved institution, board or body when the Commissioner has reasonable grounds for believing that the person who is in a fiduciary capacity responsible for the management or control of its income or assets has –<sup>179</sup>

- in any material<sup>180</sup> way failed to ensure that the objects for which that section 18A-approved institution, board or body was established are carried out;<sup>181</sup>
- expended the monies of a section 18A-approved institution, board or body for purposes not covered by its objects;
- issued or allowed a section 18A receipt to be issued for fees or other emoluments payable to that section 18A-approved institution, board or body;
- issued or allowed a section 18A receipt to be issued in contravention of section 18A;
- used a donation for which a section 18A receipt was issued for any purpose other than for any PBAs in Part II in South Africa;
- failed to obtain and retain an audit certificate;<sup>182</sup> or
- failed submit an audit certificate to the Commissioner on an annual basis by the accounting officer or accounting authority, as the case may be.<sup>183</sup>

In the above instances, the Commissioner may, by written notice, direct that –

- the amount of the donations for which section 18A receipts were issued will be deemed to be taxable income of that section 18A-approved institution, board or body; and
- unless corrective steps are taken by that section 18A-approved institution, board or body within a period specified in the notice, any receipt issued by that section 18A-approved institution, board or body will not qualify as a valid section 18A receipt from the date specified in the notice. Those donations will therefore not qualify for a deduction from the taxable income of the donor.

<sup>179</sup> Section 18A(5).

<sup>180</sup> The Act does not specify what constitutes a material failure. The Commissioner must therefore decide each case on its own facts and circumstances. A material failure to ensure that the objects for which that section 18A-approved institution, board or body was established have been carried out may include a significant, relevant, and important failure.

<sup>181</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 25 June 2022].

<sup>182</sup> Section 18A(5)(d). Subparagraph (d) was inserted by section 4(f) of the Tax Administration Laws Amendment Act 24 of 2020. The amendment is effective from 20 January 2021.

<sup>183</sup> Section 18A(5)(e). Subparagraph (e) was inserted by section 4(f) of the Tax Administration Laws Amendment Act 24 of 2020. The amendment is effective from 20 January 2021.

An institution, board or body carrying on a combination of Part I and Part II PBAs and therefore required to obtain and retain an audit certificate is, if in contravention of those requirements, subject to consequences discussed in **10.2**.

### **10.10 Non-compliance by responsible person**

A person who is responsible in a fiduciary capacity for the management or control of the income and assets of a section 18A-approved institution, board or body who intentionally fails to comply with any provision of section 18A or a provision of the founding document under which such an institution, board or body is established to the extent that it relates to section 18A, will be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding two years.<sup>184</sup>

An accounting officer or an accounting authority who intentionally fails to comply with any provision of section 18A will be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding two years.<sup>185</sup>

### **10.11 Group registration**

The Commissioner may approve a group of institutions, boards or bodies sharing a common purpose and carrying on any PBAs in Part II in South Africa under the direction or supervision of a co-ordinating body, for purposes of section 18A.<sup>186</sup>

The co-ordinating body must ensure compliance with section 18A. A taxpayer reference number will be issued to the co-ordinating body. The co-ordinating body must prepare and submit consolidated annual financial statements of all the institutions, boards or bodies under its direct control and supervision annually to the Commissioner. The consolidated annual financial statements must contain a certified report that the institutions, boards or bodies within the group have complied with the provisions of section 18A.

Non-compliance by the co-ordinating body in ensuring compliance with section 18A by the institutions, boards or bodies within the group or failing to inform the Commissioner when it becomes aware of any material failure to comply with section 18A, may, after due notice, result in the withdrawal of approval of the group to issue section 18A receipts. The notice issued by the Commissioner will inform the co-ordinating body that if corrective steps are not taken within the period specified in the notice, any receipt issued by an institution, board or body within the group on or after the date specified in the notice will not qualify as a tax deduction in the hands of the donor.<sup>187</sup>

### **10.12 Retrospective section 18A approval**

The Act does not make provision for the approval under section 18A to be granted with retrospective effect. Section 18A receipts may therefore be issued only for *bona fide* donations received on or after the date of the Commissioner's notification confirming approval under section 18A.

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<sup>184</sup> Section 18A(7)(i).

<sup>185</sup> Section 18A(7)(ii).

<sup>186</sup> Section 18A(6).

<sup>187</sup> Section 18A(5A).

## 11. Other taxes and duties

### 11.1 Exemption from other taxes and duties

Institutions, boards or bodies, in addition to being exempt from the payment of income tax on their receipts and accruals (see **8**), also enjoy the benefit of being exempt from certain other taxes and duties.<sup>188</sup>

#### 11.1.1 Donations tax

Donations tax is payable on the value of any property disposed of by donation by any resident<sup>189</sup> (the donor) to another person (the donee)<sup>190</sup> at the 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; and
- 25% of that value to the extent that it exceeds R30 million.<sup>191</sup>

A donation comprises any gratuitous disposal of property including any gratuitous waiver or renunciation of a right (for example, the waiver of debt). The disposal of property at less than its market value will also constitute a donation to the extent that the Commissioner is not satisfied that the consideration was adequate.<sup>192</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>193</sup>

Donations made by or to an institution, board or body are exempt from the payment of donations tax.<sup>194</sup>

#### 11.1.2 Estate duty

Estate duty is levied under the Estate Duty Act 45 of 1955 at the rate of 20% on the first R30 million of the dutiable amount of the estate of a deceased person, and at the rate of 25% of the dutiable amount that exceeds R30 million.<sup>195</sup>

Any property bequeathed to an institution, board or body having as its sole or principal object the carrying on of any PBAs qualifies as a deduction and therefore is excluded from the net value of the estate and not subject to estate duty.<sup>196</sup>

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<sup>188</sup> For more information on any of these taxes and duties, see *Taxation in South Africa*.

<sup>189</sup> The term “resident” is defined in section 1(1).

<sup>190</sup> The term “donee” is defined in section 55(1).

<sup>191</sup> Section 64.

<sup>192</sup> Section 58.

<sup>193</sup> Section 59.

<sup>194</sup> Section 56(1)(h).

<sup>195</sup> Section 2(2) of the Estate Duty Act and at the rate set out in the First Schedule to that Act.

<sup>196</sup> Section 4(h)(iA) of the Estate Duty Act.

### 11.1.3 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>197</sup> acquired by any person.<sup>198</sup> The rates vary from 0% to 13% for all persons.<sup>199</sup> The person acquiring the property (the transferee) is normally the person who is liable for the payment of transfer duty. Transfer duty will apply only if the property transaction is not a taxable supply for value-added tax purposes.

Any institution, board or body is exempt from the payment of transfer duty on any property acquired provided the whole or substantially the whole<sup>200</sup> of the property is used for the purpose of carrying on one or more PBAs.<sup>201</sup>

An exemption from the payment of transfer duty is not a blanket exemption but an exemption for a specific transaction. Each transaction is therefore considered on its own merits. A declaration<sup>202</sup> available on eFiling **www.sarsefiling.co.za** must be submitted for each acquisition of property for which an exemption is required. No supporting documents need to be submitted at the time that the required declaration is submitted. Supporting documents must, however, be retained and submitted when requested in writing by SARS through eFiling. Supporting documents may include –

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

At any time subsequent to the acquisition of property that qualified for the exemption from transfer duty the whole or substantially the whole of the property is used for a purpose other than for carrying on any PBAs, transfer duty becomes payable. The date the property is used for a purpose other than for the carrying on of the PBA is deemed to be the date of acquisition. The transfer duty will be calculated at the rate applicable at the deemed date of acquisition but will be based on the value of the property as at the original date of acquisition.<sup>203</sup>

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<sup>197</sup> See definition of “property” in section 1(1) of the Transfer Duty Act.

<sup>198</sup> For further information on transfer duty in general and the processing of transactions on eFiling, see *External Guide - Guide for Transfer Duty via eFiling* and the *Transfer Duty Guide*.

<sup>199</sup> Section 2(1)(b) of the Transfer Duty Act.

<sup>200</sup> See Binding General Ruling (Income Tax) 20 “Interpretation of the Expression ‘Substantially the Whole’ “.

<sup>201</sup> Section 9(1)(c)(ii) of the Transfer Duty Act.

<sup>202</sup> The declaration is required under section 14 of the Transfer Duty Act and is regarded as a “return” and subject to the provisions of section 25 of the TA Act.

<sup>203</sup> For guidance on the interpretation and application of the transfer duty exemption relating to institutions, boards or bodies, see Interpretation Note 22 “Transfer Duty Exemption: Public Benefit Organisations and Statutory Bodies”.

#### 11.1.4 Dividends tax

The provisions relating to dividends tax are contained in sections 64D to 64N and apply to any dividend paid by a company, other than a headquarter company, on or after 1 April 2012.<sup>204</sup> Although dividends tax is part of the Act, it is a separate tax from income tax.<sup>205</sup>

Dividends tax is levied at the rate of 20%<sup>206</sup> of the amount of a dividend paid by a company that is a resident.<sup>207</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>208</sup>

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>209</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 dividends tax unless an exemption applies.

It is not the responsibility of the company or regulated intermediary<sup>210</sup> paying the dividend to determine who the beneficial owner of a dividend is and whether that person qualifies for an exemption from dividends tax. The exemptions from dividends tax for cash dividends are contained in section 64F while the exemptions for dividends *in specie* are contained in section 64FA(1).

Any institution, board or body that is the beneficial owner of a dividend is exempt from dividends tax.<sup>211</sup> This exemption applies only if the institution, board or body 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 institution, board or body 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>212</sup>

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<sup>204</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>205</sup> For more information, see the *Comprehensive Guide to Dividends Tax*.

<sup>206</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>207</sup> A reduced or nil rate may apply under specific circumstances.

<sup>208</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 and licensed under section 9 of that Act. A listed share could thus include a share in a foreign company whose shares are listed on a South African exchange.

<sup>209</sup> The term "beneficial owner" is defined in section 64D.

<sup>210</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>211</sup> Section 64F(1)(e) and section 64FA(1)(a).

<sup>212</sup> Section 64G(2)(a) and section 64H(2)(a).

The Commissioner has not issued actual forms to be used for purposes of a declaration or written undertaking but has prescribed the required wording and minimum information required in the forms which are to be prepared by the company, regulated intermediary or beneficial owner.<sup>213</sup>

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

It is important for any institution, board or body that is a beneficiary of a trust to determine whether it has a vested right to a dividend received by or which accrued to the trust before the dividend is paid by the relevant company in order to ensure that the necessary declaration of exemption is filed with the company or regulated intermediary. A beneficiary that has a vested right in a dividend received by or which accrued to a trust will be regarded as the beneficial owner. Should the trust be the beneficial owner of the dividend, dividends tax at the rate of 20% may become payable. A trust whose beneficiary acquires a vested right to a dividend after it is paid but before the end of the trust's year of assessment may be able to claim a refund of the dividends tax withheld.<sup>214</sup>

An institution, board or body receiving a dividend, which is exempt or partially exempt from dividends tax,<sup>215</sup> is with effect from 17 January 2019 not required to submit to SARS a Dividends Tax Return (DTR02).<sup>216</sup>

#### **11.1.5 Securities transfer tax**

The Securities Transfer Tax Act 25 of 2007 (STT Act) provides that a securities transfer tax (STT) must be levied at a rate of 0,25%<sup>217</sup> on the taxable amount<sup>218</sup> of the transfer<sup>219</sup> of every security<sup>220</sup> issued by a close corporation or company incorporated in South Africa as well as foreign companies listed on an exchange.<sup>221</sup>

The Securities Transfer Tax Administration Act 26 of 2007 contains the administration provisions governing the payment of STT. Any STT payment must be made electronically through SARS e-STT system.<sup>222</sup>

The exemptions from STT are contained in section 8(1) of the STT Act. STT is not payable if the security is transferred to an institution, board or body having as its sole or principal object the carrying on of any PBA if that institution, board or body would have been liable to pay the STT.<sup>223</sup>

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<sup>213</sup> See *Business Requirements Specifications: Administration of Dividends Tax*.

<sup>214</sup> See *Comprehensive Guide to Dividends Tax* in 2.3.1.

<sup>215</sup> Section 64F or section 64FA.

<sup>216</sup> Section 64K(1A)(b) was deleted by section 1 of the Tax Administration Laws Amendment Act 22 of 2018.

<sup>217</sup> Section 2(1) of the STT Act.

<sup>218</sup> Sections 3(1), 4, 5 and 6 of the STT Act determine the relevant taxable amount.

<sup>219</sup> The term "transfer" is defined in section 1 of the STT Act and, save for certain exclusions, includes the transfer, sale, assignment or cession or disposal in any other manner of a security or the cancellation or redemption of that security.

<sup>220</sup> The term "security" is defined in section 1 of the STT Act and means any share or depository receipt in a company, or any member's interest in a close corporation.

<sup>221</sup> The term "exchange" means an "exchange" as defined in section 1 of the Financial Markets Act and licensed under section 9 of that Act.

<sup>222</sup> Section 3(2) and (5) of the STT Administration Act 26 of 2007.

<sup>223</sup> Section 8(1)(e) of the STT Act.

The exemption is, however, subject to a declaration<sup>224</sup> being submitted by any person to a participant<sup>225</sup> who holds and administers that security.<sup>226</sup>

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*.

#### 11.1.6 Skills development levy

The skills development levy (SDL) is a compulsory levy to fund education and training under the Skills Development Levies Act 9 of 1999. 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 Authority (SETA).<sup>227</sup>

An institution, board or body is exempt from the payment of SDL if it is –

- registered as an employer and its annual payroll will not exceed R500 000 in the following 12 months;<sup>228</sup> and
- a national or provincial public entity<sup>229</sup> and if 80% or more of its expenditure is defrayed directly or indirectly from funds voted by Parliament.<sup>230</sup>

#### 11.1.7 Capital gains tax

Any capital gain or capital loss determined on an asset donated or bequeathed to an institution, board or body must be disregarded by the donor.<sup>231</sup>

A person must disregard any capital gain or capital loss on the disposal of an asset when any amount constituting gross income of whatever nature would be exempt from tax under section 10(1)(cA)(i) were it to be received by or to accrue to that person.<sup>232</sup>

The following publications on capital gains tax are available:

- *Comprehensive Guide to Capital Gains Tax*
- *Guide on Valuation of Assets for Capital Gains Tax Purposes*

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<sup>224</sup> Section 8(2) of the STT Act.

<sup>225</sup> The term “participant” is defined in section 1 of the STT Act and means a person that holds in custody and administers a listed security or an interest in a listed security and that has been authorised in accordance with section 31 of the Financial Markets Act 19 of 2012 by a central securities depository as a participant in that central securities depository.

<sup>226</sup> Section 8(3) of the STT Act.

<sup>227</sup> For more information, see the *Quick Reference Guide for Skills Development Levy*.

<sup>228</sup> Section 4(b) of the Skills Development Levies Act.

<sup>229</sup> The terms “national public entity” and “provincial public entity” are defined in section 1 of the PFMA and listed in Part A and C of Schedule 3 to that Act.

<sup>230</sup> Section 4(d) of the Skills Development Levies Act.

<sup>231</sup> Paragraph 62(c) of the Eighth Schedule.

<sup>232</sup> Paragraph 63 of the Eighth Schedule.

## 11.2 Compliance with other taxes and duties

### 11.2.1 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 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>233</sup> of an employee, calculated on an annual basis, in order to determine the employees' final income tax liability for a year of assessment.

Employees' tax must be deducted or withheld by every employer (or representative employer when the employer is not resident in South Africa) who pays or becomes liable to pay an amount of remuneration<sup>234</sup> to any person.

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

Any institution, board or body that is an employer must register for employees' tax within 21 business days of becoming an employer.<sup>235</sup> Registration is done by completing the prescribed application form EMP 101e and submitting it to the local SARS branch office. 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.

### 11.2.2 Unemployment insurance contributions

The unemployment insurance fund (UIF) gives short-term relief to workers when they become unemployed or are unable to work because of maternity, adoption leave, or illness. It also provides relief to the dependants of a deceased contributor.<sup>236</sup>

The Unemployment Insurance Act 63 of 2001 and the Unemployment Insurance Contributions Act 4 of 2002 govern the unemployment insurance system in South Africa. 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, which are equal to 2% of the remuneration paid or payable by an employer to its employees, subject to specified exclusions, are payable by employers on a monthly basis. The employer must pay a total contribution of 2% (1% contributed by the employee and 1% contributed by the employer) within the prescribed period.

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<sup>233</sup> Paragraph 28 of the Fourth Schedule.

<sup>234</sup> The term "remuneration" is defined in paragraph 1 of the Fourth Schedule.

<sup>235</sup> Paragraph 15(1) of the Fourth Schedule read with Chapter 3 of the TA Act.

<sup>236</sup> See section 2 of the Unemployment Insurance Act.

Any institution, board or body 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>237</sup> or to SARS within seven days after the end of the month during which the amount was deducted.<sup>238</sup> Payment can be made via eFiling, electronic funds transfer or at a branch of an approved banking institution.

### **11.2.3 Value-Added Tax**

This guide does not deal with Value-Added Tax (VAT). However, various VAT guides are available on the SARS website. Should a ruling request be required on a specific VAT issue, a ruling application may be submitted by e-mail to **VATRulings@sars.gov.za**. For information on the VAT ruling process, see *VAT Ruling Process Quick Reference Guide*.

## **12. Applications for the exemption under section 10(1)(cA)(i) and approval under section 18A**

Any entity not approved by the Commissioner as an institution, board or body must complete the prescribed application form EI 1. Approval under section 18A to issue tax-deductible receipts may also be selected on the EI 1 provided the requirements of section 18A are met.

The notification of the exemption under section 10(1)(cA)(i) and approval under section 18A, if applicable, is issued by the Commissioner by letter. The letter contains a unique reference number generally referred to as an exemption reference number, which is a different reference number to the taxpayer reference number (see **17.1**). The institution, board or body approved by the Commissioner is required to retain the letter confirming approval as part of its records (see **16**).

A written notification will also be issued by the Commissioner to the institution, board or body should the exemption under section 10(1)(cA)(i) or 18A not be granted together with reasons why the institution, board or body failed to meet the conditions and requirements of sections 10(1)(cA)(i) or 18A, if applicable. An entity not approved by the Commissioner will be liable for income tax and other taxes and duties as a normal taxpayer.<sup>239</sup>

## **13. Administrative provisions – Tax Administration Act**

The TA Act<sup>240</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>241</sup>

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<sup>237</sup> Information is available from the Department of Labour's website at **www.labour.gov.za**.

<sup>238</sup> For more information, see the *Guide for Employers in respect of the Unemployment Insurance Fund*.

<sup>239</sup> See paragraph (a) of the definition of "company" in section 1(1).

<sup>240</sup> The TA Act came into effect on 1 October 2012.

<sup>241</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)*.

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>242</sup> If there is any inconsistency between the TA Act and any other tax Act, the other Act prevails.<sup>243</sup>

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

## 14. Furnishing of information

In order to assist in enforcing the Act, the Commissioner may submit a written request to any person to furnish information about any institution, board or body and may require that person to —<sup>244</sup>

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

These provisions also apply to any section 18A-approved institution, board or body.<sup>245</sup>

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>246</sup>

## 15. Changes in registered particulars

An institution, board or body must inform SARS of changes in its registered particulars to ensure that SARS has the most accurate and current information. An institution, board or body must communicate to SARS any change of postal, physical or electronic addresses, representative taxpayer and banking particulars.<sup>247</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>248</sup>

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<sup>242</sup> Section 4(2) of the TA Act.

<sup>243</sup> Section 4(3) of the TA Act.

<sup>244</sup> Section 46(1) of the TA Act.

<sup>245</sup> Section 18A(4).

<sup>246</sup> Section 234(h)(i) and (ii) of the TA Act.

<sup>247</sup> Section 23 of the TA Act.

<sup>248</sup> Section 234(a) of the TA Act.

## 16. Record-keeping

All institutions, boards or bodies are required to keep records for five years from the date of the submission of a return.<sup>249</sup>

A return<sup>250</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. This return includes 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 the exemption from income tax.

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>251</sup>

The required retention periods for records, books of account or documents are as follows:

- Five years from the date of the submission of a return.<sup>252</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>253</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 or decision becomes final or the applicable five-year period has elapsed, whichever is the later.<sup>254</sup>
- A person that has been 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>255</sup>
- Indefinitely if a document is relevant for future years of assessment such as the prescribed application form for approval from income tax 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

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<sup>249</sup> Section 29(3) of the TA Act.

<sup>250</sup> The term “return” is defined in section 1 of the TA Act.

<sup>251</sup> Section 32 of the TA Act.

<sup>252</sup> Section 29(2)(a) read with section 29(3)(a) of the TA Act.

<sup>253</sup> Section 29(2)(b) of the TA Act.

<sup>254</sup> Section 23(b) of the TA Act.

<sup>255</sup> Section 32(a) of the TA Act.

- Fixed-asset register
- Bank statements and deposit slips
- Invoices
- Section 18A receipts issued, if approved by the Commissioner under that section to issue tax-deductible receipts
- Audit certificates (see **10.2**).

In order to ensure the safe retention of records as well as easy and efficient access to records by SARS, especially for inspection or audit purposes during the prescribed retention period, any institution, board or body is required to keep and retain its records in their original form, in an orderly fashion and in a safe place.<sup>256</sup>

The electronic form of record-keeping is regulated by the Electronic Record-Keeping Rules.<sup>257</sup> The rules require that electronic records must be kept in their original form,<sup>258</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.<sup>259</sup>

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>260</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>261</sup>

An institution, board or body must submit income tax returns, even if its exemption results in no tax liability. The income tax return enables the Commissioner to annually assess whether the institution, board or body is operating within the prescribed limits of its approval.

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

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

A return must be a full and true return<sup>262</sup> and be signed by the institution, board or body or by the duly authorised representative of the institution, board or body. The person signing the return will be regarded as being cognisant of the statements made in the return.<sup>263</sup>

<sup>256</sup> Section 30 of the TA Act.

<sup>257</sup> See Government Notice 787 *Government Gazette* 35733 of 1 October 2012.

<sup>258</sup> See section 14 of the Electronic Communications and Transactions Act 25 of 2002. Under that section, a document will be regarded as being in original form if the integrity of the data is maintained, for example, when it is complete and unaltered.

<sup>259</sup> For further information in this regard, see *Electronic Communications Guide*.

<sup>260</sup> Section 234(e) of the TA Act.

<sup>261</sup> Section 66(1).

<sup>262</sup> Section 25(2) of the TA Act.

<sup>263</sup> Section 25(3) of the TA Act.

Non-receipt of an income tax return does not affect the obligation to submit an income tax return.<sup>264</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>265</sup>

### **17.1 Taxpayer reference number**

A taxpayer reference number is allocated on completion of registration for income tax purposes.<sup>266</sup> For a group registration for purposes of section 18A, a taxpayer reference number will be allocated to the co-ordinating body (see **10.11**) and not to each individual institution, board or body within the group.

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**

Any institution, board or body established by or under any law will have a year of assessment ending on the date that coincides with its financial year.<sup>267</sup> If the financial year-end is 30 June, its year of assessment will run from 1 July to 30 June of the following year. The Commissioner has discretion to accept financial accounts of a company for a period ending on a day differing from the last day of the company's financial year.<sup>268</sup>

### **17.4 Supporting documentation**

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

Any institution, board or body whose income tax return is supported by a 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>269</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.

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<sup>264</sup> Section 25(4) of the TA Act.

<sup>265</sup> Section 234(d) of the TA Act.

<sup>266</sup> The term “taxpayer reference number” is defined in section 1 of the TA Act and means the number referred to in section 24 of the same Act.

<sup>267</sup> The term “financial year” is defined in section 1(1). For commentary, see *Taxation in South Africa*.

<sup>268</sup> See Interpretation Note 90 “Year of Assessment of a Company: Accounts Accepted to a Date Other Than the Last Day of a Company’s Financial Year”.

<sup>269</sup> Section 28 of the TA Act.

## 18. Objection and appeal

Any decision in the exercise of the Commissioner's discretion under section 10(1)(cA) and section 18A is subject to objection and appeal.<sup>270</sup>

The Commissioner's discretion under section 10(1)(cA) will be exercised to determine whether –

- an organisation may be approved for exemption under section 10(1)(cA);
- any conditions are deemed necessary to ensure that the activities of the institution, board or body are wholly or mainly directed at the furtherance of its sole or principal object; and
- an institution, board or body has failed to comply with section 10(1)(cA).

The Commissioner's discretion under section 18A will be exercised to determine whether an institution, board or body may be approved for purposes of that section.

Any institution, board or body may object to any of the above decisions or an assessment within 30 business days<sup>271</sup> from the date of the decision or assessment<sup>272</sup> in accordance with Chapter 9 of the TA Act read with the "rules" as published in the *Government Gazette*.<sup>273</sup> The objection must be made on the prescribed form and specify in detail the grounds on which it is made. SARS will consider the objection and may disallow the objection or allow the objection completely or in part.

If on disallowance of the objection the institution, board or body 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>274</sup>

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<sup>270</sup> Section 3(4)(b).

<sup>271</sup> The term "business day" is defined in section 1 of the TA Act.

<sup>272</sup> See Interpretation Note 15 "Exercise of Discretion in case of Late Objection or Appeal".

<sup>273</sup> The rules for objections and appeals are formulated under section 103 of the TA Act and published in Government Notice 550 in *Government Gazette* 37819 of 11 July 2014. Rule 7 deals with objections. 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* and *Alternative Dispute Resolution: Quick Guide*.

<sup>274</sup> Rule 10.

## Annexure A – Section 10(1)(cA)

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

(cA) the receipts and accruals of—

- (i) any institution, board or body (other than a company as defined in the Companies Act, any co-operative, close corporation, trust or water services provider) established by or under any law and which, in the furtherance of its sole or principal object—
  - (aa) conducts scientific, technical or industrial research;
  - (bb) provides necessary or useful commodities, amenities or services to the State (including any provincial administration) or members of the general public; or
  - (cc) carries on activities (including the rendering of financial assistance by way of loans or otherwise) designed to promote commerce, industry or agriculture or any branch thereof;
- (ii) any association, corporation or company contemplated in paragraph (a) of the definition of “company” in section 1, all the shares of which are held by any such institution, board or body, if the operations of such association, corporation or company are ancillary or complementary to the object of such institution, board or body:

Provided that such institution, board, body or company—

- (a) has been approved by the Commissioner subject to such conditions as he may deem necessary to ensure that the activities of such institution, board, body or company are wholly or mainly directed to the furtherance of its sole or principal object;
- (b) is by law or under its constitution—
  - (i) not permitted to distribute any amount to any person, other than, in the case of such company, to the holders of shares in that company;
  - (ii) required to utilize its funds solely for investment or the object for which it has been established; and
  - (iii) required on dissolution—
    - (aa) where the institution, board, body or company is established under any law, to transfer its assets to some other institution, board or body which has been granted exemption from tax in terms of this paragraph and which has objects similar to those of such institution, board, body or company; or
    - (bb) where the institution, board or body is established by law, to transfer its assets to—
      - (A) some other institution, board or body which has been granted exemption from tax in terms of this paragraph and which has objects similar to those of such institution, board, body or company; or
      - (B) to the State:

Provided further that—

- (a) where the Commissioner is satisfied that any such institution, board, body or company has during any year of assessment failed to comply with the provisions of this paragraph, he may withdraw his approval of the institution, board, body or company with effect from the commencement of that year of assessment;

- (b) where the institution, board, body or company fails to transfer, or take reasonable steps to transfer, its assets as contemplated in paragraph (b)(iii) of the first proviso, the accumulated net revenue which has not been distributed shall be deemed for the purposes of this Act to be an amount of taxable income which accrued to such institution, board, body or company during the year of assessment contemplated in paragraph (a); and
- (c) . . . . .

## Annexure B – Section 18A

**18A. Deduction of donations to certain organisations.**—(1) Notwithstanding the provisions of section 23, there shall be allowed to be deducted in the determination of the taxable income of any taxpayer so much of the sum of any *bona fide* donations by that taxpayer in cash or of property made in kind, which was actually paid or transferred during the year of assessment to—

- (a) any—
- (i) public benefit organisation contemplated in paragraph (a)(i) of the definition of “public benefit organisation” in section 30(1) approved by the Commissioner under section 30; or
  - (ii) institution, board or body contemplated in section 10(1)(cA)(i),
- which—
- (aa) carries on in the Republic any public benefit activity contemplated in Part II of the Ninth Schedule, or any other activity determined from time to time by the Minister by notice in the *Gazette* for the purposes of this section;
  - (bb) complies with the requirements contemplated in subsection (1C), if applicable, and any additional requirements prescribed by the Minister in terms of subsection (1A); and
  - (cc) has been approved by the Commissioner for the purposes of this section;
- (b) any public benefit organisation contemplated in paragraph (a)(i) of the definition of “public benefit organisation” in section 30(1) approved by the Commissioner under section 30, which provides funds or assets to any public benefit organisation, institution, board or body contemplated in paragraph (a), or any department contemplated in paragraph (c) and which has been approved by the Commissioner for the purposes of this section; or
- (bA) (i) any agency contemplated in the definition of “specialized agencies” in section 1 of the Convention on the Privileges and Immunities of the Specialized Agencies, 1947, set out in Schedule 4 to the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001);
- (ii) the United Nations Development Programme (UNDP);
  - (iii) the United Nations Children’s Fund (UNICEF);
  - (iv) the United Nations High Commissioner for Refugees (UNHCR);
  - (v) the United Nations Population Fund (UNFPA);
  - (vi) the United Nations Office on Drugs and Crime (UNODC);
  - (vii) the United Nations Environmental Programme (UNEP);
  - (viii) the United Nations Entity for Gender, Equality and the Empowerment of Women (UN Women);
  - (ix) the International Organisation for Migration (IOM);
  - (x) the Joint United Nations Programme on HIV/AIDS (UNAIDS);
  - (xi) the Office of the High Commissioner for Human Rights (OHCHR); or
  - (xii) the United Nations Office for the Coordination of Humanitarian Affairs (OCHA),
- if that agency, programme, fund, High Commissioner, office, entity or organisation—
- (aa) carries on in the Republic any public benefit activity contemplated in Part II of the Ninth Schedule, or any other activity determined from time to time by the Minister by notice in the *Gazette* for the purposes of this section;
  - (bb) furnishes the Commissioner with a written undertaking that such agency will comply with the provisions of this section;
  - (cc) waives diplomatic immunity for the purposes of subsection (5)(i); and
  - (dd) has been approved by the Commissioner for the purposes of this section; or

- (c) any department of government of the Republic in the national, provincial or local sphere as contemplated in section 10(1)(a), which has been approved by the Commissioner for the purposes of this section, to be used for purpose of any activity contemplated in Part II of the Ninth Schedule,

as does not exceed—

- (A) where the taxpayer is a portfolio of a collective investment scheme, an amount determined in accordance with the following formula:

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

in which formula:

- (AA) “A” represents the amount to be determined;
- (BB) “B” represents the average value of the aggregate of all of the participatory interests held by investors in the portfolio for the year of assessment, determined by using the aggregate value of all of the participatory interests in the portfolio at the end of each day during that year; or
- (B) in any other case, ten per cent of the taxable income (excluding any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit and severance benefit) of the taxpayer as calculated before allowing any deduction under this section or section 6*quat* (1C): Provided that any amount of a donation made as contemplated in this subsection and which has been disallowed solely by reason of the fact that it exceeds the amount of the deduction allowable in respect of the year of assessment shall be carried forward and shall, for the purposes of this section, be deemed to be a donation actually paid or transferred in the next succeeding year of assessment.

(1A) The Minister may, by regulation, prescribe additional requirements with which a public benefit organisation, institution, board or body or the department carrying on any specific public benefit activity identified by the Minister in the regulations, must comply before any donation made to that public benefit organisation, institution, board or body or the department shall be allowed as a deduction under subsection (1).

(1B) Any activity determined by the Minister in terms of subsection (1)(a) or any requirements prescribed by the Minister in terms of subsection (1A), must be tabled in Parliament within a period of 12 months after the date of publication by the Minister of that activity or those requirements, as the case may be, in the *Gazette*, for incorporation into this Act.

(1C) The constitution or founding document of a public benefit organisation carrying on the activity contemplated in paragraph 4(d) of Part II of the Ninth Schedule, must expressly provide that the organisation—

- (a) may not issue any receipt contemplated in subsection (2) in respect of any donation made by a person to that public benefit organisation, unless—
- (i) that donation is made by that person on or after 1 August 2002; and
  - (ii) that person (in the case of a company, together with any other company in the same group of companies as that company) has during the relevant year of assessment of that person donated an amount of at least R1 million to that organisation;
- (b) must ensure that every donation contemplated in paragraph (a), in respect of which such a receipt has been issued, will be matched by a donation to that organisation of the same amount made by a person who is not a resident and which is made from funds generated and held outside the Republic; and
- (c) must utilise the amount of—
- (i) all donations contemplated in paragraph (a), in respect of which such a receipt has been issued, and all income derived therefrom, in the Republic in carrying on that activity; and
  - (ii) all donations contemplated in paragraph (b), either in the Republic in carrying on that activity, or in respect of a transfrontier conservation area of which the Republic forms part.

(2) Any claim for a deduction in respect of any donation under subsection (1) shall not be allowed unless supported by—

- (a) a receipt issued by the public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation or the department concerned, containing—
  - (i) the reference number of the public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation or the department issued by the Commissioner for the purposes of this section;
  - (ii) the date of the receipt of the donation;
  - (iii) the name of the public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation or the department which received the donation, together with an address to which enquiries may be directed in connection therewith;
  - (iv) the name and address of the donor;
  - (v) the amount of the donation or the nature of the donation (if not made in cash);
  - (vi) a certification to the effect that the receipt is issued for the purposes of section 18A of the Income Tax Act, 1962, and that the donation has been or will be used exclusively for the object of the public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation concerned or, in the case of a department in carrying on the relevant public benefit activity; or
- (b) an employees' tax certificate as defined in the Fourth Schedule on which the amount of donations contemplated in paragraph 2(4)(f) of that Schedule, for which the employer has received a receipt contemplated in paragraph (a), is given.

(2A) A public benefit organisation, institution, board, body or department may only issue a receipt contemplated in subsection (2) in respect of any donation to the extent that—

- (a) in the case of a public benefit organisation, institution, board or body contemplated in subsection (1)(a) which carries on activities contemplated in Parts I and II of the Ninth Schedule, that donation will be utilised solely in carrying on activities contemplated in Part II of the Ninth Schedule;
- (b) in the case of a public benefit organisation contemplated in subsection (1)(b)—
  - (i) that organisation will within 12 months after the end of the relevant year of assessment distribute or incur the obligation to distribute at least 50 per cent of all funds received by way of donation during that year in respect of which receipts were issued: Provided that the Commissioner may, upon good cause shown and subject to such conditions as he or she may determine, either generally or in a particular instance, waive, defer or reduce the obligation to distribute any funds, having regard to the public interest and the purpose for which the relevant organisation wishes to accumulate those funds; and
  - (ii) which provides funds or assets to public benefit organisations, institutions, boards or bodies or any department that carry on public benefit activities contemplated in Parts I and II of the Ninth Schedule, that donation will be utilised solely to provide funds or assets to a public benefit organisation, institution, board or body contemplated in subsection (1)(a), which will utilise those funds or assets solely in carrying on activities contemplated in Part II of the Ninth Schedule or to any department contemplated in subsection (1)(c) which will utilise those funds or assets solely for the purpose of any activity contemplated in Part II of the Ninth Schedule; or
- (c) in the case of a department, that donation will be utilised solely in carrying on activities contemplated in Part II of the Ninth Schedule.

(2B) A public benefit organisation, institution, board or body contemplated in subsection (2A), must obtain and retain an audit certificate confirming that all donations received or accrued in that year in respect of which receipts were issued in terms of subsection (2), were utilised in the manner contemplated in subsection (2A).

(2C) The accounting officer or accounting authority contemplated in the Public Finance Management Act or an accounting officer contemplated in the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003), as the case may be, for the department which issued any receipts in terms of subsection (2), must on an annual basis submit an audit certificate to the Commissioner confirming that all donations received or accrued in the year in respect of which receipts were so issued were utilised in the manner contemplated in subsection (2A).

(2D) Any public benefit organisation contemplated in subsection (1)(b), in respect of any amount that is not distributed as required by subsection (2A)(b)(i), shall distribute or incur the obligation to distribute all amounts received in respect of investment assets held by it, other than amounts received in respect of disposals of those investment assets to any public benefit organisation, institution, board or body contemplated in subsection (1)(a) or to any department contemplated in subsection (1)(c), no later than six months after—

- (a) every five years from the date on which the Commissioner issued a reference number referred to in subsection (2)(a)(i) to that public benefit organisation referred to in subsection (1)(b), if that public benefit organisation is incorporated, formed or established on or after 1 March 2015; or
- (b) every five years from 1 March 2015, if that public benefit organisation referred to in subsection (1)(b) was incorporated, formed or established and issued with a reference number referred to in subsection (2)(a)(i) prior to 1 March 2015.

(3) If any deduction is claimed by any taxpayer under the provisions of subsection (1) in respect of any donation of property in kind, other than immovable property of a capital nature where the lower of market value or municipal value exceeds cost, the amount of such deduction shall be deemed to be an amount equal to—

- (a) where such property constitutes—
  - (i) a financial instrument which is trading stock of the taxpayer, the lower of fair market value of that financial instrument on the date of that donation or the amount which has been taken into account for the purposes of section 22(8)(C); or
  - (ii) any other trading stock of the taxpayer (including any livestock or produce in respect of which the provisions of paragraph 11 of the First Schedule are applicable), the amount which has been taken into account for the purposes of section 22(8)(C) or, in the case of such livestock or produce, the said paragraph 11, in relation to the donation of such property; or
- (b) where such property (other than trading stock) constitutes an asset used by the taxpayer for the purposes of his trade, the lower of—
  - (i) the fair market value of that property on the date of that donation; or
  - (ii) the cost to the taxpayer of such property less any allowance (other than any investment allowance) allowed to be deducted from the income of the taxpayer under the provisions of this Act in respect of that asset; or
- (c) where such property does not constitute trading stock of the taxpayer or an asset used by him for the purposes of his trade, the lower of—
  - (i) the fair market value of that property on the date of that donation; or
  - (ii) the cost to the taxpayer of such asset, less, in the case of a movable asset which has deteriorated in condition by reason of use or other causes, a depreciation allowance calculated in the manner contemplated in section 8(5)(bB)(i); or
- (d) where such property is purchased, manufactured, erected, assembled, installed or constructed by or on behalf of the taxpayer in order to form the subject of the said donation, the lower of—
  - (i) the fair market value of that property on the date of that donation; or
  - (ii) the cost to the taxpayer of such property.

(3A) If any deduction is claimed by any taxpayer under the provisions of subsection (1) in respect of any donation of immovable property of a capital nature where the lower of market value or municipal value exceeds cost, the amount of such deduction shall be determined in accordance with the formula:

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

in which formula:

- (a) "A" represents the amount deductible in respect of subsection (1);
- (b) "B" represents the cost of the immovable property being donated;
- (c) "C" represents the amount of a capital gain (if any), that would have been determined in terms of the Eighth Schedule had the immovable property been disposed of for an amount equal to the lower of market value or municipal value on the day the donation is made; and
- (d) "D" represents 60 per cent in the case of a natural person or special trust or 20 per cent in any other case.

(3B) No deduction shall be allowed under this section in respect of the donation of any property in kind which constitutes, or is subject to any fiduciary right, usufruct or other similar right, or which constitutes an intangible asset or financial instrument, unless that financial instrument is—

- (a) a share in a listed company; or
- (b) issued by an eligible financial institution as defined in section 1 of the Financial Sector Regulation Act.

(4) The provisions of section 30(10) shall apply *mutatis mutandis* in respect of any institution, board or body contemplated in subsection (1)(a).

(5) If the Commissioner has reasonable grounds for believing that any person who is in a fiduciary capacity responsible for the management or control of the income or assets of any public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation (other than an institution, board or body in respect of which subsection (5B) applies) has—

- (a) in any material way failed to ensure that the objects for which the public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation was established are carried out or has expended moneys belonging to the public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation for purposes not covered by such objects;
- (b) issued or allowed a receipt to be issued to any taxpayer for the purposes of this section in respect of any fees or other emoluments payable to that organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation by that taxpayer;
- (c) issued or allowed a receipt to be issued in contravention of subsection (2A) or utilised a donation in respect of which a receipt was issued for any purpose other than the purpose contemplated in that subsection;
- (d) failed to obtain and retain an audit certificate as contemplated in subsection (2B); or
- (e) failed to submit an audit certificate as contemplated in subsection (2C),

the Commissioner may by notice in writing addressed to that person direct that—

- (i) any donation in respect of which a receipt was issued by that public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation during any year of assessment specified in that notice, will be deemed to be taxable income of that public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation in that year; and

- (ii) if corrective steps are not taken by that public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation within a period stated by the Commissioner in that notice, any receipt issued by that public benefit organisation, institution, board, body or agency, programme, fund, High Commissioner, office, entity or organisation in respect of any donation made on or after the date specified in that notice shall not qualify as a valid receipt for purposes of subsection (2).

(5A) If the Commissioner has reasonable grounds for believing that any regulating or co-ordinating body of a group of public benefit organisations, institutions, boards or bodies contemplated in section 30(3A) or subsection (6) fails to—

- (a) take any steps contemplated in section 30(3A) or subsection (6), to exercise control over any public benefit organisation, institution, board or body in that group; or
- (b) notify the Commissioner where it becomes aware of any material failure by any public benefit organisation, institution, board or body over which it exercises control to comply with any provision of this section,

the Commissioner may by notice in writing addressed to that regulating or co-ordinating body direct that if corrective steps are not taken by that regulating or co-ordinating body within a period stated by the Commissioner in that notice, any receipt issued by public benefit organisations, institutions, boards or bodies in that group in respect of any donation made on or after the date specified in that notice shall not qualify as a valid receipt for purposes of subsection (2).

(5B) If the Commissioner has reasonable grounds for believing that any accounting officer or accounting authority contemplated in the Public Finance Management Act or an accounting officer contemplated in the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003), as the case may be, for any institution in respect of which that Act applies, has issued or allowed a receipt to be issued in contravention of subsection (2A) or utilised a donation in respect of which a receipt was issued for any purpose other than the purpose contemplated in that subsection, the Commissioner—

- (a) must notify the National Treasury and the Provincial Treasury (if applicable) of the contravention; and
- (b) may by notice in writing addressed to that accounting officer or accounting authority direct that, if corrective steps are not taken by that accounting officer or accounting authority within a period stated by the Commissioner in that notice, any receipt issued by that institution in respect of any donation made on or after the date specified in that notice shall not qualify as a valid receipt for purposes of subsection (2).

(5C) If any public benefit organisation contemplated in subsection (1)(b), has not distributed amounts as contemplated in subsection (2D), or has not incurred the obligation to distribute those amounts received in respect of investment assets held by it, those amounts shall be deemed to be taxable income of that public benefit organisation in that year of assessment.

(6) The Commissioner may, for the purposes of this section, approve a group of institutions, boards or bodies contemplated in subsection (1)(a)(ii), sharing a common purpose which carry on any public benefit activity under the direction or supervision of a regulating or co-ordinating body, where that body takes such steps, as prescribed by the Commissioner, to exercise control over those institutions, boards or bodies in order to ensure that they comply with the provisions of this section.

(7) Any person who is—

- (i) in a fiduciary capacity responsible for the management or control of the income and assets of any public benefit organisation, institution, board or body contemplated in this section; or
- (ii) the accounting officer or accounting authority contemplated in the Public Finance Management Act or the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003), as the case may be, for any institution in respect of which that Act applies,

who intentionally fails to comply with any provisions of this section, or a provision of the constitution, will or other written instrument under which such organisation is established to the extent that it relates to the provisions of this section, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 24 months.

## Annexure C – Part II

### NINTH SCHEDULE

#### PART II

#### WELFARE AND HUMANITARIAN

1.
  - (a) The care or counseling of, or the provision of education programmes relating to, abandoned, abused, neglected, orphaned or homeless children.
  - (b) The care or counseling of poor and needy persons where more than 90 per cent of those persons to whom the care or counseling are provided are over the age of 60.
  - (c) The care or counseling of, or the provision of education programmes relating to, physically or mentally abused and traumatised persons.
  - (d) The provision of disaster relief.
  - (e) The rescue or care of persons in distress.
  - (f) The provision of poverty relief.
  - (g) Rehabilitative care or counseling or education of prisoners, former prisoners and convicted offenders and persons awaiting trial.
  - (h) The rehabilitation, care or counseling of persons addicted to a dependence-forming substance or the provision of preventative and education programmes regarding addiction to dependence-forming substances.
  - (i) Conflict resolution, the promotion of reconciliation, mutual respect and tolerance between the various peoples of South Africa.
  - (j) The promotion or advocacy of human rights and democracy.
  - (k) The protection of the safety of the general public.
  - (l) The promotion or protection of family stability.
  - (m) The provision of legal services for poor and needy persons.
  - (n) The provision of facilities for the protection and care of children under school-going age of poor and needy parents.
  - (o) The promotion or protection of the rights and interests of, and the care of, asylum seekers and refugees.
  - (p) Community development for poor and needy persons and anti-poverty initiatives, including—
    - (i) the promotion of community-based projects relating to self-help, empowerment, capacity building, skills development or anti-poverty;
    - (ii) the provision of training, support or assistance to community-based projects contemplated in item (i); or
    - (iii) the provision of training, support or assistance to emerging micro enterprises to improve capacity to start and manage businesses, which may include the granting of loans on such conditions as may be prescribed by the Minister by way of regulation.
  - (q) The promotion of access to media and a free press.

## HEALTH CARE

2. (a) The provision of health care services to poor and needy persons.
- (b) The care or counseling of terminally ill persons or persons with a severe physical or mental disability, and the counseling of their families in this regard.
- (c) The prevention of HIV infection, the provision of preventative and education programmes relating to HIV/AIDS.
- (d) The care, counseling or treatment of persons afflicted with HIV/AIDS, including the care or counseling of their families and dependants in this regard.
- (e) The provision of blood transfusion, organ donor or similar services.
- (f) The provision of primary health care education, sex education or family planning.

## EDUCATION AND DEVELOPMENT

3. (a) The provision of education by a "school" as defined in the South African Schools Act, 1996, (Act No. 84 of 1996).
- (b) The provision of "higher education" by a "higher education institution" as defined in terms of the Higher Education Act, 1997, (Act No. 101 of 1997).
- (c) "Adult education and training", as defined in the Adult Education and Training Act, 2000 (Act No. 52 of 2000), including literacy and numeracy education.
- (d) "Continuing education and training" provided by a "private college" as defined in the Continuing Education and Training Colleges Act, 2006 (Act No. 16 of 2006), which is registered in terms of that Act.
- (e) Training for unemployed persons with the purpose of enabling them to obtain employment.
- (f) The training or education of persons with a severe physical or mental disability.
- (g) The provision of bridging courses to enable educationally disadvantaged persons to enter a higher education institution as envisaged in subparagraph (b).
- (h) The provision of educare or early childhood development services for pre-school children.
- (i) The provision of school buildings or equipment for public schools and educational institutions engaged in public benefit activities contemplated in subparagraphs (a) to (h).
- (j) Programmes addressing needs in education provision, learning, teaching, training, curriculum support, governance, whole school development, safety and security at schools, pre-schools or educational institutions as envisaged in subparagraphs (a) to (h).
- (k) Educational enrichment, academic support, supplementary tuition or outreach programmes for the poor and needy.
- (l) Training of persons employed in the national, provincial and local spheres of government, for purposes of capacity building in those spheres of government.
- (m) Career guidance and counseling services provided to persons attending any school or higher education institution as envisaged in subparagraphs (a) and (b).
- (n) The provision of hostel accommodation to students of a public benefit organisation contemplated in section 30 or an institution, board or body contemplated in section 10 (1)(cA)(i), carrying on activities envisaged in subparagraphs (a) to (g).

- (o) The provision of scholarships, bursaries, awards and loans for study, research and teaching on such conditions as may be prescribed by the Minister by way of regulation in the *Gazette*.
- (p) The provision or promotion of educational programmes with respect to financial services and products, carried on under the auspices of a public entity listed under Schedule 3A of the Public Finance Management Act.

#### CONSERVATION, ENVIRONMENT AND ANIMAL WELFARE

- 4. (a) Engaging in the conservation, rehabilitation or protection of the natural environment, including flora, fauna or the biosphere.
- (b) The care of animals, including the rehabilitation or prevention of the ill-treatment of animals.
- (c) The promotion of, and education and training programmes relating to, environmental awareness, greening, clean-up or sustainable development projects.
- (d) The establishment and management of a transfrontier area, involving two or more countries, which—
  - (i) is or will fall under a unified or coordinated system of management without compromising national sovereignty; and
  - (ii) has been established with the explicit purpose of supporting the conservation of biological diversity, job creation, free movement of animals and tourists across the international boundaries of the peace park, and the building of peace and understanding between the nations concerned.

#### LAND AND HOUSING

- 5. (a) The development, construction, upgrading, conversion or procurement of housing units for the benefit of persons whose monthly household income is equal to or less than R15 000 or any greater amount determined by the Minister of Finance by notice in the *Gazette* after consultation with the Minister of Housing.
- (b) The development, servicing, upgrading or procurement of stands, or the provision of building materials, for purposes of the activities contemplated in subparagraph (a).
- (c) Building and equipping of clinics or crèches for the benefit of the poor and needy.
- (d) The protection, enforcement or improvement of the rights of poor and needy tenants, labour tenants or occupiers, to use or occupy land or housing.
- (e) The promotion, facilitation and support of access to land and use of land, housing and infrastructural development for promoting official land reform programmes.

## Annexure D – Example of section 18A receipt



Institute, board or body X  
 Helen Joseph Street, Johannesburg, 2001  
 Telephone: (000) 000 0000  
 Email: **ibdx@org.za**  
 Website: **www.ibdx.com**  
 Reference Number: 930000000

RECEIPT NUMBER	0001
NAME OF DONOR	
ADDRESS OF DONOR	
AMOUNT OF DONATION (CASH)	R
NATURE OF DONATION (IF NOT IN CASH)	
DATE DONATION RECEIVED	
The receipt is issued for the purposes of section 18A of the Income Tax Act 58 of 1962 (the Act). The donation received has been or will be used exclusively for the object of Institute, board or body X in carrying on public benefit activities listed in Part II of the Ninth Schedule to the Act.	
DETAILS AND SIGNATURE OF PERSON IN A FIDUCIARY CAPACITY RESPONSIBLE FOR THE MANAGEMENT OR CONTROL OF THE INCOME AND ASSETS OF THE INSTITUTION, BOARD OR BODY	
DATE RECEIPT ISSUED	

**REGULATIONS ISSUED IN TERMS OF PARAGRAPH 4(o) OF PART I OF THE NINTH SCHEDULE TO THE INCOME TAX ACT, 1962 (ACT NO. 58 OF 1962), TO PRESCRIBE CONDITIONS FOR THE PROVISION OF SCHOLARSHIPS, BURSARIES AND AWARDS FOR STUDY, RESEARCH AND TEACHING**

By virtue of the power vested in me by paragraph 4(o) of Part I of the Ninth Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), I, Trevor Andrew Manuel, Minister of Finance, hereby prescribe in the Schedule hereto, the conditions on which any scholarships, bursaries and awards for study, research and teaching must be provided for purposes of that paragraph and section 30 of the Act.

**SCHEDULE**

1. In these regulations, unless the context otherwise indicates, any word or expression to which a meaning has been assigned in the Income Tax Act, 1962, bears the meaning assigned thereto.

2. For purposes of paragraph 4(o) of Part I of the Ninth Schedule to the Income Tax Act, 1962, an organisation which provides any scholarships, bursaries and awards for study, research or teaching must comply with the conditions prescribed in these regulations.

3. Subject to regulation 4, the founding document of the organisation contemplated in regulation 2, must expressly provide that—

- (a) all scholarships, bursaries or awards granted by that organisation must be *bona fide* and be granted to an individual on grounds of objective merit or need;
- (b) no scholarship, bursary or award granted by that organisation may—
  - (i) be revocable, otherwise than for reasons of a material failure to conform to the designated purposes and conditions of that scholarship, bursary or award;
  - (ii) be subject to conditions which would enable the donor of the funds of that scholarship, bursary or award or any connected person in relation to that donor, to derive some direct benefit from the application of that scholarship, bursary or award; or
  - (iii) be granted to any person who is or will become an employee of the donor of the funds of that scholarship, bursary or award or that organisation (or any associated institution in relation to that donor or organisation) or any relative of that person, unless circumstances indicate that that scholarship, bursary or award would have been granted to that person or his or her relative, even if that person had not been an employee of that donor, organisation or associated institution;
- (c) all decisions regarding the granting of scholarships, bursaries and awards must be made by a duly constituted committee consisting of at least three persons who are not connected persons in relation to the donors or the person to whom the scholarship, bursary or award is granted; and
- (d) all scholarships, bursaries and awards granted by that organisation in respect of overseas study, research or teaching will be subject to an undertaking by the person to whom the scholarship, bursary or award is granted—
  - (i) to apply the knowledge obtained from the study, research or teaching immediately after completion thereof, in the Republic for a period of at least the period that the study, research or training was funded by the organisation; or
  - (ii) to refund the full amount of the scholarship, bursary or award should he or she decide not to apply the knowledge as contemplated in subparagraph (i).

4. Where the founding document of an organisation which was established before 1 January 2003 does not expressly provide for the conditions contemplated in regulation 3, the organisation will be deemed to comply with regulation 3 until 31 December 2007, if the person responsible in a fiduciary capacity for the funds and assets of that organisation submits a written undertaking to the Commissioner that all scholarships, bursaries and awards granted by that organisation comply with the provisions of these regulations.

5. Copies of all documents and information relating to any scholarship, bursary or award and minutes of all meetings at which any scholarship, bursary or award is granted must be made available to the Commissioner on request.

**GNR.333**

**8 APRIL 2005**

**REGULATIONS ISSUED IN TERMS OF PARAGRAPH 3(o) OF PART II OF THE NINTH SCHEDULE TO THE INCOME TAX ACT, 1962 (ACT NO. 58 OF 1962), TO PRESCRIBE CONDITIONS FOR THE PROVISION OF SCHOLARSHIPS, BURSARIES AND AWARDS FOR STUDY, RESEARCH AND TEACHING**

By virtue of the power vested in me by paragraph 3(o) of Part II of the Ninth Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), I, Trevor Andrew Manuel, Minister of Finance, hereby determine that the regulations issued in terms of paragraph 4(o) of Part I of the Ninth Schedule to the Income Tax Act, 1962, and published under Government Notice No. R. 302 in *Gazette* No. 24941 of 28 February 2003, and any amendments thereto, apply *mutatis mutandis* for purposes of paragraph 3(o) of Part II of the Ninth Schedule to that Act.