



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

**Income Tax**



*South African Revenue Service*

# Tax Exemption Guide for Small Business Funding Entities

## Preface

This guide provides general guidance on the approval of small business funding entities under section 30C of the Income Tax Act 58 of 1962 (the Act) and partial taxation of its receipts and accruals under section 10(1)(cQ) of the Act.

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

- Capital gains tax (see **18.3**)
- Dividends tax (see **18.2**)
- Donations tax (see **18.1**)
- Employees' tax (see **19.5**)
- Estate duty (see **19.2**)
- Income tax (see **1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 26**)
- Securities transfer tax (see **19.4**)
- Skills development levy (see **19.7**)
- Transfer duty (see **19.3**)
- Unemployment insurance fund contributions (see **19.6**)
- Value-added tax (see **19.8**)

This guide is not an “official publication” as defined in section 1 of the Tax Administration Act 28 of 2011 (the TA Act) and accordingly does not create a practice generally prevailing under section 5 of that Act. It does not consider the technical and legal detail that is often associated with taxation and should, therefore, not be used as a legal reference.

It is also not a binding general ruling (BGR) under section 89 of the TA Act. Taxpayers requiring an advance tax ruling should visit the SARS website at **www.sars.gov.za** for details of the application procedure.<sup>1</sup>

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.<sup>2</sup>

For more information, assistance and guidance you may –

- visit the **SARS website**;
- contact the SARS National Service Centre –
  - if calling locally, on 0800 00 7277; or
  - if calling from abroad, on +27 11 602 2093 (only between 8am and 4:30pm South African time);
- have a virtual consultation with a SARS consultant by making an appointment via the **SARS website**;

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<sup>1</sup> For further commentary, see the *Comprehensive Guide to Advanced Tax Rulings*.

<sup>2</sup> For historical rates of various taxes, duties, and levies, see the *Guide for Tax Rates/Duties/Levies*.

- visit your nearest SARS service centre, after making an appointment via the **SARS website**; or
- contact your own tax advisor or tax practitioner.

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

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**SOUTH AFRICAN REVENUE SERVICE**  
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## Glossary

In this guide unless the context indicates otherwise –

- **“basic exemption”** means the amount determined as a threshold contemplated in section 10(1)(cQ)(ii)(dd) and applied to the total receipts and accruals from business undertakings or trading activities of an SBFE to the extent that such receipts and accruals are not derived from permissible business undertakings or trading activities;
- **“CGT”** means capital gains tax, being the portion of income tax payable by a taxpayer on a taxable capital gain arising from the disposal of assets determined under the Eighth Schedule;
- **“CIPC”** means the Companies and Intellectual Property Commission established under section 185 of the Companies Act;
- **“Close Corporations Act”** means the Close Corporations Act 69 of 1984;
- **“Commissioner”** means the Commissioner for the South African Revenue Service appointed under section 6 of the South African Revenue Service Act 34 of 1997, or the Acting Commissioner designated under section 7 of that Act;
- **“Companies Act”** means the Companies Act 71 of 2008;
- **“fiduciary”** means a person who holds a position of trust or responsibility including decision-making powers over the affairs of an entity;
- **“founding document”** means the written instrument such as the trust deed, constitution, or memorandum of incorporation under which an entity is established and governed;
- **“Master”** means the Master of the High Court;
- **“micro business”** means a person meeting the requirements set out in Part II of the Sixth Schedule;
- **“Minister”** means the Minister of Finance;
- **“NPC”** means a “non-profit company” as defined in section 1 of the Companies Act;
- **“NPO”** means a “non-profit organisation” as defined in section 1 of the NPO Act;
- **“NPO Act”** means the Nonprofit Organisations Act 71 of 1997;
- **“partial taxation”** means the method of taxing the receipts and accruals derived from business undertakings or trading activities falling outside the permissible business undertakings or trading activities exceeding the basic exemption;
- **“PAYE”** means employees’ tax, colloquially referred to as Pay-As-You-Earn;
- **“PBO”** means a “public benefit organisation” as defined in section 30(1) and approved by the Commissioner under section 30(3);<sup>3</sup>
- **“permissible business undertakings or trading activities”** mean limited qualifying business undertakings or trading activities an SBFE may conduct, which are integral and directly related, occasional or approved by the Minister, the receipts and accruals of which are exempt from income tax under section 10(1)(cQ)(ii);

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<sup>3</sup> For further commentary, see the *Tax Exemption Guide for Public Benefit Organisations in South Africa*.

- **“prescribed requirements”** mean the formal conditions and requirements set out in section 30C(1)(d), which an entity must include in its founding document and comply with to qualify for approval as an SBFE;
- **“SBC”** means an entity meeting the requirements of the definition of “small business corporation” in section 12E(4)(a);
- **“SBFE”** means a “small business funding entity” as defined in section 1(1) and approved by the Commissioner under section 30C(1) for purposes of partial taxation;
- **“Schedule”** means a Schedule to the Act;
- **“section”** means a section of the Act;
- **“section 10(1)(cQ)”** means the section providing for the exemption from income tax of the receipts and accruals of SBFEs derived from carrying on its the sole or principal object, which is the provision of funding for SMMEs, permissible business undertakings or trading activities and partial taxation;
- **“section 30C”** means the section setting out the prescribed requirements an **entity** must comply with to qualify for and retain approval as an SBFE;
- **“SDL”** means the skills development levy;
- **“SDL Act”** means the Skills Development Levies Act 9 of 1999;
- **“SMME”** means a “small, medium or micro-sized enterprise” as defined in section 1(1), which is any person qualifying as a micro business, or any person that is an SBC;
- **“South Africa”** means the “Republic” as defined in section 1(1);
- **“STT”** means securities transfer tax;
- **“STT Act”** means the Securities Transfer Tax Act 25 of 2007;
- **“TA Act”** means the Tax Administration Act 28 of 2011;
- **“the Act”** means the Income Tax Act 58 of 1962;
- **“Transfer Duty Act”** means the Transfer Duty Act 40 of 1949;
- **“Trust Property Control Act”** means the Trust Property Control Act 57 of 1998;
- **“UIF”** means the unemployment insurance fund;
- **“Unemployment Insurance Act”** means the Unemployment Insurance Act 63 of 2001;
- **“VAT”** means value-added tax;
- **“VAT Act”** means the Value-Added Tax Act 89 of 1991; and
- any other word or expression bears the meaning ascribed to it in the Act.

All amendment Acts, BGRs, declarations, explanatory memoranda, forms, *Government Gazettes* relating to income tax, guides, interpretation notes, returns and tables referred to in this guide are the latest versions, unless the context indicates otherwise, which are available on the **SARS website** or available on request via eFiling at [www.sarsefiling.co.za](http://www.sarsefiling.co.za), whichever is applicable.



## 1. Background

A major challenge in the growth of small, medium and micro enterprises is access to funding due to their inherent risk and lack of collateral together with the fact that they often lack the necessary training and commercial skills to manage and develop the business.<sup>4</sup>

Several funding entities are engaged in activities that support small, medium and micro enterprises, for example, the provision of developmental funding, business support and training. Relief was previously afforded to funders of small, medium and micro enterprises only if monies were invested through a venture capital company (VCC),<sup>5</sup> or if approved by the Commissioner as a PBO.<sup>6</sup> Any activity provided to small, medium and micro enterprises that did not fall under the VCC regime or PBO legislation therefore did not qualify for relief under the Act.<sup>7</sup>

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

- Definitions in section 1(1) of the terms “small business funding entity” and “small, medium or micro-sized enterprise”.
- Section 30C<sup>8</sup> setting out the prescribed requirements an entity must comply with to qualify for and retain approval as an SBFEE so as to enjoy partial taxation.
- Section 10(1)(cQ)<sup>9</sup> providing for the exemption from income tax of certain receipts and accruals of SBFEEs and the taxation of receipts and accruals falling outside the permissible business undertakings or trading activities provided in that section.
- A rate of tax for SBFEEs on any taxable income (see **16**).<sup>10</sup>

An entity will enjoy preferential tax treatment under section 10(1)(cQ) only after it has been granted approval by the Commissioner under section 30C(1) and continues to comply with the relevant prescribed requirements (see **9**) as set out in the Act.

An SBFEE may not issue section 18A receipts for donations received. Any donations made to an SBFEE are therefore not tax-deductible under section 18A<sup>11</sup> in determining the taxable income of a donor taxpayer.

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<sup>4</sup> *Explanatory Memorandum on the Taxation Amendment Bill, 2014.*

<sup>5</sup> The term “venture capital company” is defined in section 12J(1). For further commentary, see the *Guide on Venture Capital Companies*.

<sup>6</sup> The sole or principal object of an organisation seeking approval as a PBO must be to carry on one or more public benefit activities (PBAs) listed in the Ninth Schedule. See PBA 1(p)(iii) in Part I of the Ninth Schedule, which provides for the training, support, or assistance to emerging micro enterprises to improve capacity to start and manage businesses, which may include the granting of loans, in the furtherance of community development for poor and needy persons and anti-poverty initiatives.

<sup>7</sup> *Explanatory Memorandum on the Taxation Laws Amendment Bill, 2014.*

<sup>8</sup> Section 30C was inserted by section 49(1) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 March 2015.

<sup>9</sup> Section 10(1)(cQ) was inserted by section 14(1)(a) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 March 2015 and applicable in respect of amounts received or accrued on or after that date.

<sup>10</sup> The rate of tax fixed by Parliament under section 5(2) for SBFEEs for 2023/2024 is set out in section 4 of the Rates and Monetary Amounts and Amendment of Revenue Laws Act 19 of 2023 in *Government Gazette* 49948 of 22 December 2023.

<sup>11</sup> For further commentary, see the *Basic Guide to Section 18A Approval*.

## 2. Approval requirements

The Commissioner must approve an entity as an SBFE under section 30C for purposes of the exemption of its receipts and accruals under section 10(1)(cQ) if –<sup>12</sup>

- the entity is incorporated, formed or established in South Africa as –<sup>13</sup>
  - a trust (see 4.1);
  - an association of persons (see 4.2); or
  - an NPC (see 4.3);<sup>14</sup>
- the sole or principal object (see 5) of the entity is the provision of funding (see 6) for SMMEs (see 7);<sup>15</sup>
- the funding (see 6) provided by the entity is –<sup>16</sup>
  - for the benefit of, or is widely accessible to SMMEs (see 6.1);
  - provided on a non-profit basis (see 6.2.1) and with an altruistic or philanthropic intent (see 6.2.2); and
  - not intended to directly or indirectly promote the economic self-interest (see 6.3) of any fiduciary (see 9.1) or employee (see 9.4) of that entity, otherwise by way of reasonable remuneration payable to that fiduciary or employee (see 9.9);
- a copy of the entity's founding document is submitted to the Commissioner (see 8);<sup>17</sup>
- the founding document of the entity provides for all the prescribed requirements (see 9);<sup>18</sup> and
- satisfied that the entity does not have a person acting in a fiduciary capacity, who is disqualified under section 6 of the Trust Property Control, section 25A of the NPO Act, or section 69 of the Companies Act (see 9.14).

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

## 3. Application procedure

An entity seeking approval as an SBFE must complete the prescribed application form EI 1. The completed application form with the required registration information together with all requested supporting documentation must be submitted to SARS. The entity is required to retain this documentation as part of its records (see 24).

The application form EI 1 was developed to allow organisations seeking approval from the Commissioner to do so in a uniform and consistent manner. The application form EI 1 consolidates all the information and documentation required by the Commissioner to evaluate the approval being sought by the applicant organisation. The content of the application form EI 1 is not a deciding factor for approval by the Commissioner, since it is merely an administrative tool used by SARS to consider the application.

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

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

<sup>14</sup> An NPC was included in section 30C(1)(a) by section 55(1) of the Taxation Laws Amendment Act 25 of 2015. The amendment is deemed to have come into operation on 1 March 2015.

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

<sup>16</sup> Section 30C(1)(b)(ii).

<sup>17</sup> Section 30C(1)(c).

<sup>18</sup> Section 30C(1)(d).

The Commissioner issues the notification of approval as an SBFE by letter. The letter contains a unique reference number generally referred to as an exemption reference number that is a different reference number to the taxpayer reference number (see **25.1**). The entity is required to retain the letter confirming approval as an SBFE as part of its records.

Section 30C does not provide for the retrospective approval as an SBFE. The approval by the Commissioner of an SBFE and the exemption of its receipts and accruals is therefore effective only from the date indicated in the notice of approval, which is generally applicable to the year of assessment in which the notice of approval is issued.

The Commissioner will also issue a written notification to the entity should the approval not be granted together with reasons why the entity failed to meet the conditions and requirements of section 30C. The decision by the Commissioner not to approve an entity as an SBFE is subject to objection and appeal (see **26**). An entity not approved by the Commissioner as an SBFE will be liable for income tax and other taxes and duties as a normal taxpayer (see **10.2**).

## **4. Type of entity qualifying for approval**

An entity must be constituted in one of the following ways to be eligible for approval as an SBFE:

- A trust established in South Africa (see **4.1**).
- An association of persons formed or established in South Africa (see **4.2**).
- An NPC incorporated in South Africa (see **4.3**).

### **4.1 Trust**

The term “trust” as defined in the Act means –<sup>19</sup>

“any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person”.

A trust is created when a founder, also referred to as the donor, has the intention to create a trust and transfers property<sup>20</sup> to be administered by trustees on behalf of one or more beneficiaries, in accordance with the trust instrument, which could be a trust deed or will (see **8.1**). The founder can be a natural person or a legal person. There is no limitation on the maximum number of founders needed to create a trust.<sup>21</sup>

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<sup>19</sup> Section 1(1).

<sup>20</sup> The reference to property may refer to movable or immovable, corporeal, or incorporeal property such as assets of a business, claims against another, copyright, a dwelling, a farm, furniture, money, or shares. In general, anything that can be held in ownership and can be converted into money if liquidated can be deemed trust property.

<sup>21</sup> For further commentary, see the *Guide to the Taxation of Special Trusts* and the *Comprehensive Guide to Capital Gains Tax*.

The term “beneficiary” as defined in the Act in relation to a trust means –<sup>22</sup>

“a person who has a vested<sup>23</sup> or contingent<sup>24</sup> interest in all or a portion of the receipts or accruals or the assets of that trust”.

The following methods of creating a trust are recognised in South Africa:<sup>25</sup>

- Trusts created in wills, namely, trusts *mortis causa*, also referred to as testamentary trusts are created during the testator’s lifetime, but because they are created in a will, they only become effective on the death of the testator. The reference to this type of trust as *mortis causa* means that although the act of creation, namely, the execution of the will, takes place *inter vivos*, the trust is established and becomes irrevocable only once the testator dies. The testator’s intentions are usually clearly defined and normally concerned with a specific property, such as money, a farm, a building or similar asset, to be administered in trust to provide for the maintenance of the beneficiaries. The testator’s wishes, as reflected in his will, are aimed at specific rather than general orders that must be carried out.
- The *inter vivos* trust is established during the founder’s lifetime. The general view in South African law is that it emanates from a contract. The contract on which such a trust is based is usually a contract contained in an ante-nuptial contract, or a contract between the founder and trustee.
- Trusts can also be created by way of legislation, treaties, and orders of court.

## 4.2 Association of persons

The expression “association of persons” is not defined in the Act and should therefore be interpreted according to its ordinary meaning as applied to the subject matter with regard to which they are used.<sup>26</sup>

The *Cambridge Dictionary* describes “association” as –<sup>27</sup>

“a group of people who work together in a single organization for a particular purpose”.

LAWSA describes an “association” as follows:<sup>28</sup>

“It is today accepted that an association is founded on a basis of mutual agreement. This entails that it will come into being if the individuals who propose forming it have the serious intention to associate and are in agreement on the essential characteristics and objectives of the *universitas* or unincorporated association. The latter aspect is usually manifested by the approval and adoption of a constitution.”

(Footnotes omitted)

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<sup>22</sup> Section 1(1).

<sup>23</sup> A vesting trust is one in which the trust beneficiaries have an unconditional entitlement to the income or capital of the trust.

<sup>24</sup> A discretionary trust is one in which the trust beneficiaries have only contingent rights to the income or capital of the trust. Typically, the trustees are given the discretion over how much of the trust income or capital to distribute to the beneficiaries.

<sup>25</sup> Olivier, P. A., Strydom, S. & Van den Berg, G. P. J. (2023). Wills and Administration. *Trust Law and Practice* in 2.4. My LexisNexis: Online.

<sup>26</sup> Kellaway, E. A. (1995). *Principles of Legal Interpretation of Statutes, Contracts and Wills*. Butterworths. Also, see Steyn, L. C. (1981). *Die Uitleg van Wette* (5 ed) at 4 to 7. Juta and Company (Pty) Ltd.

<sup>27</sup> <https://dictionary.cambridge.org/dictionary/english/association> [Accessed 5 July 2024].

<sup>28</sup> Pienaar, G. J. (2015). Association. In *The Law of South Africa (LAWSA)*. (Third Edition) (Volume 2) in 155. My LexisNexis: Online.

### 4.3 Non-profit company

The term “non-profit company” as defined in the Companies Act means a company –<sup>29</sup>

- “(a) incorporated for a public benefit or other object as required by item 1(1) of Schedule 1;<sup>30</sup> and
- (b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3) of Schedule 1”.<sup>31</sup>

An NPC does not automatically qualify for exemption from income tax<sup>32</sup> and must satisfy the statutory requirements of the Income Tax Act to be eligible for approval as an SBFE and for its receipts and accruals to be exempt from income tax.

The primary difference between an NPC and a for-profit company is that an NPC does not have shares or shareholders and the members of an NPC are not entitled to receive distributions of profits or gains from the operations of an NPC. Profits and gains generated by an NPC approved as an SBFE must be used for the provision of funding for SMMEs, which must be its sole or principal object for which it is established.

## 5. Sole or principal object

An SBFE must have as its sole or principal object the provision of funding (see **6**) for SMMEs (see **7**).<sup>33</sup> An entity having diverse or multiple objectives not aligned with the provision of funding for SMMEs will not qualify for approval.

The sole or principal object of an SBFE set out in its founding document (see **8**) should be determined by interpreting its founding document in accordance with the ordinary rules of construction of a document.<sup>34</sup>

The object of the entity is not the subjective goals or intentions of the entities’ founders or fiduciary (see **9.1**) but the activities the entity is mandated by its founding document to perform. To determine whether an entity’s mandated object is its sole or principal object, one must look at the extent to which the object is actively pursued through what the entity actually does. The sole or principal object of an entity equates to the activities it physically and actively carries on.

The words “sole”, “principal” and “object” are not defined in the Act. They are described in *Dictionary.com* as follows:

- “Sole” as “being the only one; only.”<sup>35</sup>

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<sup>29</sup> Section 1 of that Act.

<sup>30</sup> The reference to an “other object” in item 1(1) of Schedule 1 to the Companies Act refers to cultural or social activities or communal or group interests.

<sup>31</sup> An NPC under item 1(3) of Schedule 1 to the Companies Act, for example, may pay reasonable remuneration for goods or services rendered, pay, or reimburse expenses incurred to advance a stated object of the company, or make payments in accordance with any legal obligation binding on the company.

<sup>32</sup> Item 1(6) of Schedule 1 of the Companies Act.

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

<sup>34</sup> See *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* [2021] 3 All SA 647 (SCA).

<sup>35</sup> [www.dictionary.com/browse/sole](https://www.dictionary.com/browse/sole) [Accessed 5 July 2024].

- “Principal” as “first or highest in rank, importance, value, chief.”<sup>36</sup>
- “Objective” as “something that one’s efforts or actions are intended to attain, accomplish, purpose, goal, target.”<sup>37</sup>

In ITC 1569,<sup>38</sup> the judge referred to the following two meanings of “principal” in the *Oxford English Dictionary*:

1. First or highest in rank or importance; that is at the head of all the rest; of the greatest account or value; foremost.
2. Less definitely: belonging to the first or highest group in rank or importance; of the first order; main, prominent, leading.”

The word “principal” is used in conjunction with “sole”. The word “sole” equates to 100%. The word “principal” as a percentage within this context is interpreted and concluded to mean not less than 90%, having regard to the expression “substantially the whole”,<sup>39</sup> which in the strict sense is interpreted by SARS as 90% but not less than 85% (see **9.5**).

## 6. Funding

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

The expression “provision of funding”<sup>40</sup> is not defined in the Act. The expression “provision of funding” is described in the *Free Dictionary* as –<sup>41</sup>

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

The expression “provision of funding” in the context of SBFEs refers to the act of making available or supplying money for SMMEs. An entity must itself, by expending effort or acting, make available, give, or supply funds for SMMEs. It will not suffice merely for an entity to provide funding to another entity, which itself is engaged in the provision of funds for SMMEs.

The Commissioner will approve an entity as an SBFE only if the funding provided is –<sup>42</sup>

- for the benefit of, or is widely accessible to SMMEs (see **6.1**);
- on a non-profit basis (see **6.2.1**) and with an altruistic or philanthropic intent (see **6.2.2**); and
- not intended to directly or indirectly promote the economic self-interest (see **6.3**) of any fiduciary (see **9.1**) or employee (see **9.4**) of that SBFE, except if it is reasonable remuneration payable to that fiduciary or employee (see **9.9**).

<sup>36</sup> [www.dictionary.com/browse/principal?s=t](http://www.dictionary.com/browse/principal?s=t) [Accessed 5 July 2024].

<sup>37</sup> [www.dictionary.com/browse/objective](http://www.dictionary.com/browse/objective) [Accessed 5 July 2024].

<sup>38</sup> (1993) 56 SATC 86 (C) at 90.

<sup>39</sup> The expression “substantially the whole” was introduced in the revised tax system for PBOs in 2000 to achieve a more supportive fiscal environment and to give effect to the proposals and recommendations by the Katz Commission set out in the *Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa* at 9 and 18.

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

<sup>41</sup> [www.thefreedictionary.com/funding](http://www.thefreedictionary.com/funding) [Accessed 5 July 2024].

<sup>42</sup> Section 30C(1)(b)(ii).

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

## 6.1 For the benefit of, or widely accessible

The provision of funding by an SBFE must benefit or be widely accessible to SMMEs.<sup>43</sup> SMMEs should have an equal opportunity to access and benefit from funding provided by an SBFE. Funding should be provided in a universal or public manner that is inclusive of SMMEs, for example, from a broad spectrum, target groups, geographic areas, enterprise organisational forms, developmental stages, and economic sectors. Funding may not be provided on grounds of any personal or employment relationship.

### Example 1– For the benefit of, or widely accessible

The following are non-exhaustive examples of funding for the benefit of, or widely accessible to SMMEs:

- The funding requirement will not be met if an entity provides funding for the benefit of any person not qualifying as a micro business (see 7.1) or that is not an SBC (see 7.2) because such persons do not meet the definition of an SMME.
- The funding requirement will not be met if an entity provides funding for the benefit of a select group such as SMMEs established by employees of that entity because the requirement of being widely accessible will not be met.
- The funding requirement will be met if an entity provides funding for the benefit of a certain sector of SMMEs such as black-owned and managed SMMEs, or SMMEs owned and managed by women, persons with disabilities, or persons in rural areas because this is inclusive of and widely accessible to a broad spectrum of SMMEs.

Funding provided by an SBFE may be viewed as being widely accessible, for example, if –

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

## 6.2 Manner in which funding must be provided

Funding must be provided on a non-profit basis and with an altruistic or philanthropic intent.<sup>44</sup> It is important to note that the conjunctive “and” requires that both requirements must be met, meaning that the funding must be provided on a non-profit basis and with an altruistic or philanthropic intent.

<sup>43</sup> Section 30C(1)(b)(ii)(aa).

<sup>44</sup> Section 30C(1)(b)(ii)(bb).

### 6.2.1 Non-profit basis

The words “non-profit” and “basis” are not defined in the Act. The *Cambridge Dictionary* provides the following descriptions:

- “Non-profit” is “not intended to make a profit, but to make money for a social or political purpose or to provide a service that people need.”<sup>45</sup>
- “Basis” is “the reason why someone does something or why something happens.”<sup>46</sup>

*Investopedia* describes “not for profit” as –<sup>47</sup>

“a type of organization that does not earn profits for its owners. All of the money earned by or donated to a not-for-profit organization is used in pursuing the organization's objectives and keeping it running”.

The sole or principal reason for establishing an entity must be for the provision of funding for SMMEs and not to generate a profit or financial return. An SBFE may not provide funding for purposes of making a distributable profit (see **9.3**). It will be unacceptable for an SBFE to conduct profit-making activities as its sole or principal object to fund the cost of the provision of funding for SMMEs. The provision of funding for SMMEs by an SBFE should not be to maximise profits but rather to recover direct and reasonable indirect costs. The provision of funding by means of loans will be acceptable provided charges, which may include interest, on such loans may only be to recover costs incurred by the SBFE in obtaining or supplying such funding. The particular facts and circumstances of an SBFE will be considered to determine whether the provision of funding by way of loans is on a cost-recovery basis. Any charges on loans may not result in a profit for the SBFE. An entity providing funding for SMMEs as part of a profit-making venture will not qualify for approval as an SBFE. However, an entity carrying on a business undertaking or trading activity as part of the provision of funding for SMMEs may qualify as an SBFE provided it meets all the permissible business undertaking or trading activity requirements (see **14**).

#### **Example 2 – Funding provided on a non-profit basis**

##### *Facts:*

Funding by way of a loan amounting to R500 000 is provided by an SBFE to JFK (Pty) Ltd, an SMME. The SBFE borrowed funds from a registered bank and incurred interest on the borrowed amount at a rate of 6%. The loan funding provided by the SBFE is subject to the unconditional obligation that JFK (Pty) Ltd repays the loan together with 6% interest charged on the loan amount within a certain period.

##### *Result:*

The funding provided by the SBFE to JFK (Pty) Ltd by way of a loan and interest charged is regarded as being provided on a non-profit basis, since the interest charged on such loan amount is only to recover the cost incurred by the SBFE in obtaining such funding and not to generate a profit.

<sup>45</sup> <https://dictionary.cambridge.org/dictionary/english/non-profit> [Accessed 5 July 2024].

<sup>46</sup> <https://dictionary.cambridge.org/dictionary/english/basis> [Accessed 5 July 2024].

<sup>47</sup> [www.investopedia.com/terms/n/not-for-profit.asp](http://www.investopedia.com/terms/n/not-for-profit.asp) [Accessed 5 July 2024].



## 6.2.2 Altruistic or philanthropic intent

The words “altruistic”, “philanthropic” and “intent” are not defined in the Act. The words are described in the *Cambridge Dictionary* as –

- “Altruistic” is “showing a wish to help or bring advantages to others, even if it results in disadvantage for yourself”.<sup>48</sup>
- “Philanthropic” is “helping poor people, especially by giving them money.”<sup>49</sup>
- “Intent” is “the fact that your want and plan to do something.”<sup>50</sup>

Altruism therefore generally means a concern for the well-being of others with no thought about oneself. Altruism is the opposite of self-interest (see **6.3**). The intent of an entity must not be the provision of funding for SMMEs for the personal profit, benefit, or advantage of the entity to the exclusion or regard of the well-being of SMMEs.

In *Ex Parte Henderson & another*, NNO Miller J provided the following explanation of philanthropy:<sup>51</sup>

“The word ‘philanthropy’ is generally used to convey the idea of ‘practical benevolence towards men in general; the disposition or active effort to promote the happiness and well-being of one’s fellow-men’ (*Oxford English Dictionary*).”

The word “philanthropic”, based on the above judgment, is used to describe goodwill towards men in general and the active effort to promote the happiness and well-being of one’s fellow men.

The intent of an entity is a subjective test, and it is not always an easy task to establish. The court will in the first instance give due consideration to the entity’s purpose (see **5**), that is what the entity states its intent to be in its founding document (see **8**). An objective review of an entity’s activities considered together with the relevant facts and circumstances may provide an indication of an entity’s stated intent.

The expression “altruistic or philanthropic intent” can therefore be described as the purpose or object of a charitable gift or bequest the intent of which is often expressed in restrictions, terms, or conditions between the donor (the person giving the charitable gift or bequest) and donee (the person receiving the charitable gift or bequest) but may also be expressed in the words, actions, beliefs, and giving practices of a donor. Funding will be regarded as being provided with an altruistic or philanthropic intent when it is not subject to, for example, the delivery of any activity, service, or product, or does not confer a financial benefit, or control to the SBFE in return for the funding provided. Thus, there must be no *quid pro quo*, reciprocal obligations and no direct or indirect personal benefit or return resulting from the funding provided by the SBFE.

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<sup>48</sup> <https://dictionary.cambridge.org/dictionary/english/altruistic> [Accessed 5 July 2024].

<sup>49</sup> <https://dictionary.cambridge.org/dictionary/english/philanthropic> [Accessed 5 July 2024].

<sup>50</sup> <https://dictionary.cambridge.org/dictionary/english/intent> [Accessed 5 July 2024].

<sup>51</sup> 1971 (4) SA 549 (D) at 556.

### Example 3 – Funding provided with an altruistic or philanthropic intent

#### Facts:

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

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

#### Result:

The entity will not be approved by the Commissioner as an SBFE because the funding has not been provided with an altruistic or philanthropic intent, since the entity will receive a benefit in the form of office space at no cost resulting from the funding it provided to MNO (Pty) Ltd, which is contrary to the requirement in section 30C(1)(b)(ii)(bb) for approval as an SBFE.

## 6.3 Economic self-interest

The intent of an SBFE in the provision of funding for SMMEs may not be done to directly or indirectly promote the economic self-interest of any fiduciary (see 9.1) or employee (see 9.4) of that SBFE. The payment of reasonable remuneration to fiduciaries or employees conducting the affairs of an SBFE to enable it to achieve its objectives is permitted (see 9.9).<sup>52</sup>

The words “directly”, “indirectly”, “economic” or “self-interest” are not defined in the Act. The *Cambridge Dictionary* provides the following descriptions:

- “Directly” is “without anything else being involved or in between.”<sup>53</sup>
- “Indirectly” is “in a way that is not direct or not connected in a simple way.”<sup>54</sup>
- “Economic” is “relating to trade, industry, or money.”<sup>55</sup>
- “Self-interest” is “the act of considering the advantage to yourself when making decisions, and deciding to do what is best for you.”<sup>56</sup>

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

<sup>52</sup> Section 30C(1)(b)(ii)(cc).

<sup>53</sup> <https://dictionary.cambridge.org/dictionary/english/directly> [Accessed 5 July 2024].

<sup>54</sup> <https://dictionary.cambridge.org/dictionary/english/indirectly> [Accessed 5 July 2024].

<sup>55</sup> <https://dictionary.cambridge.org/dictionary/english/economic> [Accessed 5 July 2024].

<sup>56</sup> <https://dictionary.cambridge.org/dictionary/english/self-interest> [Accessed 5 July 2024].

#### **Example 4 – No self-interest**

*Facts:*

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

*Result:*

XYZ Funding Foundation will not be approved by the Commissioner as an SBFE because a shareholder of ABC (Pty) Ltd is also an employee of the Foundation. The funding provided to ABC (Pty) Ltd has therefore directly promoted the economic self-interest of an employee of the Foundation, which is contrary to the requirement in section 30C(1)(b)(ii)(cc) for approval as an SBFE.

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

The term “small, medium or micro-sized enterprise” as defined means any –<sup>57</sup>

- person that qualifies as a micro business (see **7.1**); or
- person that is an SBC (see **7.2**).

An SBFE is responsible for determining whether a person qualifies as an SMME before providing funding to such person. The qualification as an SMME must be met at the time when the funding by an SBFE is granted. The growth over time of an SMME that initially met the requirements of an SMME, which results in it not meeting the requirements of an SMME after receiving the funding will therefore not affect the funding already provided or the approval of an SBFE.

The Commissioner may on application (see **3**), or on submission of the annual income tax return (see **25.2**), request an SBFE to furnish information (see **21**) relating to the persons to whom funding is provided as well as confirmation that such persons qualify or qualified at the time of applying for funding (see **6**) as SMMEs.<sup>58</sup>

### **7.1 Micro businesses**

A person,<sup>59</sup> whose qualifying turnover<sup>60</sup> does not exceed R1 million for the year of assessment, qualifies as a micro business if that person is –<sup>61</sup>

- a natural person (or the deceased or insolvent estate of a natural person who was a registered micro business at the time of death or insolvency);<sup>62</sup> or
- a company.<sup>63</sup>

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<sup>57</sup> Section 1(1).

<sup>58</sup> This information is required to satisfy the burden of proof contemplated in section 102 of the TA Act.

<sup>59</sup> For further commentary and quick tests to determine whether a natural person or a company qualifies as a micro business, see the *Tax Guide for Micro Businesses*.

<sup>60</sup> The term “qualifying turnover” is defined in paragraph 1 in the Sixth Schedule.

<sup>61</sup> Paragraph 2(1) of the Sixth Schedule.

<sup>62</sup> Partners in a partnership and sole proprietors fall within the natural person category.

<sup>63</sup> The term “company” is defined in section 1(1).

The SMME, that is a micro business, to whom an SBFE provides funding, is required only to meet the qualifying criteria to be a micro business. It is not a requirement that the SMME be a registered micro business<sup>64</sup> for turnover tax<sup>65</sup> with SARS.

The following are examples of persons not qualifying as a micro business:<sup>66</sup>

- A labour broker<sup>67</sup> other than a labour broker who has been issued with a certificate of exemption<sup>68</sup> by SARS. A labour broker in this context means any natural person who conducts or carries on any business whereby such person, for reward, provides a client with his or her own employees to perform work for the client or procures workers for a client, but does not personally provide the services required by the client.
- A personal service provider, which generally means any person who is a connected person in relation to a company or trust who personally renders any service on behalf of such company or trust to a client of such company or trust subject to prescribed requirements being met. A company or trust, which throughout the year of assessment employs three or more full-time employees who are on a full-time basis engaged in the business of such company or trust of rendering any such service is not a personal service provider.<sup>69</sup>
- A company with a year of assessment ending on a date other than the last day of February.
- A business if any of its partners, members or shareholders are not natural persons during the relevant year of assessment.
- Companies approved by the Commissioner as –
  - PBOs under section 30;
  - recreational clubs under sections 30A;<sup>70</sup>
  - any other association under section 30B;<sup>71</sup> or
  - an SBFE under section 30C.
- All partners in a partnership if any one of them is not a natural person or if the qualifying turnover of the partnership as a whole exceeds R1 million.

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<sup>64</sup> The term “registered micro business” is defined in paragraph 1 of the Sixth Schedule.

<sup>65</sup> Turnover tax is imposed under section 48A and is payable by any person that is a registered micro business.

<sup>66</sup> Paragraph 3 of the Sixth Schedule.

<sup>67</sup> The term “labour broker” is defined in paragraph 1 of the Fourth Schedule. For further commentary, see the *Tax Guide for Small Businesses*.

<sup>68</sup> See paragraph 2(5) of the Fourth Schedule.

<sup>69</sup> The term “personal service provider” is defined in paragraph 1 of the Fourth Schedule. For further commentary, see the *Tax Guide for Small Businesses*. To determine whether a company, close corporation or trust is a “personal service provider”, see Interpretation Note 35 “Employees’ Tax: Personal Service Providers and Labour Brokers”.

<sup>70</sup> For further commentary, see the *Tax Exemption Guide for Recreational Clubs*.

<sup>71</sup> For further commentary, see Interpretation Note 125 “Associations: Funding Requirement”.

## 7.2 Small business corporations

The requirements that must be met for an entity to qualify as an SBC are set out in section 12E(4).<sup>72</sup> These requirements are broadly summarised as follows:

- The entity must be a juristic person in the form of a close corporation,<sup>73</sup> co-operative,<sup>74</sup> a personal liability company,<sup>75</sup> or private company.<sup>76</sup>
- All the holders of shares in the company, members of the close corporation, or co-operative must always be natural persons during a year of assessment.
- No holders of shares or members should hold any shares or have any interest in the equity of any other company, other than companies as specified in the definition of “small business corporation”.<sup>77</sup>
- The gross income<sup>78</sup> of the entity for the year of assessment may not exceed R20 million.
- Not more than 20% of the total receipts and accruals (other than those of a capital nature) and all capital gains<sup>79</sup> of the entity may consist collectively of investment income<sup>80</sup> and income from rendering a personal service.<sup>81</sup>
- The entity may not be a personal service provider (see 7.1).

An entity could meet all the qualifying requirements and be an SBC in one year of assessment but not in another year of assessment. Whether an entity qualifies and is assessed as an SBC for a particular year of assessment is determined based on a set of questions relating to section 12E in the Income Tax Return for Companies (ITR 14). A taxpayer therefore elects in the ITR 14 to be assessed as an SBC if it meets the qualifying criteria.

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

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<sup>72</sup> For further commentary, see Interpretation Note 9 “Small Business Corporations”.

<sup>73</sup> The term “close corporation” is defined in section 1(1). For further commentary, see the *Tax Guide for Small Businesses*.

<sup>74</sup> The term “co-operative” is defined in section 1(1). For further commentary, see the *Tax Guide for Small Businesses*.

<sup>75</sup> The term “personal liability company” refers to a personal liability company as contemplated in section 8(2)(c) of the Companies Act.

<sup>76</sup> The term “private company” as defined in section 1 of the Companies Act refers to a company meeting the criteria set out in section 8(2)(b) of that Act. For further commentary, see the *Tax Guide for Small Businesses*.

<sup>77</sup> The term “small business corporation” is defined in section 12E(4)(a).

<sup>78</sup> The term “gross income” as defined in section 1(1) includes the total amount received by or accrued to a person that is not of a capital nature unless specifically included under paragraphs (a) to (n). For further commentary on how to determine a person’s gross income, see the *Tax Guide for Small Businesses*.

<sup>79</sup> For further commentary on the effective rates of CGT, see the *ABC of Capital Gains Tax for Companies*.

<sup>80</sup> The term “investment income” is defined in section 12E(4)(c).

<sup>81</sup> The term “personal service” is defined in section 12E(4)(d).

### **Example 5 – Provision of funding to SMMEs qualifying as an SBC**

*Facts:*

Help More NPC has as its sole or principal object the provision of funding to SMMEs. Help More NPC complies with all the prescribed requirements (see **9**) and has been approved by the Commissioner as an SBFE.

Help More NPC provides funding to five SBCs over a five-year period. In year 1, when Help More NPC granted the funding, the five entities' gross income for the previous year of assessment did not exceed R20 million. Accordingly, they qualified in that particular year of assessment as SBCs. In year 2 of receiving funding from Help More NPC, three of the five entities no longer qualified as SBCs, since after receiving funding, their gross income exceeded R20 million. If growth continues as expected it is envisaged that this trend may continue over the remaining three years of the provision of funding from Help More NPC.

*Result:*

The continuation of the provision of funding to the three entities that after year 2 no longer qualified as SBCs will not jeopardise the approval as an SBFE granted by the Commissioner to Help More NPC, since at the time of granting the funding the three entities met the qualifying criteria for an SBC.

## **8. Founding document**

An entity applying to the Commissioner for approval as an SBFE must have a founding document that establishes and governs the entity. The founding document will depend on the type of entity incorporated, formed, or established. The founding document establishing and governing –

- a trust (see **4.1**) is a trust deed (see **8.1**);
- an association of persons (see **4.2**) is a constitution adopted by its members (see **8.2**); and
- an NPC (see **4.3**) is a memorandum of incorporation (see **8.3**).

The founding document must be submitted to the Commissioner<sup>82</sup> as part of the application for approval as an SBFE (see **3**). The founding document must provide for the prescribed requirements (see **9**).<sup>83</sup> The founding document as a whole will be examined to ensure that the prescribed requirements are included.

Any amendment to the founding document of an SBFE must be submitted to the Commissioner within a prescribed period after such amendment is effected (see **9.11**).

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<sup>82</sup> Section 30C(1)(c).

<sup>83</sup> Section 30C(1)(d).

## 8.1 Trust deed

A verbal or oral trust is valid in law, however, such a verbal trust does not fall to be administered under the Trust Property Control Act.<sup>84</sup>

The term “trust instrument” as defined in the Trust Property Control Act means –<sup>85</sup>

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

A copy of the trust instrument must under the Trust Property Control Act be lodged with the Master.<sup>86</sup> Any person appointed as trustee under a trust instrument will act in that capacity only if authorised to do so in writing by the Master.<sup>87</sup>

LAWSA provides the following on the formation requirement of trusts:<sup>88</sup>

“The founder must intend to create a trust and his or her intention must be concluded in a form which obliges him or her or his or her executor to effect transfer of the prospective trust assets to the trustee, or which obliges the trustee to administer the property for the trust object.”

(Footnotes omitted)

A trust must have a written instrument administered under the Trust Property Control Act to qualify as an SBFE. The trust instrument is required to be submitted to the Commissioner.<sup>89</sup>

## 8.2 Constitution

LAWSA provides the following on the constitution of an association:<sup>90</sup>

“The constitution of an association together with all its rules or regulations collectively constitute the agreement which is entered into by its members. This agreement is the crucial factor in the existence of an association. It not only determines the nature and scope of the association’s existence and activities but also, where necessary, prescribes and demarcates the powers of, *inter alia*, the executive committee, the secretary and the members of the association in general meeting. In addition, it expresses and regulates the rights of members and provides for certain procedural aspects.”

(Footnotes omitted)

An association of persons must have a constitution or other written instrument adopted by its members to qualify as an SBFE. The constitution or other written instrument establishing and governing the association of persons must be submitted to the Commissioner.<sup>91</sup>

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<sup>84</sup> Palmer, G. C. (2022). Trusts. In *The Law of South Africa (LAWSA)*. (Third Edition) (Volume 43) in 178. My LexisNexis: Online.

<sup>85</sup> Section 1 of the Trust Property Control Act.

<sup>86</sup> Section 4(1) of the Trust Property Control Act.

<sup>87</sup> Section 6 of the Trust Property Control Act.

<sup>88</sup> Palmer, G. C. (2022). Trusts. In *The Law of South Africa (LAWSA)*. (Third Edition) (Volume 43) in 182. My LexisNexis: Online.

<sup>89</sup> Section 30C(1)(c).

<sup>90</sup> Pienaar, G. J. (2015). Association. In *The Law of South Africa (LAWSA)*. (Third Edition) (Volume 2) in 156. My LexisNexis: Online.

<sup>91</sup> Section 30C(1)(c).

### 8.3 Memorandum of incorporation

The memorandum of incorporation is the document by which an NPC is incorporated and sets out the rights, duties, and responsibilities of members, directors, and others within and in relation to a company. The Companies Act provides for the simplest possible form of incorporation by the use of a standard form of the memorandum of incorporation. After the completed and signed memorandum of incorporation<sup>92</sup> and the filing of a notice of incorporation<sup>93</sup> the registration of the company is confirmed by the CIPC<sup>94</sup> under the Companies Act through the issuing and delivery to the company of a registration certificate.<sup>95</sup>

LAWSA provides the following on the registration of a company:<sup>96</sup>

“From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company is a juristic person which exists continuously until its name is removed from the companies register in accordance with the Companies Act. A duly issued registration certificate is conclusive evidence that all the requirements for the incorporation of the company have been complied with and that the company is incorporated under the Act as from the date, and the time, if any, stated in the certificate.”

(Footnotes omitted)

The registration certification issued, and the memorandum or incorporation confirmed by the CIPC must be submitted to the Commissioner.<sup>97</sup>

## 9. Prescribed requirements

The mandatory requirements under section 30C, which must be included in the founding document of an SBFE are considered below.

There are adverse consequences, which may include a fine or imprisonment (see **10.3**), for persons in a fiduciary capacity (see **9.1**) responsible for the management or control of the income and assets of an SBFE who intentionally fail to comply with the prescribed requirements.

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

An SBFE must have a committee, a board of management or similar governing body consisting of at least three natural persons who are not connected persons in relation to each other to accept fiduciary responsibility for the SBFE.<sup>98</sup>

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<sup>92</sup> See section 13(1)(a) of the Companies Act and Regulation 15 in Government Notice Regulation 351 in *Government Gazette* 34239 of 26 April 2011 and Form CoR 15.1C.

<sup>93</sup> Sections 13(1)(b) and 13(2) of the Companies Act read with the Regulations in Government Notice Regulation 351 in *Government Gazette* 34239 of 26 April 2011. Also, see Form CoR 14.1, Notice of Incorporation, included in the Regulations.

<sup>94</sup> Section 14(1) of the Companies Act.

<sup>95</sup> Sections 14(1)(b)(iii) (4) of the Companies Act. Also, see Form CoR 14.3, Registration Certificate, included in the Regulations.

<sup>96</sup> Stoop, H. H. (2022). Companies Part 1. In *The Law of South Africa (LAWSA)*. (Third Edition) (Volume 6(1)) in 29. My LexisNexis: Online.

<sup>97</sup> Section 30C(1)(c).

<sup>98</sup> Section 30C(1)(d)(i)(aa).



The expression “fiduciary responsibility” is not defined in the Act. The *Cambridge Dictionary* describes the words separately as follows:

- “Fiduciary” is “relating to the responsibilities of a person or organization that manages property or money belonging to another person or organization.”<sup>99</sup>
- “Responsibility” is “something that it is your job or duty to deal with.”<sup>100</sup>

*Investopedia* describes “fiduciary duty” as follows:<sup>101</sup>

“A fiduciary duty involves actions taken in the best interests of another person or entity.”

The persons accepting fiduciary responsibility for an SBFE therefore are always required to act in the best interest of the SBFE and put the interests of the SBFE ahead of their own self-interest. They also are prohibited from profiting when dealing on behalf of the SBFE.

It is a further requirement that the three natural persons accepting fiduciary responsibility for the SBFE may not be connected persons in relation to each other. The term “connected person”<sup>102</sup> in relation to a natural person as defined means –<sup>103</sup>

- “(i) any relative; and
- (ii) any trust (other than a portfolio of a collective investment scheme)<sup>104</sup> of which such natural person or such relative is a beneficiary”.

The term “relative” in relation to any person as defined means –<sup>105</sup>

“the spouse of that person or anybody related to that person or that person’s spouse within the third degree of consanguinity, or any spouse of anybody so related, and for the purpose of determining the relationship between any child referred to in the definition of ‘child’ in this section and any other person, that child shall be deemed to be related to the adoptive parent of that child within the first degree of consanguinity”.

Natural persons are therefore connected persons in relation to one another if they are relatives in relation to one another. A relative includes a person’s spouse and anyone related to the person or the person’s spouse within the third degree of consanguinity<sup>106</sup>.

Natural persons are also connected persons in relation to one another, for example, if they are beneficiaries of the same trust or members of a partnership.<sup>107</sup>

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<sup>99</sup> <https://dictionary.cambridge.org/dictionary/english/fiduciary> [Accessed 5 July 2024].

<sup>100</sup> <https://dictionary.cambridge.org/dictionary/english/responsibility> [Accessed 5 July 2024].

<sup>101</sup> <https://investopedia.com/ask/answers/042915/what-are-some-examples-fiduciary-duty.asp> [Accessed 5 July 2024].

<sup>102</sup> Section 1(1).

<sup>103</sup> The term “connected person” is defined in section 1(1). For further commentary, see Interpretation Note 67 “Connected Persons”.

<sup>104</sup> The term “portfolio of a collective investment scheme” as defined in section 1(1) means (a) any portfolio of a collective investment scheme in participation bonds as defined, (b) any portfolio of a collective investment scheme in property as defined, (c) any portfolio of a collective investment scheme in securities as defined, or (d) any portfolio of a declared collective investment scheme as defined.

<sup>105</sup> Section 1(1).

<sup>106</sup> The word “consanguinity” is described in the *Cambridge Dictionary* as “the condition of being blood relations (= related to someone by birth, not marriage)”. See <https://dictionary.cambridge.org/dictionary/english/consanguinity> [Accessed 5 July 2024].

<sup>107</sup> Paragraphs (bA) and (c)(i) of the definition of “connected person” in section 1(1).

### 9.1.1 Fiduciaries of a trust

The term “trustee” as defined means –<sup>108</sup>

“in addition to every person appointed or constituted as such by act of parties, by will, by order or declaration of court or by operation of law, includes an executor or administrator, tutor or curator, and any person having the administration or control of any property subject to a trust, usufruct, fideicommissum or other limited interest or acting in any fiduciary capacity or having, either in a private or in an official capacity, the possession, direction, control or management of any property of any person under legal disability”.

The Trust Property Control Act provides that a trustee must in the performance of his or her duties and in the exercise of his or her powers act with the care, diligence, and skill, which can reasonably be expected of a person who manages the affairs of another.<sup>109</sup>

The *Trust Law and Practice* provides the following on trustees accepting fiduciary responsibility for a trust:<sup>110</sup>

“The source from which the trustee’s duties are derived is connected to his trusteeship. The duties attach legally to the office of trustee. In addition, Act 57 of 1988<sup>111</sup> makes provision for a number of duties, so that it can be said that these duties are based on legislation.”

(Footnotes omitted)

The Trust Property Control Act provides that no person may act as trustee without proper authorisation from the Master.<sup>112</sup> Trustees are therefore required to be in possession of a Letter of Authority from the Master.<sup>113</sup>

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

### 9.1.2 Fiduciaries of an association of persons

The following explanation is provided by *LAWSA* on the fiduciaries of an association:<sup>114</sup>

“Members of an association can be elected to office. The word ‘office’ ordinarily has a fairly wide connotation, meaning a position or post to which prescribed duties are attached. Where an association’s constitution prescribes the duties of the president, vice-president, treasurer, trustees and secretary, these posts are all ‘offices’. Certain persons holding office may be required to fulfil managerial functions.

The proper functioning of an association requires the appointment of a group of persons with executive powers. The constitution of the association usually regulates the matter by entrusting the management of the association’s affairs to a management (executive) committee. The election of persons to serve on the management committee takes place in accordance with the constitutional provisions. When a person is elected to serve on a management committee, he or she obtains certain rights and undertakes certain obligations in relation to the conduct of the affairs of the association. Members of the management committee may resign or be removed

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<sup>108</sup> Section 1(1).

<sup>109</sup> Section 9(1) of that Act.

<sup>110</sup> Olivier, P. A., Strydom, S. & Van den Berg, G. P. J. (2023). Wills and Administration. *Trust Law and Practice* in 3.4.2. My LexisNexis: Online.

<sup>111</sup> Trust Property Control Act.

<sup>112</sup> Section 6 of the Trust Property Control Act.

<sup>113</sup> RP Pace, R. P. (2020). *Trusts and Trustees* in 4.1.1. My LexisNexis: Online.

<sup>114</sup> Pienaar, G. J. (2015). Association. In *The Law of South Africa (LAWSA)*. (Third Edition) (Volume 2) in 166 and 178. My LexisNexis: Online.

from office in conformity with the terms of the constitution. A duly elected management committee holds office until it is dismissed or retires of its own accord.”

(Footnotes omitted)

In view of the above, any person elected to office in an association of persons, such as the chairperson, vice-chairperson, treasurer, secretary, or any person appointed to the management or executive committee may accept fiduciary responsibility for an SBFE.

### 9.1.3 Fiduciaries of a non-profit company

An SBFE incorporated as an NPC is required under the Companies Act to have a minimum of three persons to incorporate the NPC<sup>115</sup> and to appoint at least three directors.<sup>116</sup>

A director of a company must –<sup>117</sup>

- not use the position of director, or any information obtained while acting in the capacity of a director –
  - to gain an advantage for the director, or for another person other than the company or a wholly owned subsidiary of the company; or
  - to knowingly cause harm to the company or a subsidiary of the company; and
- communicate to the board at the earliest practical opportunity any information that comes to the director’s attention, unless the director –
  - reasonably believes that the information is immaterial to the company, or generally available to the public, or known to the other director’s; or
  - is bound not to disclose that information by a legal or ethical obligation of confidentiality.

A director’s standard of conduct is incorporated in the Companies Act and provides that all powers and functions arising from the capacity of a director must be exercised –<sup>118</sup>

- in good faith;
- for a proper purpose;
- in the best interest of the company; and
- with a degree of care, skill and diligence reasonably expected of a person –
  - carrying out the same functions in relation to the company as those carried out by that director; and
  - having the general knowledge, skill, and experience of that director.

LAWSA explains a director’s fiduciary duty relating to a company as follows:<sup>119</sup>

“The Companies Act defines ‘director’ as a member of the board of a company or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated.

In addition to the duties imposed on them by the Companies Act and the wide-ranging power similarly given them to manage its business and affairs (save as otherwise provided by the memorandum of incorporation), the memorandum of incorporation often gives explicit power to

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<sup>115</sup> Section 13(1) read together with item 3 of Schedule 1 to the Companies Act.

<sup>116</sup> Section 66(2)(b) of the Companies Act.

<sup>117</sup> Section 76(2) of the Companies Act.

<sup>118</sup> Section 76(3) of the Companies Act.

<sup>119</sup> Stoop, H. H. (2022). "Companies" Part 2 6(2) in *The Law of South Africa (LAWSA)* (Third Edition Volume) in 1 and 3. My LexisNexis: Online.

directors of companies to manage the company's business, to transact on its behalf, and to delegate their powers and functions. They exercise their powers collectively, by majority vote, as a board. A director therefore stands in a fiduciary relationship to the company and is subject to essentially the same fiduciary duties as are imposed on other fiduciaries who stand in a similar relationship of confidence and trust to another."

(Footnotes omitted)

In view of the above, any person who is a director or alternative director of an NPC may accept fiduciary responsibility for an SBFE.

## 9.2 Decision-making powers

No single person may have the ability or authority, either directly or indirectly, to control the decision-making powers of the SBFE.<sup>120</sup>

The expression "decision-making powers" is not defined in the Act. The words are described separately in the *Britannica Dictionary* as follows:

- "Decision-making" is "the act or process of deciding something with a group of people."<sup>121</sup>
- "Power" is "the ability or right to control people or things."<sup>122</sup>

The organisational and managerial activities of an SBFE are determined by decisions taken by persons given such authority in accordance with the founding document (see 8). No individual person, however, is permitted to control the decision-making powers of an SBFE directly or indirectly.

*Claassen's Dictionary of Legal Words and Phrases* describes "control" as follows:<sup>123</sup>

"The ordinary meaning of control is that the person who has the control of a thing has the possession of it, and that he has the management (to a limited extent, it may be) of it (per WESSELS, J in *R v Harvey* 1913 TPD 605). See *Chatwin v Central South African Railways* 1909 TH 50."

(Footnotes omitted)

Direct control of the decision-making powers by an individual person means that any decision can be inextricably linked to that person whereas the indirect control of the decision-making powers means that any decision may not be clearly linked to an individual person, since decisions are made by others on behalf of, under the influence of, and in the interests of another person. The facts and circumstances of each case are critical in determining who is controlling a SBFE because the presence and influence of controlling individuals can have a significant impact and may be contrary to this prescribed requirement.

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

- Decisions that relate to the day-to-day or general functioning or operations of the SBFE.
- Strategic decisions affecting the SBFEs objectives, organisational goals, and any other important policy matters.

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<sup>120</sup> Section 30C(1)(d)(ii).

<sup>121</sup> [www.britannica.com/dictionary/decision-making](http://www.britannica.com/dictionary/decision-making) [Accessed 5 July 2024].

<sup>122</sup> [www.britannica.com/dictionary/power](http://www.britannica.com/dictionary/power) [Accessed 5 July 2024].

<sup>123</sup> Claassen, R. C. (2023). My LexisNexis: Online.

- Financial decisions relating to the SBFEs source of finance such as issuing of debentures, loans, and advances and managing cash flow.
- Investment decisions such as the selection and acquisition of assets in which funds will be invested by the SBFE.

### Example 6 – Decision-making powers

#### *Facts:*

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

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

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

#### *Result:*

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

## 9.3 Prohibition on distributions to any person

An SBFE may not distribute any of its funds or assets directly or indirectly to any person, unless this occurs in the course of furthering its sole or principal object (see 9.8), which must be the provision of funds (see 6) for SMMEs (see 7).<sup>124</sup>

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

The *Cambridge Dictionary* describes “distribute” as –<sup>125</sup>

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

*Investopedia* provides the following explanation regarding distributions:<sup>126</sup>

“The word ‘distribution’ has several meanings in the financial world, most of them pertaining to the payment of assets from a fund, account, or individual security to an investor or beneficiary.

Distributions come from several different financial products. However, whatever the source, the distribution payment usually goes directly to the beneficiary, either electronically or by check.”

A distribution is generally the giving of funds or assets by an organisation to a beneficiary without the expectation or obligation of repayment by that beneficiary.

<sup>124</sup> Section 30C(1)(d)(iii).

<sup>125</sup> <https://dictionary.cambridge.org/dictionary/english/distribute> [Accessed 5 July 2024].

<sup>126</sup> [www.investopedia.com/terms/d/distribution.asp](http://www.investopedia.com/terms/d/distribution.asp) [Accessed 5 July 2024].

*Dictionary.com* describes “funding” as –<sup>127</sup>

“funds, money immediately available; pecuniary resources.”

The word “funds” is described in the *Cambridge Dictionary* as follows:<sup>128</sup>

“money needed or available to spend on something.”

Having regard to the above, “funds” refer to money available to finance an entity’s activities and investments.

*Investopedia* describes “assets” as follows:<sup>129</sup>

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

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

The term “person” as defined includes –<sup>130</sup>

- “(a) an insolvent estate;
  - (b) the estate of a deceased person;
  - (c) any trust; and
  - (d) any portfolio of a collective investment scheme,
- but does not include a foreign partnership”.

A person for purposes of this prohibition requirement is not limited to only a natural person since the definition of “person” does not exclude companies, other incorporated entities, associations of persons, or statutory bodies. Foreign partnerships, however, are specifically excluded. A South African partnership is not a legal entity<sup>131</sup> and a partnership is not a person at common law.<sup>132</sup> A partnership would not be a person for income tax purposes, however, the individual partners are persons for income tax purposes.

An SBFE must use its funds and assets to carry on its sole or principal object (see **5**). Any funds or assets not used for such purpose, however, may not be distributed in any way to any person.

The prohibition on distributions is an absolute prohibition. Thus, the requirement is not subject to the discretion of the Commissioner and cannot in general or in a particular instance be waived, deferred, or reduced. Even if a minimal amount is distributed or a distribution occurs as an isolated or once-off event to any person, the SBFE may be subject to the transgression penalties (see **10.2**).

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<sup>127</sup> [www.dictionary.com/browse/funding](http://www.dictionary.com/browse/funding) [Accessed 5 July 2024].

<sup>128</sup> <https://dictionary.cambridge.org/dictionary/english/funds> [Accessed 5 July 2024].

<sup>129</sup> [www.investopedia.com/terms/a/asset.asp](http://www.investopedia.com/terms/a/asset.asp) [Accessed 5 July 2024]

<sup>130</sup> Section 1(1).

<sup>131</sup> *Michalow, NO v Premier Milling Co Ltd* 1960 (2) SA 59 (W) at 61.

<sup>132</sup> *Chipkin (Natal) (Pty) Ltd v C: SARS* 2005 (5) SA 566 (SCA), 67 SATC 243 at 246.

It will be acceptable for an SBFE to accumulate or invest surplus funds for future use in carrying on its sole or principal object. Any surplus funds may be invested as chosen provided such investment does not amount to an indirect distribution of profits or the award of an impermissible benefit. It is expected that the fiduciaries should act with prudence, integrity, reasonable care and in the best interest of the SBFE.

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

- the provision of funding for SMMEs;
- any expenditure such as the purchasing of assets;
- the paying off debts’
- any funds expended in the operations of the SBFE in the furtherance of its sole or principal object;
- investments;
- any *bona fide* donations (see **18.1**) made by the SBFE; or
- the transfer of any remaining assets on dissolution (see **9.10**).

#### **9.4 Prohibition on distributions to any employee or fiduciaries**

An SBFE may not distribute, either directly or indirectly, any of its funds or assets (see **9.3**) to any –<sup>133</sup>

- employee in relation to that SBFE;
- person that is a connected person (see **9.1**) in relation to any such employee (see **9.4**); or
- person accepting fiduciary responsibility for the SBFE (see **9.1**).

The term “employee” is not defined for purposes of the Act and should be given its ordinary meaning within the context it is used. The term “employee” as defined for purposes of the Fourth Schedule means –<sup>134</sup>

- any person (other than a company) who receives remuneration (see **9.9**) or to whom any remuneration accrues;
- any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker;<sup>135</sup>
- any labour broker (see **7.1**);
- any person or class or category of person whom the Minister by notice in the *Government Gazette* declares to be an employee for the purposes of this definition;<sup>136</sup> and
- any personal service provider (see **7.1**).

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<sup>133</sup> Section 30C(1)(d)(iv).

<sup>134</sup> Paragraph 1 of that Schedule.

<sup>135</sup> This type of employee is generally referred to as a “labour broker’s worker”. See De Koker, A. P. & Williams, R. C. (2023). *Silke on South African Income Tax* in § 20.29. My LexisNexis: Online.

<sup>136</sup> This type of “employee” is generally referred to as a “declared employee”. See De Koker, A. P. & Williams, R. C. (2023). *Silke on South African Income Tax* in § 20.29. My LexisNexis: Online.

*Silke on South African Income Tax* provides the following explanation regarding an employee:<sup>137</sup>

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

#### **Example 7 – Prohibited distributions to any employee or connected person**

The following are non-exhaustive examples of prohibited distributions to any employee or connected person:

- If an SBFE distributes funds by making a loan to any employee of that SBFE or any person that is a connected person in relation to such employee or a person accepting fiduciary responsibility for that SBFE.
- If an SBFE distributes funds by paying excessive salaries or wages not commensurate with services rendered.
- If an SBFE distributes funds by donating assets to any employee of that SBFE or any person that is a connected person in relation to such employee or a person accepting fiduciary responsibility for that SBFE.

### **9.5 Use of substantially the whole of the funds**

An SBFE is required to use substantially the whole of its funds (see **6**) for its sole or principal object for which it has been established (see **5**).<sup>138</sup>

The expression “substantially the whole” is used in various sections of the Act although not defined in the Act. In the strict sense, the expression “substantially the whole” is regarded by SARS to mean 90% or more. However, since SBFEs operate in an uncertain environment making proper planning difficult, SARS will accept a percentage of not less than 85%.<sup>139</sup> This percentage must be determined using a method appropriate to the circumstances and may be motivated by considering time or cost.

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

<sup>137</sup> De Koker, A. P. & Williams, R. C. (2023). *Silke on South African Income Tax* in § 20.29. My LexisNexis: Online.

<sup>138</sup> Section 30C(1)(d)(v).

<sup>139</sup> For further commentary, see Binding General Ruling (Income Tax) 20 “Interpretation of the Expression ‘Substantially the Whole’ ”.



## 9.6 Distribution of assets held

An SBFE must within 12 months after the end of the relevant year of assessment (see **25.3**) distribute or incur the obligation to distribute at least 25% of all amounts received or accrued in respect of assets (see **9.3**) held, other than any amount received or accrued on the disposal of those assets, during that year of assessment.<sup>140</sup>

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

- “Incur” is “to become subject to and liable for; to have liabilities imposed by act or operation of law. Expenses are incurred, for example, when the legal obligation to pay them arises.”<sup>141</sup>
- “Obligation” is “a generic term for any type of legal duty or liability. In its original sense, the term obligation was very technical in nature and applied to the responsibility to pay money owed on certain written documents that were executed under seal. Currently obligation is used in reference to anything that an individual is required to do because of a promise, vow, oath, contract, or law. It refers to a legal or moral duty that an individual can be forced to perform or penalized for neglecting to perform.”<sup>142</sup>

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

The amounts required to be distributed must be used to provide funding for SMMEs and the relevant requirements must be adhered to (see **6**).

The distribution requirement is not subject to the discretion of the Commissioner and cannot in general or in a particular instance be waived, deferred, or reduced. The obligation to incur the required distribution is an absolute obligation that has no legal alternative since it is an unconditional duty.<sup>143</sup> There will be adverse consequences if an SBFE fails to distribute or incur the obligation to distribute assets held by it as required (see **10.2**).

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<sup>140</sup> Section 30C(1)(d)(vi). This section was amended by section 52(1) of the Taxation Laws Amendment Act 23 of 2018 and came into operation on 1 January 2019. Before the amendment, the distribution had to occur during the year of assessment in which amounts from the disposal of assets were received or accrued by an SBFE. The ability of SBFEs to meet the distribution requirement during a year of assessment proved to be challenging especially when those amounts were received by an SBFE on or close to the last day of a particular year of assessment.

<sup>141</sup> <https://legal-dictionary.thefreedictionary.com/incurred> [Accessed 5 July 2024].

<sup>142</sup> <https://legal-dictionary.thefreedictionary.com/obligation> [Accessed 5 July 2024].

<sup>143</sup> See types of obligations described in <https://legal-dictionary.thefreedictionary.com/obligation> [Accessed 5 July 2024].

## Example 8 – Distribution of assets held

### Facts:

An SBFE invested R2 million of surplus funds. The SBFE derived interest income of R140 000 on the invested funds and paid fees of R8 000 to a financial management company to manage this investment during the year of assessment ending 28 February 2024.

The SBFE also received taxable dividend income from shares it held in a REIT<sup>144</sup> of R150 000 during the same year of assessment.

### Result:

To comply with the distribution requirement the SBFE will be required to distribute to SMMEs at least R72 500  $[(R140\ 000 + R150\ 000) \times 25\%]$  within but no later than 28 February 2025 year of assessment.

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

A member of the committee, board, or body (see 9.1) of an SBFE may not have any personal or private interest, either directly or indirectly, in that SBFE.<sup>145</sup>

A personal or private interest may refer to the benefits, rights, or advantages gained by an individual member in a fiduciary capacity acting in that member's own best interest, rather than for the common good of the entity as a whole, or in the public interest.<sup>146</sup>

A personal or private interest may include any benefits, rights, or advantages that are –<sup>147</sup>

- financial, pecuniary, or economic; and
- non-financial, for example, access to privileged information.

The direct or indirect personal or private interest of a member in a fiduciary capacity in an SBFE has the potential to undermine the proper functioning of that SBFE by weakening adherence to the ideals of legitimacy, impartiality, and fairness in decision-making relating to the allocation of resources, the procurement of goods, the payment for services rendered (consulting fees or honoraria), and intellectual property rights (patents, copyrights and royalties) to materially benefit a member personally, or any connected person to the member.

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

<sup>144</sup> This stands for “Real Estate Investment Trust” and is defined in section 1(1). For further commentary, see Interpretation Note 97 “Taxation of REITs and Controlled Companies”.

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

<sup>146</sup> [www.hellovaia.com/explanations/law/uk-legal-system/private-interest/](http://www.hellovaia.com/explanations/law/uk-legal-system/private-interest/) [Accessed 5 July 2024].

<sup>147</sup> [www.lawinsider.com/dictionary/private-or-personal-interest](http://www.lawinsider.com/dictionary/private-or-personal-interest) [Accessed 5 July 2024].

Members in a fiduciary capacity responsible for the management of an SBFE should not take decisions to gain any financial or other material benefits for themselves or any connected person in relation to themselves (see 6.3) but solely in the furtherance of the sole or principal object of the SBFE (see 5).

## 9.8 Substantially the whole of activities directed to the furtherance of the sole or principal object

Substantially the whole (see 9.5) of the activities of the SBFE must be directed to the furtherance of its sole or principal object (see 5).<sup>148</sup>

The word “activities” and “furtherance” are not defined in the Act. The *CollinsDictionary.com* provides the following descriptions:<sup>149</sup>

- “Activity” is “something that you spend time doing. The activities of a group are the things that they do in order to achieve their aims.”
- “Furtherance” of something is “the activity of helping it to be successful or be achieved.”<sup>150</sup>

The reference to activities is therefore to the sole or principal object of an SBFE that it is mandated by its founding document (see 8) to perform and is the aim, intention, purpose, or thing sought to be accomplished and the goal to be obtained by an SBFE.

The determination whether an activity is substantially the whole directed to the furtherance of its sole or principal object will be a question of fact. The activity need not be solely or principally directed to the furtherance of its sole or principal object, as long as the activity is substantially the whole, directed for that object. In practice, SARS requires that not less than 85% of an activity, measured, for example, based on time,<sup>151</sup> be directed to the furtherance of its sole or principal object.

## 9.9 Remuneration

Employees (see 9.4), office bearers, members or other persons may receive remuneration from an SBFE for services actually rendered to that SBFE provided the remuneration –<sup>152</sup>

- is not excessive considering the particular service rendered;
- is considered to be reasonable in the particular sector; and
- does not economically benefit any person in a manner inconsistent with the sole or principal object of the SBFE (see 6.3).

The term “remuneration”<sup>153</sup> for purposes of employees’ tax is defined widely to include any amount of income paid or payable to any person whether in cash or otherwise, for example, a fringe benefit, and whether or not for services rendered. Remuneration, amongst other things, may include amounts of income paid or payable by way of any salary, fee, bonus, wage, gratuity, pension, leave encashment, emolument, voluntary award, commission, annuity, stipend, overtime, superannuation allowance, retirement allowance, lump sum benefit

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<sup>148</sup> Section 30C(1)(d)(viii).

<sup>149</sup> [www.collinsdictionary.com/dictionary/english/activity](http://www.collinsdictionary.com/dictionary/english/activity) [Accessed 5 July 2024].

<sup>150</sup> [www.collinsdictionary.com/dictionary/english/furtherance](http://www.collinsdictionary.com/dictionary/english/furtherance) [Accessed 5 July 2024].

<sup>151</sup> Other methods will be accepted if reasonable and appropriate to the facts and circumstances.

<sup>152</sup> Section 30C(1)(d)(ix).

<sup>153</sup> Paragraph 1 in Part I of the Fourth Schedule.

payment or director's remuneration. The normal employees' tax rules will apply to any remuneration received by or accrued to any employees of an SBFE (see **19.5**).

The *Claassen's Dictionary of Legal Words and Phrases* describes "services rendered" as follows:<sup>154</sup>

"The phrase for services rendered is in common use and its ordinary meaning is that something has been done for the benefit or some person, eg supplying of a particular need. when one speaks of a fee for services rendered one means the payment of a sum of money as compensation for an act which has been performed, or a need which has been provided."

The word "reasonable" is not defined in the Act. The word is described in the *Cambridge Dictionary* as –<sup>155</sup>

"based on or using good judgement and therefore fair and practical".

There must be a causal connection between the remuneration paid, in relation to the service rendered by that person and the amount generally charged for such a service in that sector. The determination whether remuneration paid to any person is excessive will be a question of fact and since the facts and circumstances, pertaining to each SBFE may differ, each case will be considered on its own merit. The ultimate test remains whether the remuneration is reasonable in the sector in relation to the service rendered and the burden is on the SBFE to motivate that the remuneration is not excessive.

## **9.10 Dissolution or liquidation**

On dissolution or liquidation, an SBFE must transfer its remaining assets to one or more of the following organisations:<sup>156</sup>

- Another SBFE.
- A PBO contemplated in paragraph (a)(i) of the definition of "public benefit organisation" in section 30(1).<sup>157</sup>
- An institution, board or body, which is exempt from tax under section 10(1)(cA)(i).<sup>158</sup>
- The government of South Africa in the national, provincial or local sphere contemplated in section 10(1)(a).<sup>159</sup>

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

Normally a process of winding-up precedes the formal process of dissolution. During the winding-up process all the assets of the SBFE are recovered and realised and the proceeds of such realisation are applied firstly to discharge the costs of winding-up (liquidation), then to pay claims of creditors in accordance with the relevant provisions of the law relating to

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<sup>154</sup> Claassen, R. C. (2023). My LexisNexis: Online.

<sup>155</sup> <https://dictionary.cambridge.org/dictionary/english/reasonable> [Accessed 5 July 2024].

<sup>156</sup> Section 30C(1)(d)(x) and (5).

<sup>157</sup> This includes an NPC, trust or an association of persons incorporated, formed, or established in South Africa, but excludes a branch of a foreign tax-exempt organisation established outside South Africa contemplated in paragraph (a)(ii) of the definition of "public benefit organisation" in section 30(1).

<sup>158</sup> For further commentary, see the *Tax Exemption Guide for Institutions, Boards or Bodies*.

<sup>159</sup> For further commentary, see the *Guide to Section 18A Approval of a Department in the National, Provincial and Local Sphere of Government*.

insolvency. On dissolution of an SBFE all of its assets, or the proceeds of realised assets should have been realised and transferred. However, any assets or funds remaining after debts have been satisfied must be distributed in accordance with the dissolution requirement. There will be adverse consequences if an SBFE fails to transfer, or to take reasonable steps to transfer its remaining assets as required (see **10.2**).

### **9.10.1 Termination of a trust**

The Trust Property Control Act does not provide for any formalities or specific control measures to be complied with when a trust is terminated. Generally, a trust terminates when the object for which it was formed is fulfilled or the trust property is destroyed. Usually, the trust deed clearly deals with the termination of a trust. On termination of a trust the remaining trust assets are distributed to the persons entitled to them.<sup>160</sup> The trustees will only be released from their responsibilities under the trust deed once the Master has discharged them.

### **9.10.2 Dissolution of an association of persons**

The dissolution of an association is described by *LAWSA* as follows:<sup>161</sup>

“If an association ceases or is unable to carry on with the main object and purpose for which it was formed, it may be validly dissolved. It may also be dissolved in accordance with the terms of its constitution or with the consent of all its members. An association cannot simply disregard the provisions of its constitution and ‘by silent and unexpressed individual concurrence of members dissolve into thin air’. Upon its dissolution, the assets of an association will, after debts have been satisfied, devolve in accordance with the provisions of the constitution.”

(Footnotes omitted)

### **9.10.3 Winding-up and dissolution of a company**

The winding-up of a solvent company may occur voluntarily or compulsory by the court.<sup>162</sup> A winding-up by the court is initiated by an application to court while a voluntary winding-up<sup>163</sup> is initiated by a resolution of the company.<sup>164</sup> A company remains a juristic person and retains all of its powers during winding-up.<sup>165</sup> The company must from the beginning of the company’s winding-up stop carrying on its business except to the extent required for the beneficial winding up of the company.<sup>166</sup> A company is dissolved as from the date that its name is removed from the companies register.<sup>167</sup>

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<sup>160</sup> Pace, R. P (2020). *Trusts and Trustees (Preliminary Note) Forms and Precedents* at 13.3. My LexisNexis: Online.

<sup>161</sup> Pienaar, G. J. (2015). Association. In *The Law of South Africa (LAWSA)*. (Third Edition) (Volume 2) in 192 and 195. My LexisNexis: Online.

<sup>162</sup> Section 79 of the Companies Act.

<sup>163</sup> Section 80 of the Companies Act.

<sup>164</sup> Section 80(6) of the Companies Act.

<sup>165</sup> Section 19 of the Companies Act.

<sup>166</sup> Section 80(8) of the Companies Act.

<sup>167</sup> Section 83(1) of the Companies Act.

## 9.11 Amendments to the founding document

The persons accepting fiduciary responsibility for the SBFE (see 9.1) must submit a copy of any amendment to its founding document (see 8) to the Commissioner within 30 days<sup>168</sup> from the date on which the amendment is affected.<sup>169</sup>

This submission requirement will enable the Commissioner to ensure that any amendment is not contrary to the requirements of section 30C (see 9). It will be unacceptable for an entity to submit a founding document that complies with the Act at the time of applying for approval and then, after obtaining such approval, to amend the founding document to include non-qualifying provisions.

### 9.11.1 Amendments to the trust deed

The Trust Property Control Act provides that if a trust instrument lodged with the Master is varied, the trustee must lodge the amendment or a copy thereof so certified with the Master.<sup>170</sup>

LAWSA provides the following on the variation of a trust instrument:<sup>171</sup>

“The term “variation” denotes the alteration of the terms of a trust by the court, trustees, the founder or beneficiaries. The Act provides for the variation of a trust instrument by the court in certain circumstances, and for the tutor or curator of a trust beneficiary to agree to an amendment on behalf of that beneficiary. The Act provides that where a trust instrument which has been lodged with the master is varied, the trustee must lodge the amendment or a copy thereof so certified with the master. The failure to lodge the amendment with the master does not invalidate the amendment. Furthermore, there is no time frame for lodging an amendment or a requirement for the lodgement of a complete, amended trust instrument after the amendment. All that is required is the lodgement of the document amending the trust instrument.”

(Footnotes omitted)

### 9.11.2 Amendments to the constitution

LAWSA provides the following on amendments to a constitution:<sup>172</sup>

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

(Footnotes omitted)

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<sup>168</sup> Section 4 of the Interpretation Act 33 of 1957 deals with the calculation of days and provides that when any particular number of days is prescribed for the doing of any act, or for any other purpose, the same will be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time will be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

<sup>169</sup> Section 30C(1)(d)(xi).

<sup>170</sup> Section 4(2) of the Trust Property Control Act.

<sup>171</sup> Palmer, G. C. (2022). Trusts. In *The Law of South Africa (LAWSA)*. (Third Edition) (Volume 43) in 187. My LexisNexis: Online.

<sup>172</sup> Pienaar, G. J. (2015). Association. In *The Law of South Africa (LAWSA)*. (Third Edition) (Volume 2) in 158. My LexisNexis: Online.

### 9.11.3 Amendments to the memorandum of incorporation

The following is provided by LAWSA on the amendment of the memorandum of incorporation:<sup>173</sup>

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

An amendment to a company’s memorandum of incorporation takes effect, in the case of an amendment that changes the name of the company, on the date set out in the amended registration certificate issued by the commission<sup>174</sup> or, in any other case, on the later of the date on and time at which the notice of amendment is filed or the date, if any, set out in the notice of amendment.”

(Footnotes omitted)

Pre-existing companies<sup>175</sup> approved as SBFES that may have amended their memoranda and articles of association or replaced the latter with a memorandum of incorporation under the Companies Act must ensure that the prescribed requirements (see **9**) remain included in the amended or replacement founding documents. A copy of the amended or replacement founding documents must be submitted to the Commissioner.

#### **Example 9 – Amendments to the founding document**

##### *Facts:*

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

##### *Result:*

The provision of funds to employees and their relatives is contrary to the requirements for approval as an SBFE (see **9.4**). A copy of the amendment to the constitution was also not submitted to the Commissioner within the prescribed period (see **9.11**). Consequently, the Commissioner will inform Ezezimali of the intention to withdraw the approval as an SBFE if corrective steps are not taken within a period determined by the Commissioner. If corrective steps are not taken the SBFE may be liable for transgression penalties (see **10**).

<sup>173</sup> Stoop, H. H. (2022). Companies: Part I. 6(1). (Third Edition Volume). *The Law of South Africa (LAWSA)* in 37. My LexisNexis: Online.

<sup>174</sup> The CIPC.

<sup>175</sup> The term “pre-existing company” is defined in section 1 of the Companies Act.

## 9.12 Reporting

An SBFE must comply with any reporting requirements determined by the Commissioner from time to time.<sup>176</sup> Aside from the general reporting requirements of the Act and TA Act (see **20**) no specific reporting requirements applicable to an SBFE have been determined by the Commissioner.<sup>177</sup>

The Commissioner annually gives public notice in the *Government Gazette* of the persons that must furnish an income tax return.<sup>178</sup> Generally, the persons who are required to submit returns include every resident company and trust during that particular year of assessment, subject to specific conditions and requirements set out in the relevant public notice.

The term “company” as defined, amongst other things, includes –<sup>179</sup>

- any association, corporation or company incorporated or deemed to be incorporated by or under any law in force or previously in force in South Africa or in any part thereof, or any body corporate formed or established or deemed to be formed or established by or under any such law;<sup>180</sup> or
- any association formed in the Republic to serve a specified purpose, beneficial to the public or a section of the public.<sup>181</sup>

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

An SBFE must therefore submit income tax returns, even if its approval and exemption results in no tax liability. The income tax return enables the Commissioner to annually assess whether an SBFE has operated within the prescribed limits of its approval and to determine whether the partial taxation principles have been applied to receipts and accruals derived from a business undertaking or trading activity that does not qualifying for exemption (see **15**).

## 9.13 Participation in tax avoidance schemes

The SBFE must not knowingly become a party to, nor permit itself to be used as part of –<sup>182</sup>

- an impermissible avoidance arrangement contemplated in Part IIA of Chapter III;<sup>183</sup> or
- a transaction, operation or scheme contemplated in section 103(5).<sup>184</sup>

An SBFE may therefore not be a party to or permit itself to be used for any transaction, operation or scheme, the sole or main purpose of which is or was to reduce, postpone, or avoid any tax, duty or levy<sup>185</sup> that would otherwise have been or would have become payable by any person under the Act or under any other Act administered by the Commissioner.<sup>186</sup>

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<sup>176</sup> Section 30C(1)(d)(xii).

<sup>177</sup> Section 67(1).

<sup>178</sup> Section 25 of the TA Act read with section 66(1).

<sup>179</sup> Section 1(1).

<sup>180</sup> Paragraph (a) of the definition of “company” in section 1(1).

<sup>181</sup> Paragraph (d) of the definition of “company” in section 1(1).

<sup>182</sup> Section 30C(1)(d)(xiii).

<sup>183</sup> Sections 80A to 80L.

<sup>184</sup> The cession of an amount in exchange for the right to receive dividends.

<sup>185</sup> See definition of “tax” in section 80L. These taxes, duties, or levies, amongst other things, may include income tax (including CGT), VAT, transfer duty, or employees’ tax.

<sup>186</sup> The Acts administered by the Commissioner involving tax, duties or levies are set out in Schedule 1 of the South African Revenue Service Act.



This rule will apply irrespective of whether the SBFE itself or any other person benefitted from the reduction, postponement or avoidance of any applicable tax, duty or levy.

In *Smith v CIR* the court noted that the ordinary meaning of avoiding a liability for a tax is –<sup>187</sup> “to get out of the way of, escape or prevent an anticipated liability”.

The Act contains anti-avoidance provisions that the Commissioner may use if taxpayers and their advisers enter into schemes with the sole purpose of avoiding tax.<sup>188</sup> In these circumstances, the Commissioner is entitled to determine the taxpayer’s liability for any tax, duty or levy imposed by the Act as if the transaction, operation, or scheme had not been entered into.

#### **9.14 Disqualification of person to act in a fiduciary capacity**

The Commissioner must be satisfied that a person acting in a fiduciary capacity (see **9.1**) of an SBFE is not disqualified under the Trust Property Control Act,<sup>189</sup> the NPO Act,<sup>190</sup> or the Companies Act<sup>191</sup> (see **9.14**).<sup>192</sup>

This requirement aligns with the National Strategy on Anti Money Laundering Countering, Terrorism Financing and Countering the Financing of Proliferation and to achieve consistency with the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022.<sup>193</sup>

The use of the disjunctive word “or means that a person will be disqualified from acting in a fiduciary capacity of an SBFE if that person has been disqualified under either one or a combination of the of the Trust Property Control Act, NPO Act or the Companies Act. A disqualified person may not act in a fiduciary capacity for an SBFE.<sup>194</sup> A disqualified person who acts in a fiduciary capacity of an SBFE will be guilty of an offence and liable, on conviction, to a fine or to imprisonment for a period not exceeding 24 months.<sup>195</sup>

The grounds of disqualification of a person authorised as a trustee under the Trust Property Control Act, the grounds of disqualification of a person from being appointed or elected as an officer-bearer under the NPO Act, as well as the grounds of disqualification of a person as a director of a company under the Companies Act are similar. The grounds for disqualification under those Act have therefore been summarised and considered below.

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<sup>187</sup> 1964 (1) SA 324 (A), 26 SATC 1 at 12.

<sup>188</sup> Kolitz, M. (1999). *Tax Avoidance*. My LexisNexis: Online.

<sup>189</sup> Section 6 of that Act.

<sup>190</sup> Section 25 of that Act.

<sup>191</sup> Section 69 of that Act.

<sup>192</sup> Section 30C(1)(e) was inserted by section 9(b) of the Tax Administration Laws Amendment Act 18 of 2023, which came into operation on 22 December 2023, the date of promulgation of that Act.

<sup>193</sup> See the *Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2023*, in 2.3.

<sup>194</sup> Section 30C(8) was inserted by section 9(c) of the Tax Administration Laws Amendment Act 18 of 2023, which came into operation on 22 December 2023, the date of promulgation of that Act.

<sup>195</sup> Section 30C(9) was inserted by section 9(c) of the Tax Administration Laws Amendment Act 18 of 2023, which came into operation on 22 December 2023, the date of promulgation of that Act.

A person will be disqualified under the Trust Property Control Act, the NPO Act and the Companies Act if that person –

- is an unrehabilitated<sup>196</sup> insolvent;<sup>197</sup>
- has been prohibited by a court to be a director of a company, or declared by a court to be delinquent<sup>198</sup> under the Companies Act or the Close Corporations Act;<sup>199</sup>
- is prohibited under any law to be a director of a company;<sup>200</sup>
- has been removed from an office of trust, on the grounds of misconduct involving dishonesty;<sup>201</sup>
- has been convicted, in South Africa or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount under the Companies Act<sup>202</sup> for theft, fraud, forgery, perjury or an offence –<sup>203</sup>
  - involving fraud, misrepresentation or dishonesty, or money laundering, terrorist financing or proliferation financing activities;<sup>204</sup>
  - in connection with the promotion, formation, or management of a company,<sup>205</sup> or in connection with consenting to act or acting as a director when ineligible or disqualified;<sup>206</sup> or
  - under the Trust Property Control Act, the NPO Act, the Companies Act, the Insolvency Act 24 of 1936, the Close Corporations Act, the Competition Act 89 of 1998, the Financial Intelligence Centre Act 38 of 2001, the Financial Markets Act 19 of 2012, Prevention and Combating of Corrupt Activities Act 12 of 2004, the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004, or the TA Act;<sup>207</sup>

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<sup>196</sup> Section 69(11) of the Companies Act empowers the court to exempt a person from the grounds of disqualification set out in section 69(8)(b) of that Act.

<sup>197</sup> Section 6(1A)(a) of the Trust Property Control Act, section 25A(1)(a) of the NPO Act and section 69(8)(b)(i) of the Companies Act.

<sup>198</sup> A declaration of delinquency may be made under section 162 of the Companies Act or under section 47 of the Close Corporations Act.

<sup>199</sup> Section 6(1A)(b) of the Trust Property Control Act, section 25A(1)(b) of the NPO Act and section 69(8)(a) of the Companies Act.

<sup>200</sup> Section 6(1A)(c) of the Trust Property Control Act, section 25A(1)(c) of the NPO Act and section 69(8)(b)(ii) of the Companies Act.

<sup>201</sup> Section 6(1A)(d) of the Trust Property Control Act, section 25A(1)(d) of the NPO Act and section 69(8)(b)(iii) of the Companies Act.

<sup>202</sup> Section 69 of the Companies Act.

<sup>203</sup> Section 6(1A)(e) of the Trust Property Control Act, section 25A(1)(e) of the NPO Act and section 69(8)(b)(iv) of the Companies Act.

<sup>204</sup> Section 6(1A)(e)(i) of the Trust Property Control Act, section 25A(1)(e)(i) of the NPO Act and section 69(8)(b)(iv)(aa) of the Companies Act. See section 1 the Financial Intelligence Centre Act 38 of 2001 for definition of those terms.

<sup>205</sup> Section 69(2) or (5) of the Companies Act.

<sup>206</sup> Section 6(1A)(e)(ii) of the Trust Property Control Act, section 25A(1)(e)(ii) of the NPO Act and section 69(8)(b)(iv)(bb) of the Companies Act.

<sup>207</sup> Section 6(1A)(e)(iii) of the Trust Property Control Act, section 25A(1)(e)(iii) of the NPO Act and section 69(8)(b)(iv)(cc) of the Companies Act.

- is subject to a resolution adopted<sup>208</sup> by the Security Council of the United Nations;<sup>209</sup> or
- is an unemancipated minor or is under a similar legal disability.<sup>210</sup>

Public registers have been established and maintained of persons disqualified from serving as –

- trustees, under an order of a court pursuant to the Trust Property Control Act or any other law, by the Master;<sup>211</sup>
- office-bearers, under an order of a court pursuant to the NPO Act or any other law, by the NPO Directorate;<sup>212</sup> and
- a director, or who is subject to an order of probation as a director, under an order of a court pursuant to the Companies Act or any other law, by the CIPC.<sup>213</sup>

## 10. Non-compliance

### 10.1 Withdrawal of approval

The Commissioner may withdraw the approval as an SBFE if the Commissioner is satisfied that the SBFE has during any year of assessment (see **25.3**) in any material respect<sup>214</sup> or during any year of assessment has on a continuous or repetitive basis,<sup>215</sup> failed to comply with section 30C or with its founding document as it relates to section 30C (see **9**).<sup>216</sup>

The Act does not specify what constitutes a “material, continuous, or repetitive” failure by an SBFE to comply with section 30C or with the founding document as it relates to that section. The *Cambridge Dictionary* provides the following descriptions:

- “Material” is “important or having an important effect.”<sup>217</sup>
- “Continuous” is “without a pause or interruption.”<sup>218</sup>
- “Repetition” is “something that happens in the same way as something that happened before.”<sup>219</sup>

<sup>208</sup> Chapter VII of the Charter of the United Nations, which provides for financial sanctions entailing the identification of persons or entities against whom member states of the United Nations must act specified in the resolution.

<sup>209</sup> Section 6(1A)(f) of the Trust Property Control Act, section 25A(1)(f) of the NPO Act and section 69(8)(v) of the Companies Act.

<sup>210</sup> Section 6(1A)(g) of the Trust Property Control Act, section 25A(1)(g) of the NPO Act and section 69(7)(b) of the Companies Act.

<sup>211</sup> Section 6(1H) of the Trust Property Control Act.

<sup>212</sup> Section 25A(9)(a) of the NPO Act.

<sup>213</sup> Section 69(13) of the Companies Act.

<sup>214</sup> Section 30C(2)(a).

<sup>215</sup> Section 30C(2)(b).

<sup>216</sup> Section 30C(2).

<sup>217</sup> <https://dictionary.cambridge.org/dictionary/english/material?q=material+> [Accessed 5 July 2024].

<sup>218</sup> <https://dictionary.cambridge.org/dictionary/english/continuous> [Accessed 5 July 2024].

<sup>219</sup> <https://dictionary.cambridge.org/dictionary/english/repetition> [Accessed 5 July 2024].

A failure by an SBFE to comply with section 30C in any material respect may therefore include a significant, relevant, and important failure. A failure on a continuous basis may be prolonged without interruption, while a failure on a repetitive basis may be done many times in the same manner by the SBFE.

The Commissioner may withdraw the approval in any of the above circumstances but must decide each case on its own facts and circumstances. Notice, however, must be given by the Commissioner to the transgressing SBFE to take corrective steps within a specified period as determined by the Commissioner having regard to the particular facts and circumstances relating to the transgression failing which the intention is to withdraw the approval as an SBFE.<sup>220</sup>

If no corrective steps are taken by the SBFE within the period stated in the notice, the approval as an SBFE will be withdrawn from the beginning of the year of assessment in which the non-compliance or failure by the SBFE occurred.<sup>221</sup>

The decision of the Commissioner to withdraw the SBFE approval is subject to objection and appeal (see **26**).

## 10.2 Consequences of withdrawal

On withdrawal of the approval as an SBFE the affected entity must transfer or take reasonable steps to transfer its remaining assets within six months or a longer period allowed by the Commissioner to —<sup>222</sup>

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

Failure to transfer, or to take reasonable steps to transfer the remaining assets of the SBFE on dissolution (see **9.10**) or the withdrawal of its approval as an SBFE, will result in an amount equal to the market value of the assets not transferred less the amount of the *bona fide* liabilities of the SBFE, being deemed to be taxable income accruing to the SBFE during the year of assessment in which the approval was withdrawn.<sup>223</sup>

The term “taxable income”<sup>224</sup> as defined means —<sup>225</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<sup>226</sup> to be deducted from or set off against such income; and

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<sup>220</sup> Section 30C(2).

<sup>221</sup> Section 30C(3).

<sup>222</sup> Section 30C(4).

<sup>223</sup> Section 30C(6).

<sup>224</sup> The taxable income or assessed loss is determined by deducting from income, all the allowable expenses and allowances under the Act and adding all specified amounts to be included in income or taxable income under the Act. Besides the general deductions, the Act provides for a number of special and additional deductions and allowances. For further commentary, see *Taxation in South Africa* and the *Tax Guide for Small Businesses*.

<sup>225</sup> Section 1(1).

<sup>226</sup> The particular Part of Chapter 11 of the Act spans section 5 to 37G.

- (b) all amounts to be included or deemed to be included in the taxable income of any person in terms of this Act”.

An SBFEE guilty of such a transgression will therefore not be allowed to deduct any further tax allowances or deductions from its net revenue since its net revenue is deemed to be taxable income, which is after allowances and deductions.

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

- An association of persons (see **4.2**)<sup>227</sup> and an NPC (see **4.3**) will be liable for tax on all its taxable income, namely, gross income less exempt income and allowable deductions, at the rate applicable to companies, which is currently 27%.<sup>228</sup>
- A trust (see **4.1**) will be liable for tax on its taxable income at the rate applicable to trusts, subject to section 7<sup>229</sup> and section 25B,<sup>230</sup> which is currently 40%.<sup>231</sup>

The Minister may announce different rates in the national annual budget. The rates are published annually in the Rates and Monetary Amounts and Amendment of Revenue Laws Act.<sup>232</sup>

### 10.3. Non-compliance by responsible person

A person who is in a fiduciary capacity responsible for the management of an SBFEE (see **9.1**) who intentionally fails to comply with any provision of section 30C or any provision in its founding document (see **8**) to the extent that it relates to section 30C (see **9**), will be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding two years.<sup>233</sup>

## 11. Determining taxable income

The starting point for the general framework to calculate “taxable income”<sup>234</sup> on which income tax is calculated, is “gross income”. The meaning of “exemptions” is also relevant for this calculation.

### 11.1 Gross income

Gross income in relation to any year of assessment (see **25.3**) is the total amount (worldwide), in cash or otherwise, received by or accrued to or in favour of any person who is a resident, excluding receipts and accruals of a capital nature.<sup>235</sup>

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<sup>227</sup> Paragraph (d) of the definition of “company” in section 1(1).

<sup>228</sup> The rate of tax fixed by Parliament under section 5(2) for specified companies is set out in paragraph 3 of Schedule I.

<sup>229</sup> The section deals with when income is deemed to have accrued or to have been received.

<sup>230</sup> The section deals with the taxation of trusts and its beneficiaries. For further commentary, see Interpretation Note 114 “Interaction Between Section 25B(1) and Section 7(8) in Case of Conflict, Inconsistency or Incompatibility”.

<sup>231</sup> The rate of tax fixed by Parliament under section 5(2) for trusts is set out in paragraph 2 of Schedule I.

<sup>232</sup> Section 5(2)(a).

<sup>233</sup> Section 30C(7).

<sup>234</sup> Section 1(1).

<sup>235</sup> The term “gross income” is defined in section 1(1).

An amount, excluding receipts and accruals of a capital nature, will constitute gross income if it was received by or accrued to a taxpayer during a period or year of assessment. In *CIR v Genn & Co (Pty) Ltd*<sup>236</sup> it was held that not every obtaining of physical control over money and money's worth constitutes a receipt for purposes of the definition of gross income.

The words "received" and "accrued" are not defined in the Act, and therefore reliance is placed on various principles established in this regard by way of case law. An amount will be "received" by a person as envisaged in the Act only if the person receives it on his or her own behalf and for his or her own benefit.<sup>237</sup> An amount "accrues" to a person when the person is entitled to it and when the person's right to the amount is unconditional.<sup>238</sup> An amount is included in a person's gross income in the year of assessment in which that person receives it, or the year of assessment in which it accrues to that person, whichever comes first.<sup>239</sup> In *C: SARS v Brummeria Renaissance (Pty) Ltd*<sup>240</sup> the Supreme Court of Appeal held that the word "amount" in the definition of gross income is to be interpreted widely and that the value of a receipt or accrual in a form other than money constitutes an "amount".

South Africa has a residence basis of taxation, which means that a South African resident is taxable on their worldwide income regardless of the source of the income. The term "resident"<sup>241</sup> in the context of a person other than a natural person is defined and means, amongst other things, a person incorporated, established, or formed in South Africa or has its place of effective management in South Africa.

The principle therefore applies to SBFES incorporated, formed or established as a trust (see 4.1), an association of persons (see 4.2) or as an NPC (see 4.3) in South Africa or has its place of effective management in South Africa.

After determining a person's gross income, the next step is to determine income,<sup>242</sup> by deducting from gross income all receipts and accruals that are exempt from income tax.

Finally, the taxable income or assessed loss of a person is arrived at by –

- deducting from income, all the allowable expenses, losses, and allowances, under the Act;<sup>243</sup> and
- adding all specified amounts to be included in income or taxable income under the Act, for example, taxable capital gains.

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<sup>236</sup> 20 SATC 113.

<sup>237</sup> *Geldenhuys v CIR* 1974 (3) SA 256 (C), 14 SATC 419.

<sup>238</sup> *Lategan v CIR* 1926 CPD 203, 2 SATC 16; *Ochberg v CIR* 1933 CPD, 6 SATC 1.

<sup>239</sup> *SIR v Silverglen Investments (Pty) Ltd* 1969 (1) SA 365 (A), 30 SATC 199.

<sup>240</sup> 2007 (6) SA 601 (SCA), 69 SATC 205

<sup>241</sup> The term "resident" is defined in section 1(1).

<sup>242</sup> The term "income" is defined in section 1(1).

<sup>243</sup> Section 11(a) read with section 23(g).

## 11.2. Receipts and accruals exempt under section 10(1)

There are basically two categories of exemptions, namely, certain income that is exempt from income tax<sup>244</sup> and the receipts and accruals of certain entities<sup>245</sup> that are exempt from income tax.

The type of receipt or accrual that is exempt under section 10(1) is one that is included in the definition of “gross income”. The term “gross income” includes the total amount received by or accrued to a person that is not of a capital nature unless specifically included.<sup>246</sup>

Receipts or accruals of a capital nature that are not specifically included in gross income would not be included in the receipts and accruals referred to in the opening words of section 10(1)(cQ) since they do not require exemption. Receipts or accruals of a capital nature are considered in determining a taxable capital gain. A taxable capital gain is potentially subject to income tax, however, the exemptions in section 10 do not apply to it because a taxable capital gain is included directly in taxable income<sup>247</sup> and does not comprise “income” (gross income less exempt income).<sup>248</sup> Paragraph 63B of the Eighth Schedule contains the rules for disregarding capital gains and losses of an SBFE (see **18.3**).

## 12. Exempt receipts and accruals under section 10(1)(cQ)

Section 10(1)(cQ) applies only to the receipts and accruals of an entity which has been approved by the Commissioner under section 30C.

Section 10(1)(cQ) provides for the exemption from income tax of the receipts and accruals of organisations approved by the Commissioner as SBFEs, to the extent that –

- the receipts and accruals are derived from –
  - the carrying on of its sole or principal object (see **5**), which is the provision of funding (see **6**) to SMMEs (see **7**);<sup>249</sup> and
  - permissible business undertakings or trading activities (see **14**);<sup>250</sup> and
- the receipts and accruals are derived from any business undertaking or trading activity (see **13**) other than permissible business undertakings or trading activities (see **14**) not exceeding the basic exemption (see **15**).<sup>251</sup>

An SBFE is permitted to carry on permissible business undertakings or trading activities provided its sole or principal object remains the provision of funding to SMMEs. The receipts and accruals derived by an SBFE from conducting permissible business undertakings or

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<sup>244</sup> For example, any levy contemplated in section 10(1)(e)(i), any amount, amongst other things, received as a war pension contemplated in section 10(1)(g) and any government grant or government scrapping payment contemplated in section 10(1)(y).

<sup>245</sup> For example, the national, provincial or local sphere of government under section 10(1)(a), institutions, boards or bodies under section 10(1)(cA)(i), recreational clubs under section 10(1)(cO) and small business funding entities under section 10(1)(cQ).

<sup>246</sup> See paragraphs (a) to (n) of the definition of “gross income”.

<sup>247</sup> Paragraph (b) of the definition “taxable income” in section 1(1).

<sup>248</sup> Section 26A.

<sup>249</sup> Section 10(1)(cQ)(i).

<sup>250</sup> Section 10(1)(cQ)(ii)(aa), (bb) and (cc).

<sup>251</sup> Section 10(1)(cQ)(ii)(dd).

trading activities may qualify for exemption from income tax provided the prescribed conditions and requirements are met (see **14.1**).<sup>252</sup>

The receipts and accruals derived by an SBFE from conducting business undertakings or trading activities falling outside the permissible business undertakings or trading activities (see **14**), are taxable (see **16**), if such receipts and accruals exceed the basic exemption (see **15**).

### **13. Exempt receipts and accruals derived otherwise from business undertakings or trading activities under section 10(1)(cQ)(i)**

The receipts and accruals of any SBFE will be exempt from income tax to the extent that the receipts and accruals are derived otherwise than from any business undertaking or trading activity. Therefore, the receipts and accruals derived by an SBFE from carrying on its sole or principal object (see **5**), which must be the provision of funds (see **6**) for SMMEs (see **7**), is exempt from income tax<sup>253</sup> under section 10(1)(cQ)(i).

The concepts “business undertaking” and “trading activity” mentioned in section 10(1)(cQ)(i) are considered below.

#### **13.1 Meaning of business undertakings or trading activities**

The words “business” and “business undertaking” are not defined in the Act and should therefore be interpreted according to their ordinary meaning as applied to the subject matter with regard to which they are used.<sup>254</sup>

The *Claassen’s Dictionary of Legal Words and Phrases* defines “business” as follows:<sup>255</sup>

“Business is anything which occupies the time and attention of a man for the purpose of profit..... Generally, the word business is capable of a very wide meaning. It may be a charitable business ..... Even a single, isolated activity enterprise or pursuit may constitute a business.”

On the issue of what constitutes “carrying on business”, Beadle CJ, in *Estate G v COT* said the following:<sup>256</sup>

“The sensible approach, I think, is to look at the activities concerned as a whole, and then to ask the question: Are these the sort of activities which, in commercial life, would be regarded as ‘carrying on business’? The principal features of the activities which might be examined in order to determine this are their nature, their scope and magnitude, their object (whether to make a profit or not), the continuity of the activities concerned, if the acquisition of property is involved, the intention with which the property was acquired. This list of features does not purport to be exhaustive, nor are any one of these features necessarily decisive, nor is it possible to generalize and state which feature should carry most weight in determining the problem. Each case must depend on its own particular circumstances.”

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<sup>252</sup> For further commentary, see Interpretation Note 24 “Public Benefit Organisations: Partial Taxation”.

<sup>253</sup> Also referred to as normal tax. The term “normal tax” as defined in section 1(1) means income tax referred to in section 5(1).

<sup>254</sup> Kellaway, E. A. (1995). *Principles of Legal Interpretation of Statutes, Contracts and Wills*. Butterworths. Also, see Steyn, L. C. (1981). *Die Uitleg van Wette* (5 ed) at 4 to 7. Juta and Company (Pty) Ltd.

<sup>255</sup> Claassen, R. C. (2023). My LexisNexis: Online.

<sup>256</sup> 1964 (2) SA 701 (SR), 26 SATC 168 at 173 and 174.



Based on case law, “business” is therefore generally accepted to include anything that occupies the time, attention and labour of a person for profit.<sup>257</sup> There are no set rules to determine what constitutes “business” and as a result, the answer to the question of whether a person is carrying on “business” requires an inference from facts, taking into account certain factors such as intention, motive, frequency and nature of the activity.<sup>258</sup>

The words “trading activity” are not defined in the Act. The term “trade” is defined as including –<sup>259</sup>

“every profession, trade, business, employment, calling, occupation or venture, including the letting of property and the use of or the grant of permission to use any patent as defined in the Patents Act<sup>260</sup> or any design as defined in the Designs Act<sup>261</sup> or trade mark as defined in the Trade Marks Act<sup>262</sup> or any copyright as defined in the Copyright Act<sup>263</sup> or any other property which is of a similar nature”.

The *Claassen’s Dictionary of Legal Words and Phrases* defines “trade” as follows:<sup>264</sup>

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

The courts have also interpreted trade to be neither exhaustive nor restrictive and will include any activity involving risking something with the object of making a profit, including the continuous turnover of floating capital.<sup>265</sup> The absence of profit will, however, not preclude a taxpayer’s activities from being classified as a trade.<sup>266</sup> Each case will be considered on its own merits to determine whether a trading activity<sup>267</sup> is being carried on.<sup>268</sup>

The carrying on of a “trade” is not the same thing as the conducting of a “business”. However, the word “business” is included in the definition of “trade”. The conducting of a “business undertaking” will, therefore, also constitute “trade”.

#### **Example 10 – Trading activities**

The following are non-exhaustive examples of trading activities:

- Letting of immovable property.
- Conducting farming activities.
- Provision of professional services.
- The granting of permission to use a copyright or patent.

<sup>257</sup> *Smith v Anderson* (15 Ch.D. 258).

<sup>258</sup> *Estate G v COT* (above). Also, see *CIR v Stott* 1928 AD 252, 3 SATC 253 at 257 and ITC 1283 (1978) 41 SATC 36 (SW) at 43.

<sup>259</sup> Section 1(1).

<sup>260</sup> Act 57 of 1978.

<sup>261</sup> Act 195 of 1993.

<sup>262</sup> Act 194 of 1993.

<sup>263</sup> Act 98 of 1978.

<sup>264</sup> Claassen, R. C. (2023). My LexisNexis: Online.

<sup>265</sup> ITC 1675 (1998) 62 SATC 219 (G); *Burgess v CIR* 1993 (4) SA 161 (A), 55 SATC 185 at 196; ITC 770 (1953) 19 SATC 216 (T) at 216 and 7; ITC 615 (1946) 14 SATC 399 (U) at 402 and *Modderfontein Deep Levels Ltd & another v Feinstein* 1920 TPD 288.

<sup>266</sup> *De Beers Holdings (Pty) Ltd v CIR* 1986 (1) SA 8 (A), 47 SATC 229 at 260.

<sup>267</sup> Section 10(1)(cQ)(i).

<sup>268</sup> For commentary, see Interpretation Note 33 “Assessed Losses Companies: The ‘Trade’ and ‘Income from Trade’ Requirements”. This Note applies to SBFEs that are NPCs and association of persons and not to SBFEs that are trusts.

The passive investment of surplus funds in shares or an investment in a financial institution is not normally regarded as a business undertaking or trading activity. However, if it is undertaken in an active manner, such as the advancing of interest-bearing loans at market-related rates it could be regarded as a business undertaking. The mere holding of shares does not constitute a business undertaking or trading activity. Continuity is a factor that may be taken into consideration in determining whether a person is conducting a business. However, the main criterion applied in determining whether a business is conducted, is that the transaction should be undertaken with the direct and primary object of making a profit and not with a mere hope of ultimately making a profit.<sup>269</sup>

## **14. Exempt receipts and accruals from permissible business undertakings or trading activities under section 10(1)(cQ)(ii)**

The receipts and accruals derived by an SBFE from business undertakings or trading activities will be exempt from income tax only if such undertakings or activities fall within the permissible business undertakings or trading activities provided in section 10(1)(cQ)(ii), namely, if the business undertaking or trading activity is –

- integral and directly related to the sole or principal object of that SBFE (see **14.1.1**), is carried out or conducted on a basis substantially the whole of which is directed towards the recovery of cost (see **14.1.2**) and does not result in unfair competition in relation to taxable entities (see **14.1.3**);
- of an occasional nature and undertaken substantially with assistance on a voluntary basis without compensation (see **14.2**); or
- approved by the Minister by notice in the *Government Gazette* (see **14.3**).

The use of the disjunctive word “or” between the permissible business undertakings or trading activities provided in that section means that receipts and accruals of an SBFE may be derived from either one or a combination of those undertakings or activities. There is no limit on the amount of receipts and accruals qualifying for exemption from income tax under a permissible business undertaking or trading activity.

The conditions and requirements of the permissible business undertakings or trading activities are considered below.

### **14.1 Integral and directly related permissible business undertaking or trading activity**

The receipts and accruals of any SBFE will be exempt from income tax to the extent that the receipts and accruals are derived from any business undertaking or trading activity if the business undertaking or trading activity –<sup>270</sup>

- is integral and directly related to the sole or principal object of that SBFE;<sup>271</sup>
- is carried out or conducted on a basis substantially the whole of which is directed towards the recovery of cost;<sup>272</sup> and
- does not result in unfair competition in relation to taxable entities.<sup>273</sup>

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<sup>269</sup> *Platt v CIR* 1922 AD 42, 32 SATC 142.

<sup>270</sup> Section 10(1)(cQ)(ii)(aa).

<sup>271</sup> Section 10(1)(cQ)(ii)(aa)(A).

<sup>272</sup> Section 10(1)(cQ)(ii)(aa)(B).

<sup>273</sup> Section 10(1)(cQ)(ii)(aa)(C).

Section 10(1)(cQ)(ii) must be interpreted and applied as a whole having regard to the context in which it appears and the apparent purpose to which it is directed. The individual requirements should therefore not be read in isolation because they are joined together by the conjunctive word "and", which means that all the requirements must be met for the receipts and accruals to be regarded as being derived from the integral and directly related permissible business undertakings or trading activities.

#### **14.1.1 Integral and directly related to the sole or principal object**

The words "integral", "directly" and "related" are not defined in the Act. The *Cambridge Dictionary* provides the following descriptions:

- "Integral" is "necessary and important as a part of a whole, contained within something, not separate."<sup>274</sup>
- "Directly" is "without anything else being involved or in between."<sup>275</sup>
- "Related" is "connected to, influenced by, or caused by something."<sup>276</sup>

A business undertaking or trading activity will not be regarded as related to an SBFE's sole or principal object if it does not directly connect or contribute to achieving the sole or principal object of the SBFE, which must be the provision of funding for SMMEs. Whether a business undertaking or trading activity is connected or contributes to achieving the SBFE's sole or principal object will depend on the facts of each case. The size and extent of the business undertakings or trading activities involved must be considered in relation to the nature and extent of the approved function that they intend to serve to determine whether those business undertakings or trading activities contribute directly to achieve the approved sole or principal object of an SBFE.

An unrelated business undertaking or trading activity would be an undertaking or activity conducted by an SBFE that is not directly related or connected to the performance of the SBFE's sole or principal object. Any income derived from activities that are not integral and directly related to the sole or principal object of the SBFE (see **14**) is taxable (see **16**) subject to the basic exemption (see **15**).

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

#### **14.1.2 Substantially the whole directed towards the recovery of cost**

It is a requirement that the integral and directly related business undertaking or trading activity is carried out or conducted on a basis substantially the whole (see **9.5**) of which is directed towards the recovery of cost.

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<sup>274</sup> <https://dictionary.cambridge.org/dictionary/english/integral> [Accessed].

<sup>275</sup> <https://dictionary.cambridge.org/dictionary/english/directly> [Accessed 5 July 2024].

<sup>276</sup> <https://dictionary.cambridge.org/dictionary/english/related> [Accessed 5 July 2024].

The words “carried out”, “conducted”, “basis”, “substantially”, “whole”, “recovery” and “cost” are not defined in the Act. The ordinary meaning in the *Cambridge Dictionary* are as follows:

- “Carried out something” is “to perform or complete a job or activity; to fulfil.”<sup>277</sup>
- “Conduct” is “to organize and perform a particular activity.”<sup>278</sup>
- “Basis” is “the most important facts, ideas, etc. from which something is developed.”<sup>279</sup>
- “Substantially” is “to a large degree.”<sup>280</sup>
- “Whole” is “complete or not divided.”<sup>281</sup>
- “Recovery” is “the process of getting something back.”<sup>282</sup>
- “Cost” is “the amount of money needed to buy, do, or make something, or an amount spent for something.”<sup>283</sup>

It is not always possible to base business undertakings or trading activities on a 100% cost-recovery basis and it is for this reason that legislation requires that substantially the whole of the integral and directly related business undertaking or trading activity must be based on recovery of cost. This requirement will be met when not less than 85% of the business undertaking or trading activity is carried out to recover direct and reasonable indirect costs.

The concept “recovery of cost” means that the integral and directly related business undertaking or trading activity is not conducted at a mark-up to maximise profits, but rather with the intention of recovering direct and reasonable indirect costs relating to the integral and directly related business undertaking or trading activity.

In *C v COT*, Goldin J stated the following on the meaning of “cost”:<sup>284</sup>

“The word ‘cost’, when undefined, may be used in various senses. As Jordan CJ said in the case of *Ex parte Brierley, Re Elvidge* (1947) 47 NSWSR 423 at 427; *Words and Phrases Legally Defined* 2 ed –

‘It may, in the case of manufacture, be used to mean the price paid for the raw material plus the wages paid for turning it into finished articles; and, in the case of trading, the price paid for what is re-sold. Or, in either case, it may include all the other expenses incurred in bringing into existence, or obtaining, and then selling a vendible article – what are generally described as ‘overheads’ .’

Goldin J stated further that –<sup>285</sup>

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

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<sup>277</sup> <https://dictionary.cambridge.org/dictionary/english/carry-out?q=carried+out> [Accessed 5 July 2024].

<sup>278</sup> <https://dictionary.cambridge.org/dictionary/english/conduct> [Accessed 5 July 2024].

<sup>279</sup> <https://dictionary.cambridge.org/dictionary/english/basis> [Accessed 5 July 2024].

<sup>280</sup> <https://dictionary.cambridge.org/dictionary/english/substantially> [Accessed 5 July 2024].

<sup>281</sup> <https://dictionary.cambridge.org/dictionary/english/whole> [Accessed 5 July 2024].

<sup>282</sup> <https://dictionary.cambridge.org/dictionary/english/recovery> [Accessed 5 July 2024].

<sup>283</sup> <https://dictionary.cambridge.org/dictionary/english/cost> [Accessed 5 July 2024].

<sup>284</sup> 1973 (4) SA 449 (R), 35 SATC 241 at 246 and 247.

<sup>285</sup> At 247.

Trollip JA held in *SIR v Eaton Hall (Pty) Ltd* that –<sup>286</sup>

“...in the absence of any definition in the Act of such cost one must look at its ordinary meaning. The *Oxford English Dictionary* defines ‘cost’ as meaning: ‘That which must be given or surrendered in order to acquire, produce, accomplish, or maintain something; the price paid for a thing’ ”.

### 14.1.3 Unfair competition with taxable entities

It is a requirement that the integral and directly relating business undertaking or trading activity should not result in unfair competition with other taxable entities.

The *Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa* provides the following on unfair competition:<sup>287</sup>

“In granting privileged tax status to particular organisations, the fiscus needs to have regard to the issue of ‘unfair competition’ between bodies which are subject to tax and those which are tax-exempt. The broad issue of fairness or equity within a free-market economy is a fundamental one that warrants some degree of vigilance. However, the Commission is of the view that this value should not be elevated to the status of a ‘*summum bonum*’ and needs to be counter-balanced with other important values in society, including the need for a strong, independent, and viable NPO sector.”

An SBFE should not be in a more favourable position or have an unfair advantage over a taxable entity conducting the same business undertaking or trading activity. An SBFE has an advantage in that it is not required to sacrifice a portion of its profit in the form of tax.

Each case will be considered on its own merits to determine whether an SBFE has an unfair advantage. In the determination of whether an SBFE has an unfair advantage various factors could be considered such as –

- whether the SBFE engages in active advertising or marketing;
- whether the activity is conducted on a competitive basis with the intention of maximising profits;
- the amount of income received;
- the location and availability of similar activities; or
- whether voluntary assistance of helpers or volunteers who are not compensated for their services is provided.

## 14.2 Occasional permissible business undertakings or trading activities

The receipts and accruals of any SBFE will be exempt from income to the extent that the receipts and accruals are derived from any business undertaking or trading activity if the business undertaking or trading activity is of an occasional nature and undertaken substantially with assistance on a voluntary basis without compensation.<sup>288</sup>

The Act does not define “occasional”, “nature”, “substantially” (see 9.5), “assistance”, “voluntary” and “compensation”. The *Cambridge Dictionary* provides the following descriptions:

- “Occasional” is “not happening or done often or regularly.”<sup>289</sup>

<sup>286</sup> 1975 (4) SA 953 (A), 37 SATC 343 at 347.

<sup>287</sup> At 10.

<sup>288</sup> Section 10(1)(cQ)(ii)(bb).

<sup>289</sup> <https://dictionary.cambridge.org/dictionary/english/occasional> [Accessed 5 July 2024].

- “Nature” is “the type or main characteristic or something.”<sup>290</sup>
- “Assistance” is “help.”<sup>291</sup>
- Voluntary” is “done, made, or given willingly, without being forced or paid to do it.”<sup>292</sup>
- “Compensation” is “the combination of money and other benefit (= rewards) that an employee receives for doing their job.”<sup>293</sup>

A business undertaking or trading activity of an occasional nature is one conducted on an irregular, infrequent basis or as a special event. For example, fundraising activities such as a dinner, dance, auction, or a golf day that take place on an annual basis with the assistance of helpers or volunteers who are not compensated for their services.

The difference between occasional and frequent is that “occasional” occurs irregularly, from time to time, once in a while, therefore rarely, while “frequent” occurs regularly, very often or many times. Fundraising activities will therefore not be regarded as occasional if there is a frequency and continuity to them, and if such activities are pursued in a manner similar to commercial activities of taxable entities.

It is a requirement that a large or significant part of the occasional business undertaking or trading activity must be undertaken with assistance from volunteers without compensation.

The repayment of reasonable and necessary out-of-pocket expenditure to volunteers in assisting in the carrying on of the SBFES occasional business undertakings or trade activities is allowed.

### **14.3 Permissible business undertakings or trading activities approved by the Minister**

The receipts and accruals of any SBFE will be exempt from income to the extent that the receipts and accruals are derived from any business undertaking or trading activity if the business undertaking or trading activity is approved by the Minister by notice in the *Government Gazette*.<sup>294</sup>

A business undertaking or trading activity may be approved by the Minister having regard to the –

- scope and benevolent nature of the undertaking or activity;<sup>295</sup>
- direct connection and interrelationship of the undertaking or activity with the sole or principal object of the SBFE;<sup>296</sup>
- profitability of the undertaking or activity;<sup>297</sup> and
- level of economic distortion that will be caused by the tax-exempt status SBFE carrying on the undertaking or activity.<sup>298</sup>

<sup>290</sup> <https://dictionary.cambridge.org/dictionary/english/nature> [Accessed 5 July 2024].

<sup>291</sup> <https://dictionary.cambridge.org/dictionary/english/assistance> [Accessed 5 July 2024].

<sup>292</sup> <https://dictionary.cambridge.org/dictionary/english/voluntary> [Accessed 5 July 2024].

<sup>293</sup> <https://dictionary.cambridge.org/dictionary/english/compensation> [Accessed 5 July 2024].

<sup>294</sup> Section 10(1)(cQ)(ii)(cc).

<sup>295</sup> Section 10(1)(cQ)(ii)(cc)(A).

<sup>296</sup> Section 10(1)(cQ)(ii)(cc)(B).

<sup>297</sup> Section 10(1)(cQ)(ii)(cc)(C).

<sup>298</sup> Section 10(1)(cQ)(ii)(cc)(D).

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

This permissible business undertaking or trading activity is intended to cater for exceptional business undertakings or trading activities falling outside the other permissible business undertaking or trading activity already catered for in section 10(1)(cQ)(ii). This provision to allow the Minister to approve permissible business undertaking or trading activity provision is rarely invoked.

Should the Minister, however, approve a particular business undertaking or trading activity that undertaking or activity may only be conducted by the SBFE whom requested approval from the Minister.

## 15. Basic exemption

The receipts and accruals of any SBFE will be exempt from income tax to the extent that the receipts and accruals are derived from any business undertaking or trading activity other than from permissible business undertakings or trading activities that do not exceed the greater of –<sup>299</sup>

- 5% of the total receipts and accruals of that SBFE during the relevant year of assessment;<sup>300</sup> or
- R200 000.<sup>301</sup>

The basic exemption is the amount determined as a threshold and applied to the total receipts and accruals of an SBFE during a year of assessment derived from business undertakings or trading activities other than permissible business undertakings or trading activities.

The basic exemption cannot create a loss since it is not a deduction but a calculation to determine the threshold amount to be applied to the total receipts and accruals from business undertakings or trading activities other than permissible business undertakings or trading activities to determine the receipts and accruals qualifying for exemption and the receipts and accruals subject to tax (see **16**). The total receipts and accruals of an SBFE will include the total or gross amount received or accrued from all sources, whether of a capital nature or not, such as donations, subsidies, rent, fundraising activities, investment income, the sale of movable and immovable assets and bequests.

If an SBFE is operational for only a part of a year of assessment its total receipts and accruals will equate to the receipts and accruals for the relevant operational period derived during that year of assessment. The basic exemption is therefore not applied on a *pro rata* basis to the number of months an SBFE operated in a year of assessment because it applies to the SBFEs total receipts and accruals derived from business undertakings or trading activities other than permissible business undertakings or trading activities during a year of assessment.

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<sup>299</sup> Section 10(1)(cQ)(ii)(dd).

<sup>300</sup> Section 10(1)(cQ)(ii)(dd)(A).

<sup>301</sup> Section 10(1)(cQ)(ii)(dd)(B).

The total receipts and accruals derived from all business undertakings or trading activities other than permissible business undertakings or trading activities must be added together before the deduction of the basic exemption. The basic exemption threshold must be applied collectively to the total receipts and accruals from all business undertakings or trading activities other than permissible business undertakings or trading activities and not individually to each such undertaking or activity.

### Example 11 – Basic exemption

*Facts:*

The total receipts and accruals of an approved SBFE for a year of assessment are as follows:

|  |                  |
|--|------------------|
|  | R                |
| Donations and bequests   | 1 000 000        |
| Receipts and accruals from permissible business undertakings and trading activities exempt from income tax under section 10(1)(cQ)(i) and (ii)                   | 300 000          |
| Receipts and accruals from business undertakings and trading activities falling outside the ambit of the permissible business undertakings or trading activities | <u>220 000</u>   |
| Total receipts and accruals  | <u>1 520 000</u> |

*Result:*

The basic exemption is calculated as an amount equal to the greater of –

- 5% of the total receipts and accruals; or
- R200 000.

5% of the total receipts and accruals of R1 520 000 amounts to R76 000.

Since this amount is less than the alternative threshold amount of R200 000, the SBFE will be entitled to a basic exemption under section 10(1)(cQ)(ii)(dd) of R200 000 in respect of its receipts and accruals from business undertaking or trading activities falling outside the permissible business undertakings or trading activities under section 10(1)(cQ)(ii)(aa) to (cc), which amounts to R220 000.

The excess receipts and accruals from business undertakings or trading activities not qualifying for exemption, which amounts to R20 000 will be subject to income tax (see 16).

## 16. Partial taxation

An SBFE carrying on business undertakings or trading activities other than permissible business undertakings or trading activities will, subject to the basic exemption, be taxed on the receipts and accruals derived from all such business undertakings or trading activities exceeding the basic exemption threshold.

An SBFE liable to income tax on taxable income will pay tax at a rate applicable to an SBFE irrespective of whether it is formed as a trust, established as an association of persons, or incorporated as an NPC (see 4).



The current rate of tax to be levied on the taxable income of any SBFE is 27% if that SBFE is a –<sup>302</sup>

- company for any year of assessment ending on or after 1 April 2023; or
- trust for any year of assessment commencing on or after 1 March 2023.

The Minister may announce different rates in the national annual budget, which are prescribed annually in the Rates and Monetary Amounts and Amendment of Revenue Laws Act.<sup>303</sup>

**Example 12** in the **Annexure C** provides a step-by-step guide to calculating the taxable income of an SBFE by applying the basic exemption.

## 16.1 Apportionment of expenditure

Expenditure directly incurred in the production of a specific category of income must be allocated to such income. Expenditure paid as a single amount relating to non-exempt income and income from the provision of funds, the SBFE's sole or principal object, must be apportioned *pro rata* between these two categories. The basis of apportioning an expense will depend on the nature of the expense.

General expenditure incurred, such as accounting fees, audit fees, bank charges or overhead expenses, not specifically relating to a particular source of income but which can be attributed to various sources, must be apportioned on a *pro rata* basis by applying the ratio that a particular source of income bears to the total receipts and accruals derived by the SBFE (see from Step 5 in **Example 12** in the **Annexure C**).

If an SBFE has maintained accurate records of expenditure relating to particular sources of income it will be unnecessary for it to allocate the expenditure on a *pro rata* basis.

## 16.2 Allowable deductions

Expenditure incurred in the production of income is generally allowable as a deduction in determining taxable income to the extent that it meets the requirements of the Act. Expenditure of a capital nature, such as the cost of acquiring the business and expenditure incurred which produces exempt income is not allowed as a deduction in determining taxable income.<sup>304</sup>

## 16.3 Losses incurred

A profit or loss arises from the final result of a trading operation after allowable expenditure has been deducted. Expenditure and losses, which are not of a capital nature, and which are actually incurred in the production of income and for purposes of trade, may be deducted under section 11(a) read with section 23(g) in the determination of taxable income.

An “assessed loss” arises when the deductions admissible under section 11 exceed the income against which they are so admissible.<sup>305</sup> A balance of assessed loss determined in a previous year of assessment may be carried forward from the preceding year of assessment for set-off against the income derived in the current year of assessment.

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<sup>302</sup> Section 4 of Schedule I (Section 1) in the Rates and Monetary Amounts and Amendment of Revenue Laws Act 19 of 2023 in *Government Gazette* 49948 of 22 December 2023.

<sup>303</sup> Section 5(2)(a).

<sup>304</sup> Sections 11(a) and 23(g). The Act also provides for other specific deductions and allowances.

<sup>305</sup> The term “assessed loss” is defined in section 20(2).

In the case of a company,<sup>306</sup> an assessed loss may not be carried forward or set-off in the next succeeding year of assessment unless the company has carried on a “trade” (see **13.1**).<sup>307</sup>

#### **16.4 Wear-and-tear or depreciation allowance on assets**

Section 11(e) provides for the deduction of a wear-and-tear or depreciation allowance on certain qualifying assets.<sup>308</sup> The allowance is claimed over the useful life of the asset concerned and will only be allowed to the extent that the asset is used for the purposes of trade. The allowance must be apportioned for an asset that has not been used throughout the year of assessment for the purposes of trade, for example, in the year of assessment in which an asset is acquired, disposed of, or ceases to be used.

The allowance may be claimed proportionately on an asset used by an SBFE partly for trade and partly for carrying on its sole or principal object, namely, the provision of funding for SMMEs. Only the portion of the allowance attributable to the SBFE’s trade usage will qualify for deduction.

An asset may have been used by an SBFE in a previous year of assessment during which its receipts and accruals were fully exempt from income tax. The SBFE may later become taxable on its business undertakings or trading activities in the current year of assessment as a result of its income from such undertakings or activities exceeding the basic exemption. The use of the asset during the period when the SBFE was fully exempt from income tax must be considered in determining the amount by which the value of the asset has diminished.

### **17. Beneficiary of a trust**

Section 10(1)(cQ) does not specify that the business undertaking or trading activity must be conducted by the SBFE, it merely specifies that receipts and accruals from a business undertaking or trading activity of an SBFE may be exempt from income tax.

An SBFE may be a beneficiary of a trust. Generally, income received by or accrued to a trust during a year of assessment is deemed to accrue to its beneficiary when the beneficiary acquires a vested right to such income during that year of assessment, including the acquisition of such a right through the exercise of the trustees’ discretion.<sup>309</sup>

To the extent that an amount is not deemed to accrue to a beneficiary it is deemed to accrue to the trust.<sup>310</sup>

It follows that an SBFE that is a beneficiary of a trust must account for any income vested in it during the year of assessment.

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<sup>306</sup> The term “company” is defined in section 1(1).

<sup>307</sup> See Interpretation Note 33 “Assessed Losses: Companies: The ‘Trade’ and ‘Income from Trade’ Requirements”. This Note applies to SBFEs that are NPCs and association of persons and not to SBFEs that are trusts.

<sup>308</sup> For further commentary on section 11(e) as it relates to the determination of the value of an asset on which the allowance is based and acceptable write-off periods, see Interpretation Note 47 “Wear-and-Tear or Depreciation Allowance”.

<sup>309</sup> Sections 25B(1) and (2).

<sup>310</sup> Section 7(7) contains an exception to this rule when the income of the trust has been funded by a donation, settlement, or other disposition. When section 7(7) applies the income will be deemed to accrue to the trust donor.

A distribution received by an SBFEE from a trust which is generated from a business undertaking or trading activity, such as rental income, retains its character and will be deemed to be a receipt or accrual from an impermissible business undertaking or trading activity derived by the SBFEE and will be considered in the determination of the basic exemption of the SBFEE (see 15).

## 18. Exemption from other taxes

In addition to being exempt from income tax on certain receipts and accruals, SBFEEs also enjoy the benefit of being exempt from certain other taxes and duties,<sup>311</sup> which are considered below.

### 18.1 Donations tax

Donations tax is payable<sup>312</sup> on the value of any property wheresoever situated<sup>313</sup> disposed of by donation, whether directly or indirectly and whether in trust or not, by any resident<sup>314</sup> (the donor) to another person (the donee)<sup>315</sup> unless an exemption<sup>316</sup> applies, at the rate of –

- 20% on that value if the aggregate of that value and the value of any other property disposed of under a taxable donation on or after 1 March 2018 until the date of that donation does not exceed R30 million;<sup>317</sup> and
- 25% on that value to the extent that it exceeds R30 million.<sup>318</sup>

A donation comprises any gratuitous disposal of property, which includes cash or non-cash property, including any gratuitous waiver or renunciation of a right, for example, the waiver of debt.<sup>319</sup> The disposal of property at less than its market value will also constitute a donation to the extent that the Commissioner is not satisfied that the consideration was adequate.<sup>320</sup>

The term "property" is legally a very wide concept and inclusive to not only movable or immovable property, corporeal (tangible) or incorporeal (intangible), but also a right in that property. Property is an object of legal rights and includes anything tangible or intangible over which a person has a legal title. Property is considered to be movable if it can be moved from one place to another without being damaged and without losing its identity.<sup>321</sup> Some examples include stocks, money, notes, patents, as well as intangible property such as copyrights. Animals that can move on their own are also moveable property. Immovable property is considered to be land, things attached to it as well as certain rights registered against the title deed of the land.

The main function of money is distinguished as a medium of exchange or a unit of account and therefore falls within the definition of "property".

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<sup>311</sup> For further commentary on any of these taxes and duties, see the *Taxation in South Africa*.

<sup>312</sup> Section 54.

<sup>313</sup> See definition of "property" in section 55(1).

<sup>314</sup> The term "resident" is defined in section 1(1).

<sup>315</sup> The term "donee" is defined in section 55(1).

<sup>316</sup> Section 56.

<sup>317</sup> Section 64(1)(a)(i).

<sup>318</sup> Section 64(1)(a)(ii).

<sup>319</sup> The term "donation" is defined in section 55(1).

<sup>320</sup> Section 58(1).

<sup>321</sup> Van der Merwe, C. G. (2014). Things. In *The Law of South Africa (LAWSA)*. (Second Edition Volume 27) at 50. My LexisNexis: Online.

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>322</sup>

Donations made by or to an SBFE are exempt from the payment of donations tax.<sup>323</sup>

## 18.2 Dividends tax

The provisions relating to dividends tax are contained in sections 64D to 64N and apply to any dividend paid by a company, other than a headquarter company, on or after 1 April 2012.<sup>324</sup> Although dividends tax is part of the Act, it is a separate tax from income tax.<sup>325</sup>

Dividends tax is levied at the rate of 20%<sup>326</sup> of the amount of a dividend paid by a company that is a resident.<sup>327</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>328</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>329</sup>

Generally, a company that declares and pays a dividend must withhold an amount of dividends tax, except to the extent that the dividend consists of a distribution of an asset *in specie*, in which case, the company paying the dividend is potentially liable for the dividends tax unless an exemption applies.

It is not the responsibility of the company or regulated intermediary<sup>330</sup> paying the dividend to determine who the beneficial owner of a dividend is and whether the person qualifies for an exemption from dividends tax. The exemptions from dividends tax for cash dividends are contained in section 64F while the exemptions for dividends *in specie* are contained in section 64FA(1).

Any SBFE that is a beneficial owner of a dividend is exempt from dividends tax.<sup>331</sup> This exemption applies only if the SBFE has submitted a declaration to the company that declared and paid the dividend or to the regulated intermediary that paid the dividend, that it is exempt from dividends tax. The SBFE is also required to submit a written undertaking to the company or regulated intermediary that it will inform such company or regulated intermediary

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<sup>322</sup> Section 59.

<sup>323</sup> Section 56(1)(h).

<sup>324</sup> Any dividend paid before 1 April 2012 was subject to secondary tax on companies (STC), a tax that was levied on the company paying the dividend.

<sup>325</sup> For further commentary, see the *Comprehensive Guide to Dividends Tax*.

<sup>326</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>327</sup> A reduced or nil rate may apply under specific circumstances.

<sup>328</sup> The term "listed share" as defined in section 1(1) means a share that is listed on an exchange as defined in section 1 of the Financial Markets Act 19 of 2012 and licensed under section 9 of that Act. A listed share could include a share in a foreign company whose shares are listed on a South African exchange.

<sup>329</sup> The term "beneficial owner" is defined in section 64D.

<sup>330</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>331</sup> Sections 64F(1)(i) and 64FA(1)(a).

in writing should it cease to be the beneficial owner of the shares or if the circumstances affecting the exemption change.<sup>332</sup>

The Commissioner has not issued forms to be used for purposes of a declaration or written undertaking referred to above but has prescribed the required wording and minimum information required in the forms which are to be prepared by the company, regulated intermediary or beneficial owner.<sup>333</sup>

The obligation lies with an SBFEE 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.

Any SBFEE that is a beneficiary of a trust should determine whether it has a vested right to a dividend received by or which accrued to the trust before is paid by the relevant company to ensure that the necessary declaration of exemption is filed with the company or regulated intermediary. A beneficiary that has a vested right in a dividend received by 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>334</sup>

An SBFEE receiving a dividend, which is exempt or partially exempt from dividends tax,<sup>335</sup> is not required to submit to SARS a Dividends Tax Return (DTR02).<sup>336</sup>

Certain sections were introduced to counter the potential use of SBFEEs in schemes, which essentially seek to convert dividends that are subject to dividends tax to exempt dividends.<sup>337</sup>

### 18.3 Capital gains tax

"CGT" is not a separate tax but represents the portion of income tax payable on a "taxable capital gain"<sup>338</sup> included in taxable income under section 26A. A taxable capital gain or assessed capital loss is determined under the Eighth Schedule.<sup>339</sup>

Any capital gain or capital loss made by an SBFEE on the disposal of an asset falling into one of the following three categories must be disregarded:<sup>340</sup>

- Category 1: Non-trading assets. This category applies to assets that are not used by an SBFEE in carrying on any business undertaking or trading activity. It covers assets

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<sup>332</sup> Sections 64G(2)(a) and 64H(2)(a).

<sup>333</sup> For further commentary, see the *Business Requirements Specifications: Administration of Dividends Tax*.

<sup>334</sup> For further commentary, see the *Comprehensive Guide to Dividends Tax*.

<sup>335</sup> Sections 64F or 64FA.

<sup>336</sup> Section 64K(1A)(b) was deleted by section 1 of the Tax Administration Laws Amendment Act 22 of 2018 with effect from 17 January 2019.

<sup>337</sup> For example, section 64EB.

<sup>338</sup> The term "taxable capital gain" as defined in section 1(1) is the amount determined under paragraph 10 of the Eighth Schedule.

<sup>339</sup> See the *ABC of Capital Gains Tax for Companies* for a very basic overall understanding of the subject, the *Tax Guide for Share Owners* for commentary on most aspects of CGT affecting the holding of shares, and the *Comprehensive Guide to Capital Gains Tax* for very detailed commentary on CGT including a paragraph on SBFEEs.

<sup>340</sup> Paragraph 63B of the Eighth Schedule was inserted by section 90(1) of the Taxation Laws Amendment Act 43 of 2014 with effect from 1 March 2015.

that are not "used" but are "held", such as investments in the nature of shares, or participatory interests in collective investment schemes.<sup>341</sup>

- Category 2: Minimal-trading assets. This category applies when substantially the whole of the use of the asset by an SBFE was directed at a purpose other than carrying on a business undertaking or trading activity.<sup>342</sup> An example of such an asset is one that is used 10% of the time for trading purposes and 90% of the time for funding SMMEs. The term "substantially the whole of the use" is explained in 9.5. Such assets do not fall into the first category because they are used, albeit to a limited extent, in carrying on a business undertaking or trading activity. The percentage of the asset used for trade or business purposes must be determined using a method appropriate to the circumstances. For example, a proportion based on time, floor area or a combination of the two may be appropriate.
- Category 3: Permissible trading assets. This category applies when substantially the whole of the use of the asset by the SBFE was directed at carrying on a business undertaking or trading activity that qualifies for exemption (see **14.1**).<sup>343</sup>

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

Any taxable capital gain, which is equal to the net capital gain<sup>344</sup> multiplied by the inclusion rate of 80% for an SBFE,<sup>345</sup> must be included in the SBFE's taxable income and will be taxed at the rate of tax applicable to SBFEs (see **16**).

## 19 Other taxes

### 19.1 Provisional tax

Provisional tax<sup>346</sup> is dealt with in the Fourth Schedule.<sup>347</sup> It is not a separate tax but merely a mechanism to assist taxpayers in meeting their tax liability by spreading it over the relevant year of assessment as opposed to paying a large amount at the end of a year of assessment. A provisional taxpayer<sup>348</sup> is required to estimate taxable income for a year of assessment and calculate provisional tax payable on that estimate.

SBFEs are excluded from the definition of "provisional taxpayer" in the Fourth Schedule and are not required to submit provisional tax payments.<sup>349</sup> Any liability to income tax on taxable income will become payable on assessment.

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<sup>341</sup> Paragraph 63B(1)(a) of the Eighth Schedule.

<sup>342</sup> Paragraph 63B(1)(b)(i) of the Eighth Schedule.

<sup>343</sup> Paragraph 63B(1)(b)(ii) of the Eighth Schedule.

<sup>344</sup> The term "net capital gain" as defined in paragraph 1 is the amount determined under paragraph 8 of the Eighth Schedule.

<sup>345</sup> Paragraph 10(c) of the Eighth Schedule. The inclusion rate of 80% applies to years of assessment commencing on or after 1 March 2016.

<sup>346</sup> The term "provisional tax" is defined in paragraph 1 of that Schedule.

<sup>347</sup> For further commentary, see *Taxation in South Africa* and the *Guide for Provisional Tax*.

<sup>348</sup> The term "provisional taxpayer" is defined in paragraph 1 of the Fourth Schedule.

<sup>349</sup> Paragraph (ee) of the exclusions to the definition of "provisional taxpayer" in paragraph 1 of the Fourth Schedule.

## 19.2 Estate duty

Estate duty is levied under the Estate Duty Act 45 of 1955 (Estate Duty Act) at a rate of –<sup>350</sup>

- 20% on the first R30 million of the dutiable amount of the estate of a deceased person; and
- 25% of the dutiable amount that exceeds R30 million.

No exemption for estate duty is provided for bequests to SBFES. Any property bequeathed to an SBFE will not qualify as a deduction and therefore will not be excluded from the net value of the estate and will be subject to estate duty.

## 19.3 Transfer duty

Transfer duty is levied under the Transfer Duty Act on a sliding scale on the value of any property<sup>351</sup> acquired by any person.<sup>352</sup> The rates vary from 0% to 13% for all persons.<sup>353</sup> The person acquiring the property (the transferee) is normally the person who is liable for the payment of transfer duty.

Certain transfer duty exemptions may apply in different circumstances.<sup>354</sup> There, however, is no specific exemption, which applies to an SBFE. One of the main exemptions provides that if a supply of property is subject to VAT, it will be exempt from transfer duty.<sup>355</sup>

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

## 19.4 Securities transfer tax

The STT Act provides that a STT must be levied at the rate of 0.25%<sup>356</sup> on the taxable amount<sup>357</sup> of the transfer<sup>358</sup> of every security<sup>359</sup> issued by a close corporation or company incorporated in South Africa as well as foreign companies listed on an exchange.<sup>360</sup>

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<sup>350</sup> Section 2(2) and at the rate set out in the First Schedule to the Estate Duty Act.

<sup>351</sup> The term “property” is defined in section 1(1) of the Transfer Duty Act.

<sup>352</sup> For further commentary on transfer duty in general and the processing of transactions on eFiling, see the *Guide for Transfer Duty via eFiling* and the *Transfer Duty Guide*.

<sup>353</sup> Section 2(1)(b) of the Transfer Duty Act.

<sup>354</sup> Section 9 of the Transfer Duty Act.

<sup>355</sup> Section 9(15) of the Transfer Duty Act.

<sup>356</sup> Section 2(1) of the STT Act.

<sup>357</sup> Sections 3(1), 4, 5 and 6 of the STT Act determine the relevant taxable amount.

<sup>358</sup> The term “transfer” as defined in section 1 of the STT Act includes, save for certain exclusions, the transfer, sale, assignment, cession, or disposal in any manner of a security or the cancellation or redemption of that security.

<sup>359</sup> The term “security” as defined section 1 of the STT Act means any share or depository receipt in a company, or any member’s interest in a close corporation.

<sup>360</sup> The term “exchange” means an “exchange” as defined in section 1 of the Financial Markets Act 19 of 2012 and licensed under section 9 of that Act.

The Securities Transfer Tax Administration Act 26 of 2007 (STT Administration Act) contains the administration provisions governing the payment of STT. Any STT payment must be made electronically through SARS e-STT system.<sup>361</sup>

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

## 19.5 Employees' tax

Employees' tax<sup>362</sup> is dealt with in the Fourth Schedule. The purpose of the employee's tax system is to ensure that an employee's income tax liability is settled at the same time that the employee's remuneration (see 9.9) is earned, therefore 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>363</sup> of an employee (see 9.4), calculated on an annual basis to determine the employees' final income tax liability for a year of assessment.

Employees' tax must be deducted or withheld by every employer (or representative employer<sup>364</sup> when the employer is not resident in South Africa) who pays or becomes liable to pay an amount of remuneration to any person.

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

Any SBFEE that is an employer must, if any of its employees are liable for income tax, register for employees' tax within 21 business days of becoming an employer.<sup>365</sup> Registration is done by completing the prescribed application form EMP 101e.<sup>366</sup> An SBFEE already registered for another tax type on eFiling may as part of the single registration initiative register for PAYE on eFiling.<sup>367</sup> A registered employer will receive a monthly return, EMP 201 form, which must be completed and submitted 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, amongst other things, the total remuneration earned during a year of assessment and the employees' tax and UIF contributions deducted by the employer.

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<sup>361</sup> Sections 3(2) and 5 of the STT Administration Act. For further commentary on STT, the electronic submission of STT declarations and payments on the e-STT system via eFiling, see the *Taxation in South Africa* and the *External Reference Guide – Securities Transfer Tax*.

<sup>362</sup> For further commentary, see the *Guide for Employers in Respect of Employees' Tax - External Guide*.

<sup>363</sup> Paragraph 28 of the Fourth Schedule.

<sup>364</sup> Paragraph (b) of the definition of "representative taxpayer" in section 153(1) of the TA Act.

<sup>365</sup> Paragraph 15(1) of the Fourth Schedule read with Chapter 3 of the TA Act.

<sup>366</sup> For further commentary, see the *External Guide – Guide for Completion of Employer Registration Application*.

<sup>367</sup> For further commentary, see the *External Guide – How to Complete the Registration, Amendments and Verification Form (RAV01)*.



## 19.6 Unemployment insurance fund contributions

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, amongst other things, provide for the benefits, to which contributors are entitled, and the imposition and collection of contributions to UIF, respectively.

The UIF<sup>368</sup> gives short-term relief to workers when they become unemployed or unable to work because of maternity, adoption leave, or illness. It also provides relief to the dependents of a deceased contributor.<sup>369</sup>

The employer must pay a total contribution of 2% (1% contributed by the employee and 1% contributed by the employer) of the remuneration paid or payable by an employer to employees. UIF contributions are payable by employers on a monthly basis, subject to specified exclusions. These contributions must be paid to the UIF office of the Department of Labour<sup>370</sup> or to SARS within seven days after the end of the month during which the amount was deducted. Payment can be made via eFiling, electronic funds transfer (EFT) or at a branch of an approved banking institution. An SBFE paying remuneration to its employees will also be liable for UIF contributions unless it qualifies for certain exemptions.

## 19.7 Skills development levy

The SDL is a compulsory levy to fund education and training under the SDL Act.<sup>371</sup> SARS administers the collection of the SDL payable by employers, which is based broadly on 1% of the payroll of employers.<sup>372</sup>

The SDL Act<sup>373</sup> imposes on every employer an SDL on the total amount of remuneration paid or payable or deemed to be paid or payable by an employer<sup>374</sup> to its employees<sup>375</sup> during any month. The amount of such remuneration is the same as the amount of remuneration<sup>376</sup> determined under the Fourth Schedule from which an employer is obligated to withhold employees' tax taking into consideration certain exclusions.<sup>377</sup>

Section 4 of the SDL Act contains a number of exemptions from the SDL. There, however, is no specific exemption from SDL for an SBFE. An SBFE that is an employer whose annual payroll will not exceed R500 000 in the following 12 months will be exempt from paying SDL.<sup>378</sup>

An employer liable to pay SDL must apply to the Commissioner in such manner as the Commissioner may determine to be registered as an employer for the purposes of SDL.<sup>379</sup>

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<sup>368</sup> For further commentary, see the *Guide for Employers in respect of the Unemployment Insurance Fund*.

<sup>369</sup> Section 2 of the Unemployment Insurance Act.

<sup>370</sup> Information is available on the Department of Labour's website at [www.labour.gov.za](http://www.labour.gov.za).

<sup>371</sup> For further commentary, see the *Quick Reference Guide for Skills Development Levy*.

<sup>372</sup> For commentary, see the *Guide for Tax Rates / Duties / Levies and Taxation in South Africa*.

<sup>373</sup> Section 3(1) of that Act.

<sup>374</sup> The term "employer" is defined in section 1(1) of the SDL Act and includes an "employer" as defined in the Fourth Schedule.

<sup>375</sup> The term "employee" is defined in section 1(1) of the SDL Act and includes an "employee" as defined in the Fourth Schedule.

<sup>376</sup> The term "remuneration" is defined in paragraph 1 of the Fourth Schedule.

<sup>377</sup> See section 3(4) of the SDL Act for the exclusions.

<sup>378</sup> Section 4(b) of the SDL Act.

<sup>379</sup> Section 5(1) of the SDL Act. For commentary, see the *External Guide – Guide for Employers in Respect of Skills Development Levy* SDL-GEN-01-G01.

## 19.8 Value-added tax

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

VAT is currently levied at a standard rate of 15% on most supplies in South Africa and on most goods imported into the country. There is a limited range of goods and services that are subject to VAT at the zero rate when supplied in South Africa and on exports to other countries. Supplies attracting VAT at either the standard or zero rate are called “taxable supplies”. Certain goods are also exempt when supplied in or imported into South Africa. VAT is payable on imported services only if those services are acquired for exempt, private or other non-taxable purposes.

VAT is levied on an inclusive basis, which means that any prices marked on products in stores, and any prices advertised or quoted, must include VAT if the supplier is a vendor.

The defined term “small business funding entity” used for purposes of income tax is not used in the VAT Act and there are no specific rules intended for an SBFE contained in the VAT Act. However, in light of the requirements to be approved as an SBFE for purposes of income tax, an SBFE may qualify as an “association not for gain” for purposes of VAT,<sup>380</sup> regardless of whether it qualifies for the exemption of certain receipts and accruals under section 10(1)(cQ). Further, since an SBFE is not a PBO, it will not qualify to be a “welfare organisation”<sup>381</sup> for purposes of VAT.

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

Should a ruling be required relating to a specific VAT issue, a ruling application may be submitted by e-mail to [VATRulings@sars.gov.za](mailto:VATRulings@sars.gov.za).<sup>382</sup>

### 19.8.1 Association not for gain

An “association not for gain” is essentially a religious institution or other society, association or organisation that is not carried on for profit and is required to use any property or income solely in the furtherance of its aims and objects.<sup>383</sup>

An SBFE qualifying as an association not for gain and that meets the requirements for compulsory or voluntary VAT registration is treated like any other business that makes taxable supplies and will be liable to register and account for VAT according to the normal VAT rules that apply to all vendors. There, however, are a few special provisions that apply to associations not for gain.<sup>384</sup>

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<sup>380</sup> Paragraph (b) of the definition of “association not for gain” in section 1(1) of the VAT Act.

<sup>381</sup> The term “welfare organisation” is defined in section 1(1) of the VAT Act.

<sup>382</sup> For further commentary, see the *VAT Ruling Process Quick Reference Guide*.

<sup>383</sup> The term “association not for gain” is defined in section 1(1) of the VAT Act.

<sup>384</sup> For further commentary, see the *VAT 414 – Guide for Associations not for Gain and Welfare Organisations*.

## 19.8.2 Registration

A person cannot register for VAT<sup>385</sup> if no supplies of goods or services are made, if supplies are made for no consideration, or if only exempt supplies are made. Examples of supplies that are exempt from VAT include the rental of dwellings, certain supplies of donated goods or services, certain educational services, financial services and public transport by road or rail.<sup>386</sup> An SBFE may therefore register for VAT only to the extent that it carries on other enterprise activities falling within the scope of VAT, that are over and above the activities of providing funds (money) for SMMEs.

Any person, including an association not for gain,<sup>387</sup> is required to register for purposes of VAT if an enterprise is carried on and taxable supplies in excess of R1 million are made in any consecutive 12-month period or are expected to be made within a 12-month period under a written contract.

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

## 19.8.3 Donations

The characteristics of a donation<sup>388</sup> are as follows:

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

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

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

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

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<sup>385</sup> For further commentary, see the *VAT 404 – Guide for Vendors*.

<sup>386</sup> Section 12 of the VAT Act.

<sup>387</sup> The term “association not for gain” includes a “welfare organisation”.

<sup>388</sup> The term “donation” is defined in section 1(1) of the VAT Act.

## 20. Administrative provisions under the Tax Administration Act

SARS is responsible for the administration of the TA Act under the control and direction of the Commissioner.<sup>389</sup> The Commissioner may to administer a tax Act, obtain full information relating to anything that may affect the liability of a person for tax for any tax period,<sup>390</sup> tax event,<sup>391</sup> or the obligation of a person, whether personally or on behalf of another person, to comply with a tax Act.<sup>392</sup> The Commissioner may also perform any other administrative function necessary to carry out the provisions of the tax Act.<sup>393</sup>

The TA Act<sup>394</sup> deals with tax administration and seeks, amongst 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>395</sup>

Some administrative provisions that apply only to, and are unique to, the administration of a specific tax type remain in the Act imposing that tax. If the TA Act is silent on the administration of a tax Act and it is specifically provided for in any other tax Act, the provisions of that Act apply.<sup>396</sup> If there is any inconsistency between the TA Act and any other tax Act, the other Act prevails.<sup>397</sup>

General administrative provisions contained in the TA Act relating to, for example, record-keeping (see **24**), returns (see **25**), assessments and dispute resolution (see **26**), interest, refunds and anti-avoidance will therefore apply to SBFEs.

## 21. Furnishing of information

SARS under the TA Act may for purposes of the administration of a tax Act request a taxpayer to submit relevant material (whether orally or in writing) that SARS requires.<sup>398</sup> A request for relevant material from a person other than the taxpayer is limited to material maintained or kept that should reasonably be maintained or kept by the person relating to the taxpayer.<sup>399</sup>

The Commissioner may by written notice request any person whom the Commissioner may deem able to furnish information about any SBF E and may require that person to –<sup>400</sup>

- answer any questions relating to the SBF E;
- make books of account, records or other documents relating to the SBF E available for inspection; or

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<sup>389</sup> Section 3(1) of the TA Act.

<sup>390</sup> Section 3(2)(a)(i) of the TA Act.

<sup>391</sup> Section 3(2)(a)(ii) of the TA Act. The term “tax event” as defined in section 1 of the TA Act means an occurrence which affects or may affect the liability of a person to tax.

<sup>392</sup> Section 3(2)(a)(iii) of the TA Act.

<sup>393</sup> Section 3(2)(h) of the TA Act.

<sup>394</sup> The TA Act came into effect on 1 October 2012.

<sup>395</sup> For further commentary, see the *SARS Short Guide to the Tax Administration Act, 2011 (Act No. 28 of 2011)*.

<sup>396</sup> Section 4(2) of the TA Act.

<sup>397</sup> Section 4(3) of the TA Act.

<sup>398</sup> Section 46(1) of the TA Act.

<sup>399</sup> Section 46(3) of the TA Act.

<sup>400</sup> Section 46(1) of the TA Act.

- meet with the Commissioner’s representative and produce for examination any documents relating to the SBFE.

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>401</sup>

## 22. Changes in registered particulars

An SBFE must inform SARS of changes in its registered particulars to ensure that SARS has the most accurate and current information. An SBFE must communicate to SARS any changes in postal, physical, or electronic addresses, representative taxpayer (see **23**) and banking particulars.<sup>402</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>403</sup>

## 23. Representative taxpayer

A trust, an association of persons or an NPC act through its representatives. The representatives, amongst other things, are responsible for the tax compliance and liabilities of an SBFE. The Act defines a representative taxpayer.<sup>404</sup> For purposes of an SBFE the representative taxpayer is a natural person who resides in South Africa and includes the –

- trustee of the income of a trust;
- person in a fiduciary capacity of the income of an association of persons under his or her management, disposition, or control;
- public officer of the income of an NPC; and
- business rescue practitioner of an NPC under business rescue under the Companies Act.

A representative taxpayer under the TA Act means a person who is responsible for paying the tax liability of another person as an agent and, amongst other things, includes a person who is a representative taxpayer under the Act.<sup>405</sup> Every person who becomes or ceases to be a representative taxpayer under the Act, except a public officer of a company, must notify SARS within 21 business days, as the case may, in such form as the Commissioner may prescribe.<sup>406</sup>

Any person who wilfully and without just cause refuses or neglects to appoint a representative taxpayer or notify SARS of the appointment or change of a representative taxpayer is guilty of an offence and on conviction is subject to a fine or imprisonment for a period not exceeding two years.<sup>407</sup>

<sup>401</sup> Sections 234(1)(c)(i), (2)(f) and (2)(h) of the TA Act.

<sup>402</sup> Section 23 of the TA Act.

<sup>403</sup> Section 234(2)(a) of the TA Act.

<sup>404</sup> See complete definition of “representative taxpayer” in section 1(1).

<sup>405</sup> Section 153(1)(a) of the TA Act.

<sup>406</sup> Section 153(2) of the TA Act.

<sup>407</sup> Section 234(2)(b) of the TA Act.

A representative taxpayer is personally liable for tax payable in that capacity if the tax could have been paid to SARS but was not, or the amount in respect of which the tax was chargeable was disposed of.<sup>408</sup> An assessment on a representative taxpayer for any tax is regarded as made on the representative taxpayer only in that capacity.<sup>409</sup>

A taxpayer<sup>410</sup> is not relieved from any liability, responsibility or duty imposed under a tax Act because the taxpayer's representative taxpayer failed to perform those responsibilities or duties, or the representative taxpayer is liable for the tax payable by the taxpayer.<sup>411</sup>

The trustee (see **9.1.1**) or other person entitled to the receipt, management, disposal or control of the income of any trust are the representative taxpayer.<sup>412</sup> Generally, where there is more than one trustee, the practice is for the trustees to nominate a single trustee to carry out all the duties and responsibilities imposed as a representative taxpayer. The other trustees despite this practice remain subject to the same duties, responsibilities, and liabilities of a representative taxpayer.<sup>413</sup>

The representative taxpayer for any association of person may generally be the treasurer, or other person appointed to administer or manage the financial assets and liabilities of the association of persons.

Every company conducting business or having an office in South Africa must, within one month from the commencement of business operations or acquisition of an office appoint a natural person who resides in South Africa as the public officer of the company.<sup>414</sup> The public officer is the representative taxpayer of a company and must be approved by SARS.<sup>415</sup> The representative taxpayer is generally a senior official of the company or another suitable person if no senior official resides in South Africa.<sup>416</sup> The representative taxpayer must be appointed by the company, agent or legal practitioner who has authority to appoint such a representative.<sup>417</sup> A company must keep the office of public officer constantly filled and must at all times maintain a place for the service or delivery of notices.<sup>418</sup> A company must notify SARS of every change of public officer or the place of the service or delivery of notices within 21 business days of the change taking effect.<sup>419</sup> If a public officer is not appointed as required the public officer is the director, company secretary or other officer of the company that SARS designates for that purpose.<sup>420</sup> A public officer is responsible for all acts, matters or things that the public officer's company must do under a tax Act, and in case of default, the public officer is subject to penalties for the company's defaults.<sup>421</sup> If SARS is of the opinion that a person is no longer suitable to represent the company as public officer, SARS may withdraw approval of the person as representative.<sup>422</sup>

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<sup>408</sup> Section 155 of the TA Act.

<sup>409</sup> Section 154(2) of the TA Act.

<sup>410</sup> The term "taxpayer" is defined in section 1(1).

<sup>411</sup> Section 153(3) of the TA Act.

<sup>412</sup> Paragraph (c) of the definition of "representative taxpayer" in section 1(1).

<sup>413</sup> Davis, D. M. & Jooste, R. D. (2023). *Estate Planning* at 6.4. My LexisNexis: Online.

<sup>414</sup> Sections 246(1), (2)(c) and (2)(d) of the TA Act.

<sup>415</sup> Section 246(2)(a) of the TA Act.

<sup>416</sup> Sections 246(2)(a)(i) and (ii) of the TA Act.

<sup>417</sup> Section 246(2)(b) of the TA Act.

<sup>418</sup> Section 249(2)(a) of the TA Act.

<sup>419</sup> Section 249(2)(b) of the TA Act.

<sup>420</sup> Section 246(3) of the TA Act.

<sup>421</sup> Section 246(5) of the TA Act.

<sup>422</sup> Section 246(7) of the TA Act.

If a company has been placed under business rescue under the Companies Act, the business rescue practitioner is the representative taxpayer of such a company.<sup>423</sup> In the event of a company being placed in voluntary or compulsory liquidation, the liquidator or the liquidators appointed are to exercise all the functions and assume all responsibilities of a public officer during the continuance of the liquidation.<sup>424</sup>

The conditions and requirements, which apply to a public officer of a company, are also applicable to the representative taxpayer of any trust or any association of persons.

A person may not be appointed as a public officer if that person is disqualified (see **9.14**) –

- from being authorised as a trustee under section 6 of the Trust Property Control Act;
- from being an officer bearer of a registered NPO under section 25A of the NPO Act; or
- to be a director of an NPC under section 69 of the Companies Act.<sup>425</sup>

## 24. Record-keeping

All SBFEs are required to keep records for five years from the date of the submission of a return.<sup>426</sup> A return<sup>427</sup> includes any form, declaration, document, or other manner of submitting information to SARS that incorporates a self-assessment or is the basis on which an assessment is to be made by SARS.

Although records are generally required to be kept and retained for five years, there are circumstances in which they are required to be retained for longer periods.<sup>428</sup>

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

- Five years from the date of the submission of a return.<sup>429</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>430</sup>
- If an objection or appeal against an assessment or decision is lodged, the records, books of account or documents relevant to the objection or appeal must be kept and retained until the disputed assessment, decision becomes final, or the applicable five-year period has elapsed, whichever is the later.<sup>431</sup>
- A person notified of or is aware of an audit or investigation by SARS must retain the records, books of account or documents relevant to that audit or investigation until it is concluded, or the applicable five-year period has elapsed, whichever is the later.<sup>432</sup>

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<sup>423</sup> Paragraph (a) of the definition of “representative taxpayer” in section 1(1) and section 248(2) of the TA Act.

<sup>424</sup> Section 248(1) of the TA Act.

<sup>425</sup> Section 29(2)(a) read with section 29(3)(a) of the TA Act.

<sup>426</sup> Section 29(3) of the TA Act.

<sup>427</sup> The term “return” is defined in section 1 of the TA Act.

<sup>428</sup> Section 32 of the TA Act.

<sup>429</sup> Section 29(2)(a) read with section 29(3)(a) of the TA Act.

<sup>430</sup> Section 29(2)(b) of the TA Act.

<sup>431</sup> Section 32(b) of the TA Act.

<sup>432</sup> Section 32(a) of the TA Act.

- Indefinitely if a document is relevant for future years of assessments such as the prescribed application form EI 1 and the required supplementary information and documentation, on which the Commissioner based the decision to approve or not to approve an exemption from income tax.

The records, books of account, or documents that must be kept and retained may include anything that contains a written, sound, or pictorial record or other record of information whether in physical or electronic form.

The following are non-exhaustive examples of records, books of account or documents that must be kept and retained:

- Cash books
- Debtors, creditors, and sales ledgers
- Journals
- Fixed asset register
- Bank statements and deposit slips
- Invoices

To ensure the safe retention of records as well as easy and efficient access to records by SARS, especially for inspection or audit purposes during the prescribed retention period, an SBFEE is required to keep and retain its records in their original form, in an orderly fashion and in a safe place.<sup>433</sup>

The electronic form of record-keeping<sup>434</sup> is regulated by the Electronic Record-Keeping Rules.<sup>435</sup> The rules require that electronic records must be kept in their original form,<sup>436</sup> and should within a reasonable time be accessible to, and readable by, SARS. Other requirements deal with the location of the records, the maintenance of system documentation and measures for storage, back-ups, and conversions.

A person who wilfully and without just cause fails or neglects to retain records is guilty of an offence and on conviction is subject to a fine or imprisonment for a period not exceeding two years.<sup>437</sup>

## 25. Income tax returns

The Commissioner annually gives public notice in the *Government Gazette* of the persons that must furnish an income tax return.<sup>438</sup>

The prescribed Income Tax Return for Exempt Organisations (IT 12EI) applicable to SBFEEs must be submitted on an annual basis. It may be obtained from –

- **eFiling;**

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<sup>433</sup> Section 30 of the TA Act.

<sup>434</sup> For further commentary, see the *Electronic Communications Guide*.

<sup>435</sup> See Government Notice 787 in *Government Gazette* 35733 of 1 October 2012.

<sup>436</sup> Section 14 of the Electronic Communications and Transactions Act 25 of 2002 provides that 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>437</sup> Section 234(2)(e) of the TA Act.

<sup>438</sup> Section 66(1).



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

A return must be a full and true return<sup>439</sup> and be signed by the SBFEE's duly authorised representative (see **23**). The person signing the return will be regarded as being cognisant of the statements made in the return.<sup>440</sup>

Non-receipt of an income tax return does not affect the obligation to submit an income tax return.<sup>441</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>442</sup>

## **25.1 Taxpayer reference number**

A taxpayer reference number is allocated on completion of registration for purposes of income tax.<sup>443</sup> The taxpayer reference number must be included when filing a return or any document with SARS.

## **25.2 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.

An appropriate penalty<sup>444</sup> will be imposed by SARS if satisfied that the SBFEE failed to comply with the obligation to submit an income tax return.<sup>445</sup> The appropriate penalty for non-compliance will be imposed according to a fixed amount penalty table.<sup>446</sup>

Income tax returns may be submitted manually through the assistance of a SARS branch office or electronically on **eFiling**.

## **25.3 Year of assessment**

An SBFEE, which is a trust, will have a year of assessment<sup>447</sup> ending on the last day of February. A trust can apply for permission to draw up its financial statements to a different closing date if it would be more convenient for it to do so.<sup>448</sup>

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<sup>439</sup> Section 25(2) of the TA Act.

<sup>440</sup> Section 25(3) of the TA Act.

<sup>441</sup> Section 25(4) of the TA Act.

<sup>442</sup> Section 234(2)(d) of the TA Act.

<sup>443</sup> The term "taxpayer reference number" as defined in section 1 of the TA Act means the number referred to in and allocated under section 24 of that Act.

<sup>444</sup> The terms "administrative non-compliance penalty" and "penalty" are defined in section 208 of the TA Act and means a penalty imposed by SARS in accordance with Chapter 15 of the TA Act or a tax Act other than this Act and excludes an understatement penalty referred to in Chapter 16 of the TA Act.

<sup>445</sup> Section 210 of the TA Act. For commentary, see the *Guide to Understatement Penalties*.

<sup>446</sup> Section 211 of the TA Act.

<sup>447</sup> The term "year of assessment" is defined in section 1(1).

<sup>448</sup> For further commentary, see Interpretation Note 19 "Year of Assessment of Natural Persons and Trusts: Accounts Accepted to a Date other than the Last Day of February".

An SBFE, which is an NPC, or an association of persons established under a constitution or any other written instrument<sup>449</sup> will have a year of assessment ending on the date that coincides with its financial year-end. If the financial year-end is 30 June, its year of assessment will run from 1 July to 30 June of the following year.

## 25.4 Supporting documentation

It is not a requirement for supporting documents to be submitted together with the income tax return (see 25.2). The SBFE will be notified if supporting documentation is required to substantiate any aspect of the income tax return.

An SBFE whose income tax return is supported by any balance sheet, statement of assets and liabilities or account prepared by any other person, may be requested to submit a certificate or statement recording –<sup>450</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.

A person responsible for the SBFE must sign the accounts in a fiduciary capacity (see 9.1) and by the person who prepared them on behalf of the SBFE.

## 25.5 Financial statements

An SBFE, which is an NPC, may be required to be audited or independently reviewed under the Companies Act considering, for example, the category of the company and its public-interest score.<sup>451</sup>

## 26. Objection and appeal

A decision made by a SARS official<sup>452</sup> or a notice to a specific person issued by SARS under a tax Act,<sup>453</sup> excluding a decision given effect to in an assessment or a notice of assessment that is subject to objection and appeal, may in the discretion of a SARS official mentioned below or at the request of the relevant person, be withdrawn or amended by –<sup>454</sup>

- the SARS official;<sup>455</sup>
- a SARS official to whom the SARS official reports;<sup>456</sup> or

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<sup>449</sup> An association of persons is for purposes of income tax regarded as a “company. See paragraph (d) of the definition of “company” in section 1(1).

<sup>450</sup> Section 28 of the TA Act.

<sup>451</sup> Section 30(2) of the Companies Act read with regulations 27, 28 and 29 of the Companies Regulations, 2011.

<sup>452</sup> The term “SARS official” as defined in section 1 of the TA Act means (a) the Commissioner, (b) an employee of SARS, or (c) a person contracted or engaged by SARS, other than an external legal representative, for purposes of the administration of a tax Act and who carries out the provisions of a tax Act under the control, direction or supervision of the Commissioner.

<sup>453</sup> The term “tax Act” as defined in section 1 of the TA Act means the TA Act, or an Act, or portion of Act referred to in section 4 of the South African Revenue Service Act 34 of 1997.

<sup>454</sup> Section 9(1) of the TA Act.

<sup>455</sup> Section 9(1)(a) of the TA Act.

<sup>456</sup> Section 9(1)(b) of the TA Act.

- a senior SARS<sup>457</sup> official.<sup>458</sup>

If all the material facts were known to the SARS official at the time the decision was made, a decision or notice referred to above may not be withdrawn or amended with retrospective effect, after three years from the later of the date of –<sup>459</sup>

- the written notice of that decision;<sup>460</sup> or
- assessment of the notice of assessment giving effect to the decision (if applicable).<sup>461</sup>

A decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act is regarded as made by a SARS official authorised to do so or duly issued by SARS, until proven to the contrary.<sup>462</sup>

Any decision of SARS in the exercise of its discretion under section 30C is subject to objection and appeal.<sup>463</sup> Such a decision may be objected to and appeal against in the same manner as an assessment.<sup>464</sup>

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

An SBFE aggrieved by an assessment<sup>465</sup> may before lodging an objection, request SARS to provide reasons for the assessment to enable the SBFE to formulate an objection.<sup>466</sup> The request, amongst other things, must be made in the prescribed form and manner and delivered to SARS within 30 days<sup>467</sup> from the date of the assessment.

Any SBFE may object to an assessment<sup>468</sup> in accordance with Chapter 9 of the TA Act read with the “rules”<sup>469</sup> as published in the *Government Gazette* within 80<sup>470</sup>-business days<sup>471</sup> after the –<sup>472</sup>

- delivery of the reasons requested of an assessment, if applicable;<sup>473</sup>

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<sup>457</sup> The term “senior SARS official” as defined in section 1 and read with section 6(3) of the TA Act refers to persons exercising the powers and duties required under the TA Act to be exercised by (a) the Commissioner, (b) a SARS official who has specific written authority from the Commissioner, or (c) a SARS official occupying a post designated by the Commissioner in writing for this purpose.

<sup>458</sup> Section 9(1)(c) of the TA Act.

<sup>459</sup> Section 9(2) of the TA Act.

<sup>460</sup> Section 9(2)(a) of the TA Act.

<sup>461</sup> Section 9(2)(b) of the TA Act.

<sup>462</sup> Section 9(3) of the TA Act.

<sup>463</sup> Section 3(4)(b).

<sup>464</sup> Section 104(2)(c) of the TA Act.

<sup>465</sup> The term “assessment” as defined in Rule 1 includes, for purposes of the rules, a decision referred to in section 104(2) of the TA Act.

<sup>466</sup> Rule 6 deals with reasons for an assessment.

<sup>467</sup> The term “day” in Rule 1 means a “business day” as defined in section 1 of the TA Act.

<sup>468</sup> For further commentary, see the Interpretation Note 15 “Exercise of Discretion in case of Late Objection or Appeal”.

<sup>469</sup> The rules for objections and appeals are formulated under section 103 of the TA Act.

<sup>470</sup> Rule 7(1) was amended from 30 to 80 days. The amendment is effective from 10 March 2023.

<sup>471</sup> The term “business day” is defined in section 1 of the TA Act.

<sup>472</sup> Rule 7 deals with objections.

<sup>473</sup> Rule 7(1)(a) read with Rule 6.

- notice issue by SARS notifying the SBFE that the reasons requested to enable it to formulate an objection have been provided;<sup>474</sup> or
- date of assessment.

The objection must be made on the prescribed form and set out the grounds of the objection in detail including –<sup>475</sup>

- specifying the part or specific amount of the disputed assessment objected to;
- specifying which of the grounds of assessment<sup>476</sup> are disputed; and
- submitting the documents required to substantiate the grounds of objection that the SBFE has not previously delivered to SARS for purposes of the disputed assessment.

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 SBFE is dissatisfied with SARS's decision, it may appeal against the disallowance. Such appeal must be in writing and lodged with SARS within the prescribed period.<sup>477</sup>

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<sup>474</sup> Rule 7(1)(a) read with Rule 6(4).

<sup>475</sup> Rule 7(2).

<sup>476</sup> The term “grounds of assessment” as defined in Rule 1, for purposes of the rules, include, amongst other things, any grounds for a decision referred to in section 104 (2) of the TA Act; and reasons for assessment provided by SARS contemplated in Rule 6(5).

<sup>477</sup> Rule 10.

## Annexure A – Section 10(1)(cQ)

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

- (cQ) the receipts and accruals of any small business funding entity approved by the Commissioner in terms of section 30C, to the extent that the receipts and accruals are derived—
  - (i) otherwise than from any business undertaking or trading activity; or
  - (ii) from any business undertaking or trading activity—
    - (aa) if the undertaking or activity—
      - (A) is integral and directly related to the sole or principal object of that small business funding entity;
      - (B) is carried out or conducted on a basis substantially the whole of which is directed towards the recovery of cost; and
      - (C) does not result in unfair competition in relation to taxable entities;
    - (bb) if the undertaking or activity is of an occasional nature and undertaken substantially with assistance on a voluntary basis without compensation;
    - (cc) if the undertaking or activity is approved by the Minister by notice in the *Gazette*, having regard to—
      - (A) the scope and benevolent nature of the undertaking or activity;
      - (B) the direct connection and interrelationship of the undertaking or activity with the sole or principal object of the small business funding entity;
      - (C) the profitability of the undertaking or activity; and
      - (D) the level of economic distortion that may be caused by the tax exempt status of the small business funding entity carrying out the undertaking or activity; or
    - (dd) other than an undertaking or activity in respect of which item (aa), (bb) or (cc) applies and do not exceed the greater of—
      - (A) 5 per cent of the total receipts and accruals of that small business funding entity during the relevant year of assessment; or
      - (B) R200 000;

## Annexure B – Section 30C

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

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

- (ix) the small business funding entity may not pay to any employee, office bearer, member or other person any remuneration, as defined in the Fourth Schedule, which is excessive, having regard to what is generally considered reasonable in the sector and in relation to the service rendered;
  - (x) the small business funding entity must as part of its dissolution transfer its assets to—
    - (aa) another small business funding entity approved by the Commissioner in terms of this section;
    - (bb) a public benefit organisation contemplated in paragraph (a)(i) of the definition of public benefit organisation in section 30(1) that is approved by the Commissioner as a public benefit organisation in terms of that section;
    - (cc) an institution, board or body which is exempt from tax under section 10(1)(cA)(i); or
    - (dd) the government of the Republic in the national, provincial or local sphere;
  - (xi) the persons contemplated in paragraph (d)(i) will submit any amendment of the constitution or written instrument of the small business funding entity to the Commissioner within 30 days of its amendment;
  - (xii) the small business funding entity will comply with such reporting requirements as may be determined by the Commissioner from time to time; and
  - (xiii) the small business funding entity is not knowingly and will not knowingly become a party to, and does not knowingly and will not knowingly permit itself to be used as part of, an impermissible avoidance arrangement contemplated in Part IIA of Chapter III, or a transaction, operation or scheme contemplated in section 103(5).
- (e) the Commissioner is satisfied that the entity does not have a person acting in a fiduciary capacity, who is disqualified in terms of section 6 of the Trust Property Control Act, 1988 (Act No. 57 of 1988), section 25A of the Nonprofit Organisations Act, 1997 (Act No. 71 of 1997), or section 69 of the Companies Act.
- (2) Where the Commissioner is—
- (a) satisfied that any small business funding entity approved in terms of subsection (1) has during any year of assessment in any material respect; or
  - (b) during any year of assessment satisfied that any small business funding entity approved in terms of subsection (1) has on a continuous or repetitive basis,

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

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

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

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

(6) If a small business funding entity fails to transfer, or to take reasonable steps to transfer, its assets as contemplated in subsection (4) or (5), an amount equal to the market value of those assets which have not been transferred less an amount equal to the *bona fide* liabilities of that small business funding entity must for the purposes of this Act be deemed to be an amount of taxable income which accrued to that small business funding entity during the year of assessment in which the withdrawal of approval in terms of subsection (4) or the winding-up or liquidation contemplated in subsection (5) took place.

(7) Any person who is in a fiduciary capacity responsible for the management of any small business funding entity and who intentionally fails to comply with any provision of this section or of the constitution, or other written instrument under which that small business funding entity is established to the extent that it relates to the provisions of this section, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 24 months.

(8) A person may not act in a fiduciary capacity if that person is disqualified in terms of section 6 of the Trust Property Control Act, 1988 (Act No. 57 of 1988), section 25A of the Nonprofit Organisations Act, 1997 (Act No. 71 of 1997), or section 69 of the Companies Act.

(9) A person who fails to comply with the provisions of subsection (8) shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding 24 months.



## Annexure C – Calculation of taxable income

The following example provides a step-by-step guide to calculating the taxable income of an SBFE.

### Example 12 – Determination of taxable income of an SBFE

#### Facts:

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

During the 2023 year of assessment, the SBFE derived income, amongst other things, from the following activities:

- An investment made of R300 000 of its surplus funds from which interest income of R30 000 was derived.<sup>478</sup>
- The SBFE held a golf day to raise funds, which it advanced to SMMEs. This fundraising activity yielded R50 000.

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

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

The following information is reflected in the financial statements of the SBFE for the year of assessment ending 28 February 2023:

| <b>Receipts and accruals</b>   | R                       |
|--|-------------------------|
| Donations  | 1 000 000               |
| Grants   | 500 000                 |
| Rental income  | 300 000                 |
| Interest on investment of surplus funds                                | 30 000                  |
| Proceeds from fundraising  | 50 000                  |
| Royalties – distribution from trust                                    | <u>30 000</u>           |
| <b>Total receipts and accruals</b>                                     | <b><u>1 910 000</u></b> |
| <b>Expenditure</b>   | R                       |
| Funding provided   | 300 000                 |
| Rental expenses (rates, repairs, garden services) (direct expenditure) | 50 000                  |
| Salaries (general (indirect) expenditure)                              | 60 000                  |
| Accounting fees (general (indirect) expenditure)                       | 10 000                  |
| Fundraising expenses   | <u>12 000</u>           |
| <b>Total expenditure</b>   | <b><u>432 000</u></b>   |

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

<sup>478</sup> To comply with the distribution requirement the SBFE will be required to distribute to SMMEs at least R7 500 within but not later than 28 February 2024 year of assessment.

*Result:*

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

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

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

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

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

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

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

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

The basic exemption is limited to the greater of –

- 5% of total receipts and accruals of R1 980 000<sup>479</sup> = R99 000; or
- R200 000

Basic exemption is R200 000

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

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

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

**Application of formula to rental income**

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

**Application of formula to royalty income**

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

<sup>479</sup> Total receipts and accruals = 1 600 000 + 330 000 + 50 000.

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

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

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

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

Expenditure incurred in the production of taxable total receipts and accruals from trading activities must be apportioned between the “exempt” and “taxable” portions using the following formula:<sup>480</sup>

Total receipts and accruals subject to tax / Total receipts and accruals from trading activity × Direct expenditure

**Application of formula to rental income**

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

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

Direct deductible expenditure attributable to “taxable” portion of rental income = R19 697

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

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

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

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

Specific source of receipts and accruals / Total receipts and accruals × General expenditure

<sup>480</sup> Other methods of apportionment will be accepted if reasonable and appropriate to the facts and circumstances.

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

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

**Application of formula (see Step 8) to rental income**

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

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

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

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

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

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

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

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

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

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

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

**Step 13 – Calculate income tax payable**

Taxable income R105 832 at 27% (see **15**)

|                           |                |
|---------------------------|----------------|
| <b>Income tax payable</b> | <b>R28 575</b> |
|---------------------------|----------------|