

DRAFT INTERPRETATION NOTE

DATE:

ACT : INCOME TAX ACT NO. 58 OF 1962
SECTION : SECTION 30(4)
SUBJECT : INCOME TAX: PUBLIC BENEFIT ORGANISATIONS: WRITTEN UNDERTAKING FURNISHED TO THE COMMISSIONER CONFIRMING COMPLIANCE WITH THE PRESCRIBED REQUIREMENTS

Preamble

In this Note unless the context indicates otherwise –

- **“amendment”** means an addition or alteration to the founding document;
- **“fiduciary”** means a person who holds a position of trust or responsibility including decision-making powers relating to the affairs of an organisation;
- **“founding document”** means the constitution, will or other written instrument under which an organisation is established and governed;
- **“organisation”** means an entity that has applied to the TEU for approval as a PBO;
- **“PBA”** means any public benefit activity listed in Part I of the Ninth Schedule;
- **“PBO”** means a “public benefit organisation” as defined in section 30(1);
- **“prescribed requirements”** means the formal conditions and requirements set out in section 30(3)(b);
- **“section”** means a section of the Act;
- **“TEU”** means the Tax Exemption Unit, a dedicated office within SARS dealing with all applications for approval or exemption from income tax on behalf of the Commissioner;
- **“the Act”** means the Income Tax Act No. 58 of 1962;
- **“written instrument”** means the founding document; and
- any word or expression bears the meaning ascribed to it in the Act.

1. Purpose

This Note provides guidance on the interpretation and application of section 30(4), which provides for a written undertaking to be submitted under certain circumstances before an organisation can be approved as a PBO by the TEU.

2. Background

Section 30(3)(b) prescribes specific requirements that have to be included in a founding document before an organisation can be approved as a PBO.

The founding document of an organisation may not comply with the requirements of section 30(3)(b) at the time the application is submitted to the TEU for approval. In these circumstances section 30(4) makes provision for the founding document to be deemed to comply with the requirements of section 30(3)(b), if the person responsible in a fiduciary capacity for the funds and assets of the organisation furnishes the Commissioner with a written undertaking that the organisation will be administered in compliance with the prescribed requirements.

In those circumstances in which it is possible to amend the founding document, the written undertaking is an interim measure, and the relevant requirements must subsequently be formally incorporated into the founding document within a specific timeframe.

3. The law

Section 30(4)

(4) Where the constitution, will or other written instrument does not comply with the provisions of subsection (3)(b), it shall be deemed to so comply

(a)

(b)

if the person responsible in a fiduciary capacity for the funds and assets of such organisation furnishes the Commissioner with a written undertaking that such organisation will be administered in compliance with the provisions of this section.

4. Application of the law

4.1 Requirements under section 30(3)(b)

In order to be approved as a PBO the following specific requirements must be included in the founding document:

- At least three persons, who are not connected persons in relation to each other, must accept fiduciary responsibility for the organisation and no single person is permitted to directly or indirectly control the decision-making powers of the organisation.
- Funds must be used solely for the object for which the organisation is established and no funds may be directly or indirectly distributed to any person, unless this occurs in the course of undertaking an approved PBA.
- On dissolution, the remaining assets must be transferred to one or more of the following organisations that are required to use the assets solely for the purpose of carrying on approved PBAs:
 - A PBO which has been approved under section 30(3).
 - An institution, board or body exempt from income tax under section 10(1)(cA)(i) that has as its sole or principal object the carrying on of any PBA.
 - The government of the Republic in the national, provincial or local sphere.
- A branch of a foreign exempt organisation must on termination of its activities in the Republic transfer the remaining assets to one or more of the

aforementioned entities, if more than 15% of the receipts and accruals of the branch is derived from a source within the Republic, during a period of three years preceding the termination of its activities.

- No donation may be accepted that may be revoked by the donor or when conditions are imposed that will entitle the donor or any connected person to obtain a direct or indirect benefit from that donation, or when there is any misrepresentation with regard to the tax deductibility of that donation under section 18A.
- A copy of all amendments to the founding document must be submitted to the Commissioner.

4.2 Written undertaking under section 30(4)

The term “written undertaking” is not defined in the Act. In the context of section 30 the written undertaking is regarded as a promise or commitment made by the person accepting fiduciary responsibility for the funds and assets of the organisation that, although the founding document does not meet the prescribed requirements necessary to obtain PBO approval, the organisation will be administered in compliance with these prescribed requirements.

The written undertaking is binding on the organisation and non-compliance with its terms will result in the same penalties and actions as if the prescribed requirements had been contained in the founding document (refer to **5**).

A specimen written undertaking (form EI 2) can be found on the SARS website by selecting “Find a Form” under Useful Tools. The written undertaking must be submitted together with the application for approval as a PBO under section 30(3), unless the founding document meets the prescribed requirements of section 30(3)(b). A sample copy of form EI 2 has been included in **Annexure A** for ease of reference.

4.3 Person responsible in a fiduciary capacity

The written undertaking must be given by the person responsible in a fiduciary capacity for the funds and assets of the organisation. Section 30(3)(b)(i), however, requires the organisation to have at least three persons who are not connected persons in relation to each other to accept fiduciary responsibility for the organisation. SARS therefore requires that in addition to the person responsible in a fiduciary capacity for the funds and assets, any other two of the unconnected persons must sign the written undertaking.

4.4 Other instances in which the founding document may not comply

4.4.1 Branches of exempt foreign organisations

A branch established in the Republic by a company, association or trust that is incorporated, formed or established outside the Republic and which is exempt from income tax in its country of origin, may fall within the ambit of the definition of a PBO and may qualify for approval as a PBO provided it complies with the prescribed requirements of section 30(3)(b).

The branch of a foreign exempt organisation that does not have a separate founding document relating to its activities in the Republic, but operates and is governed in accordance with the founding document of the foreign organisation, which cannot be amended to incorporate the prescribed requirements of section 30(3)(b), may submit a written undertaking by the person responsible in a fiduciary capacity for the funds

and assets, that the branch in the Republic will be administered in compliance with the prescribed requirements of section 30(3)(b).

A specimen written undertaking for a branch of a foreign exempt organisation (form EI 2B) is available on the SARS website and must be submitted together with the application for approval as a PBO under section 30(3). A sample copy of form EI 2B has been included in **Annexure B** for ease of reference.

4.4.2 Testamentary trusts

A testamentary trust is created under the provisions of a will and its trustees can only apply for its approval as a PBO once it comes into existence after the death of the testator and commences to carry on approved PBAs.

The provisions of a will cannot be amended after the death of the testator and since the will may not include the prescribed requirements of section 30(3)(b) at the time when the trust comes into existence, the person responsible in a fiduciary capacity for the funds and assets of the testamentary trust, may submit a written undertaking, in order for the testamentary trust to qualify for approval as a PBO under section 30(3).

A testator may appoint, as a fiduciary of the testamentary trust, a trustee or manager of a financial institution or of a trust and asset management company as executor or trustee to administer the estate. The trustee or trust administrator may not have the authority in terms of the will to appoint additional trustees, in order to comply with the requirement of having three unconnected persons. Section 30(3)(b)(i) was amended by section 53(1)(b) of the Taxation Laws Amendment Act No. 7 of 2010 to provide that from the commencement of years of assessment ending on or after 1 January 2011 a testamentary trust is not required to comply with the requirement of having three unconnected persons. The written undertaking need therefore only be signed by the person accepting fiduciary responsibility for the funds and assets of the testamentary trust.

The written undertaking is binding on the person accepting fiduciary responsibility for the funds and assets of the testamentary trust and non-compliance with section 30(3)(b) will result in the same penalties and actions as if the prescribed requirements had been contained in the will (refer to **5**).

4.5 Interim measure

The written undertaking is an interim measure to enable an organisation to obtain approval as a PBO under section 30(3) despite its founding document not complying with the prescribed requirements of section 30(3)(b). Although an organisation may have submitted the required written undertaking and been granted PBO approval by the TEU, it must still incorporate the relevant requirements of section 30(3)(b) in its founding document.

SARS will require the organisation to amend its founding document within a reasonable period. A reasonable period will be regarded by SARS as 12 months from the date of the letter issued by the TEU confirming PBO approval or whenever any other amendment is effected to the founding document, whichever date occurs first.

Example – Amendment of the memorandum of incorporation to include the prescribed requirements of section 30(3)(b)*Facts:*

ABC, a non-profit company, has been approved by the TEU as a PBO under section 30(3) and the three unconnected directors have signed a written undertaking, that ABC will be administered in compliance with the requirements of section 30(3)(b).

The letter confirming approval of ABC as a PBO under section 30(3) was issued by the TEU on 1 July 2013. The approval was granted subject to the condition that the memorandum of incorporation be amended to include the prescribed requirements of section 30(3)(b) within a period of 12 months from the date of the letter or whenever an amendment is effected to the memorandum of incorporation, whichever date occurs first.

Result:

ABC will be required to formally amend the memorandum of incorporation to include the prescribed requirements of section 30(3)(b) by no later than 1 July 2014.

However, should the company during the 12-month period from 1 July 2013 to 1 July 2014, make any other amendment to the memorandum of incorporation, it must include the prescribed requirements of section 30(3)(b) at the same time.

5. Non-compliance [section 30(5), 30(6), 30(7) and 30(11)]

The TEU may, after giving due notice, withdraw the approval of a PBO with effect from the beginning of the relevant year of assessment if the PBO has in any year of assessment in any material respect or on a continuous or repetitive manner failed to comply with the prescribed requirements.

Once the approval is withdrawn the organisation must transfer or take reasonable steps to transfer its remaining assets within six months from the date the approval is withdrawn (or any other period allowed by the TEU), to –

- another approved PBO;
- an institution, board or body that is exempt from income tax under section 10(1)(cA)(i) which has as its sole or principal object the carrying on of any PBA; or
- the government of the Republic in the national, provincial or local sphere.

Failure to transfer the remaining assets will result in an amount equal to the market value of the assets not transferred, less an amount equal to the *bona fide* liabilities of the PBO (net asset value), being deemed to be an amount of taxable income accruing to the PBO during the year of assessment in which the PBO approval is withdrawn.

Under section 30(11) any person in a fiduciary capacity responsible for the management or control of the income and assets of an approved PBO, who intentionally fails to comply with the prescribed requirements or the founding document under which the organisation is established to the extent that it relates to

the provisions of section 30, will be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years.

6. Conclusion

The TEU may grant an organisation approval as a PBO under section 30(3) if its founding document does not meet the prescribed requirements of section 30(3)(b) provided a written undertaking that the organisation will be administered in compliance with section 30(3)(b) is submitted by the person responsible in a fiduciary capacity for the funds and assets of the organisation.

Legal and Policy Division
SOUTH AFRICAN REVENUE SERVICE

Annexure A – Form EI 2 “Income Tax – Exemption – Public Benefit Organisation – Written Undertaking”



INCOME TAX - EXEMPTION

EI 2

Public Benefit Organisation - Written Undertaking
Furnished in terms of section 30(4) of the Income Tax Act No. 58 of 1962

Enquiries should be addressed to SARS
0800 00 SARS (7277)
www.sars.gov.za

Always quote this reference number when contacting SARS
Income tax reference number (if available)
Exemption reference number (if available)

Name of Public Benefit Organisation
[Grid for name entry]

We, the undersigned persons accepting fiduciary responsibility for the public benefit organisation, hereby undertake to comply with the following requirements:
1 The sole object of the public benefit organisation is to carry on one or more public benefit activity as defined in section 30(1) of the Act, in a non-profit manner and with an altruistic or philanthropic intent.
2 No activity will directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation otherwise than by way of reasonable remuneration.
3 At least three persons who accept fiduciary responsibility for the public benefit organisation, will not be connected persons in relation to each other, and no single person directly or indirectly controls the decision making powers relating to such organisation: Provided that these provisions shall not apply in respect of any trust established in terms of a will of any person who died on or before 31 December 2003.
4 No funds will be distributed to any person (other than in the course of undertaking any public benefit activity).
5 The funds of the public benefit organisation will be used solely for the objects for which it was established.
6 On dissolution of the public benefit organisation, the remaining assets must be transferred to -
(aa) A public benefit organisation, which has been approved in terms of section 30 of the Act.
(bb) Any institution, board or body which is exempt from the payment of income tax in terms of section 10(1)(cA)(i) of the Act, which has as its sole or principal object the carrying on of any public benefit activity; or
(cc) Any department of state or administration in the national or provincial or local sphere of government of the Republic, contemplated in section 10(1)(a) or (b) of the Act.
7 No donation will be accepted which is revocable at the instance of the donor for reasons other than a material failure to conform to the designated purposes and conditions of such donation, including any misrepresentation with regard to the tax deductibility thereof in terms of section 18A: Provided that a donor (other than a donor which is an approved public benefit organisation or an institution, board or body which is exempt from tax in terms of section 10(1)(cA)(i), which has as its sole or principal object the carrying on of any public benefit activity) may not impose any conditions which could enable such donor or any connected person in relation to such donor to derive some direct or indirect benefit from the application of such donation.
8 A copy of all amendments to the constitution, trust deed, memorandum and articles of association, or other written instrument under which the public benefit organisation was established, will be submitted to the Commissioner for the South African Revenue Service.
9 No remuneration will be paid to any employee, office bearer, member or other person which is excessive, having regard to what is generally considered reasonable in the sector and in relation to the service rendered and has not and will not economically benefit any person in a manner which is not consistent with its objects.

- 10 The public benefit organisation will not be a party to, or does not knowingly permit, or has not knowingly permitted, itself to be used as part of any transaction, operation or scheme of which the sole or main purpose is the reduction, postponement or avoidance of liability for any tax, duty or levy which, but for such transaction, operation or scheme, would have been or would have become payable by any person under this Act or any other Act administered by the Commissioner.
- 11 No resources will be used, directly or indirectly, to support advance or oppose any political party.
- 12 The public benefit organisation will submit the required returns for income tax together with the relevant supporting documents.
- 13 In the case of any public benefit organisation which provides funds or assets to any association of persons contemplated in paragraph (b)(iii) of the definition of "public benefit activity", reasonable steps will be taken to ensure that the funds are utilised for the purpose for which it has been provided.
- 14 Where the public benefit organisation has been approved in terms of section 18A(1)(b)(i) of the Act, 75% of the funds received by the organisation by way of donations which qualify for a deduction, will be distributed (or an obligation will be incurred to so distribute) within twelve months from the financial year end during which such donations were received.

Signed at this day of 20

<input type="text"/> Full name	<input type="text"/> Signature	<input type="text"/> Capacity
<input type="text"/> Full name	<input type="text"/> Signature	<input type="text"/> Capacity
<input type="text"/> Full name	<input type="text"/> Signature	<input type="text"/> Capacity

Annexure B – Form EI 2 B “Income Tax – Exemption – Foreign Branch approved as a Public Benefit Organisation – Written Undertaking”



INCOME TAX - EXEMPTION

EI 2 B

Foreign Branch approved as a Public Benefit Organisation
Written Undertaking furnished in terms of section 30(4) of the Income Tax Act No. 58 of 1962 (the Act).

The persons accepting fiduciary responsibility for the funds and assets of the South African Branch of (name of foreign charity) a charitable organisation formed, established or incorporated in terms of the laws of (name of foreign country) which is exempt from tax on income in that country, issue this undertaking to administer the South African Branch in compliance with the provisions of section 30(3) of the South African Income Tax Act, 1962 (the Act).

- We, the undersigned persons accepting fiduciary responsibility for the branch, hereby undertake to comply with the following requirements:
1. The sole or principal object of the branch is to carry on one or more public benefit activity as defined in section 30(1) of the Act, in a non-profit manner and with an altruistic or philanthropic intent.
 2. No activity will directly or indirectly promote the economic self-interest of any fiduciary or employee of the branch otherwise than by way of reasonable remuneration.
 3. At least 85% of such public benefit activity/activities conducted by the South African Branch, measured either in cost or time spent, are carried out for the benefit of persons in the Republic of South Africa. Provided that cost incurred for the benefit of persons outside the Republic shall be disregarded to the extent of donations received by that organisation from persons who are not resident and receipts and accruals derived directly or indirectly therefrom which donations, receipts and accruals have not previously been taken into account for purposes of this provision.
 4. At least three persons, who accept fiduciary responsibility for the branch, will not be connected persons in relation to each other, and no single person directly or indirectly controls the decision making powers relating to such branch.
 5. No funds will be directly or indirectly distributed to any person (other than in the course of undertaking any public benefit activity).
 6. The funds of the branch will be utilised solely for the objects for which the branch was established.
 7. On termination of the activities of the branch in the Republic of South Africa, the remaining assets of the South African branch will be transferred to -
 - any public benefit organisation, which has been approved in terms of section 30 of the Act;
 - any similar institution, board or body which is exempt from the payment of income tax in terms of section 10(1)(cA)(i) of the Act, which has as its sole or principal object the carrying on of any public benefit activity;
 - any department of state or administration in the national or provincial or local sphere of government of the Republic of South Africa, contemplated in section 10(1)(a) or (b) of the Act;
 - If more than 15% of the receipts and accruals attributable to that branch during the period of three years preceding that termination are derived from a source within South Africa.
 8. The branch will inform the Commissioner should the off-shore charity no longer qualify for exemption from tax on income in terms of the laws of the country where it is established.
 9. No remuneration will be paid by the branch to any employee, office bearer, member or other person which is excessive, having regard to what is generally considered reasonable in the sector and in relation to the service rendered and has not and will not economically benefit any person in a manner which is not consistent with its objects.
 10. Prohibited from accepting any donation which is revocable at the instance of the donor or for reasons other than a material failure to conform to the designated purposes and conditions of such donation. Provided that a donor (other than a donor which is an approved public benefit organisation or an institution board or body which is exempt from tax in terms of section 10(1)(cA)(i), which has as its sole or principal object the carrying on of any public benefit activity may not impose conditions which could enable such donor or any connected persons in relation to such donor to derive some direct or indirect benefit from the application of such donation.
 11. In the case where the branch provides funds or assets to any association of persons contemplated in paragraph 10(iii) of Part 1 of the Ninth Schedule, of the Act reasonable steps will be taken to ensure that the funds are utilised for the purpose for which they have been provided.
 12. The branch will not be a party or be used as part of any transaction operation or scheme of which the sole or main purpose is or was the reduction, postponement or avoidance of liability for any tax, duty or levy.
 13. Submit the required income tax returns.
 14. No section 18A receipts will be issued to donors.

Declaration

Signed at on this day of 20

Full Name(s)	Signature(s)	Capacity
<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>