

DRAFT INTERPRETATION NOTE

DATE:

ACT : INCOME TAX ACT NO. 58 OF 1962
SECTION : SECTION 30(1), SECTION 30(3)(f) AND PUBLIC BENEFIT ACTIVITY 10(iii) OF PART I OF THE NINTH SCHEDULE
SUBJECT : PUBLIC BENEFIT ORGANISATIONS: THE PROVISION OF FUNDS, ASSETS OR OTHER RESOURCES TO ASSOCIATIONS OF PERSONS CONTEMPLATED IN PUBLIC BENEFIT ACTIVITY 10(iii)

Preamble

In this Note unless the context indicates otherwise –

- “**founding document**” means the constitution, will or other written instrument under which an organisation is established and governed;
- “**Ninth Schedule**” means the Ninth Schedule to the Act;
- “**Part I and “Part II**” mean Part I and Part II of the Ninth Schedule;
- “**PBA**” means a public benefit activity listed in Part I;
- “**PBO**” means a “public benefit organisation” as defined in section 30(1) and approved under section 30(3);
- “**section**” means a section of the Act;
- “**the Act**” means the Income Tax Act No. 58 of 1962; and
- any other word or expression bears the meaning ascribed to it in the Act.

1. Purpose

This Note provides guidance on –

- the provision of funds, assets or other resources to an association of persons;
- the monitoring requirement imposed under section 30(3)(f) on a PBO providing funds, assets or other resources to an association of persons contemplated in PBA 10(iii); and
- the interpretation of “association of persons” contemplated in PBA 10(iii).

2. Background

Before 2001 tax-exempt organisations were allowed to make funds available only to organisations providing residential accommodation to retired persons, religious, charitable and educational institutions of a public character that were formally constituted and exempt from income tax.¹

¹ Under the repealed section 10(1)(cF) and section 10(1)(f).

This restricted exemption resulted in many informal community projects not qualifying to benefit from such funding.²

In order to address the exclusion of informal community projects from receiving funding, PBA 10(iii) was included in the Ninth Schedule.³ It provides that funds, assets or other resources may be provided to an association of persons carrying on one or more PBA contemplated in Part I in South Africa for the benefit of the general public.

Section 30(1) and PBA 10(iii) both refer to “association of persons” which has resulted in uncertainty in the interpretation and application of the requirements that must be met by an association of persons contemplated in PBA 10(iii).

3. The law

Sections 30(1), 30(3)(f) and PBA 10 are quoted in the **Annexure**.

4. Application of the law

4.1 Provision of funds, assets or other resources

A PBO can either carry on PBAs itself or provide funds, assets or other resources to any –⁴

- PBO;
- institution, board or body contemplated in section 10(1)(cA)(i) which conducts one or more PBA;
- association of persons (see **4.3**) carrying on one or more PBA; or
- department of state or administration in the national, provincial or local sphere of government contemplated in section 10(1)(a).

A PBO that provides funds, assets or other resources is generally referred to as a “conduit PBO”.

The conduit PBO must carry on the PBA –

- in a non-profit manner with an altruistic or philanthropic intent;⁵ and
- without directly or indirectly promoting the economic self-interest of any fiduciary or employee of the PBO otherwise than by reasonable remuneration.⁶

² M M Katz *et al* “Community-based and Informal Organisations (CBOs)” (1999) *Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa* at 12.

³ Section 41 of the Taxation Laws Amendment Act No. 30 of 2002.

⁴ PBA 10.

⁵ Paragraph (b)(i) of the definition of “PBO”.

⁶ Paragraph (b)(ii) of the definition of “PBO”.

Each of the PBAs carried on by the PBO must be for the benefit of, or be widely accessible to, the general public at large, including any sector of the general public, other than small and exclusive groups.⁷

A conduit PBO must in addition to the above also comply with the monitoring requirement of section 30(3)(f) as discussed below.

Example 1 – Conduit PBO

Facts:

A PBO has committed its support to a group of unemployed women in the local rural community who have identified an urgent need for daily day care and basic early childhood development services for pre-school children who are left unattended. The PBO will donate monthly food supplies as well as basic stationery and equipment such as tables, chairs and mattresses to the group of women.

Result:

The PBO is a conduit PBO that provides funds, assets or other resources to an association of persons contemplated in PBA 10(iii) which in this case is the group of unemployed women, provided the PBO complies with section 30(3)(f).

4.2 Monitoring requirement

Section 30(3)(f) requires any PBO that provides funds to an association of persons contemplated in PBA 10(iii) to take reasonable steps to ensure that the funds are used for the purpose for which they were provided.

It is difficult for SARS to monitor compliance and to ensure that the funds, assets or other resources received by an association of persons (see **4.3**) from a conduit PBO are used for the purpose of carrying on PBAs because the association of persons is not approved as a PBO and does not have to comply with reporting requirements such as the keeping of the necessary books of account and records as well as the submission of annual income tax returns.

The responsibility has therefore been placed on the conduit PBO that provides funds, assets or other resources to associations of persons to satisfy the Commissioner when requested to do so⁸ that reasonable steps have been taken to ensure that the funds, assets and other resources have been used to carry on a PBA in South Africa. The funds, assets or other resources may not be used to promote the economic self-interest of any individual person.

The words “reasonable steps” are not defined in the Act but their ordinary meaning is as follows:⁹

- “Reasonable” is “*fair and sensible, as much as is appropriate or fair; moderate*”.
- “Steps” are “*a measure or action taken to deal with or achieve something*”.

⁷ Paragraph (c)(i) of the definition of “PBO”.

⁸ Section 30(10).

⁹ M Wait, S Hawker and C Soanes *Oxford Dictionary, Thesaurus, and Wordpower Guide* (2001) Oxford University Press.

The measures, steps or action taken by a conduit PBO will vary depending on the circumstances and facts relating to a particular case. Each case will therefore be considered and evaluated on its own merits.

Example 2 – Monitoring compliance

The following are examples of what may be regarded as being reasonable steps taken by a conduit PBO to monitor compliance:

- Facilitate workshops or brainstorming sessions to help develop a business plan, timeframe and cost analysis.
- Implement relevant monitoring and evaluation tools to track challenges and outcomes.
- Regular on-site visits at agreed specific phases during the implementation of PBAs carried on by the association of persons.

Failure to take reasonable steps to ensure that the funds, assets or other resources are used for the purpose for which they were provided may result in the Commissioner withdrawing the approval of the conduit PBO after notice is given. The approval may be withdrawn from the beginning of the relevant year of assessment during which the non-compliance with section 30(3)(f) occurred unless the conduit PBO has taken corrective steps within a period specified in the notice of withdrawal.¹⁰

4.3 Association of persons

The term “association of persons” referred to in section 30(1) and PBA 10(iii) is not defined in the Act. *LAWSA*¹¹ states that an “association” is founded on a basis of mutual agreement when individuals have a serious intention to associate and agree on essential characteristics and objectives which are normally set out in a constitution.

The “association of persons” contemplated in the definition of PBO¹² (see the **Annexure**) refers to a formal association of persons established by adopting a legal founding document and which may qualify for approval as a PBO.

By contrast, an “association of persons” contemplated in PBA 10(iii) is a voluntary informal association or group of persons which carries on one or more PBAs in South Africa. Such an association or group of individuals will not qualify for approval as a PBO because it does not have a founding document.

The “association of persons” referred to in the definition of a PBO and an “association of persons” referred to in PBA 10(iii) are listed separately in PBA 10 as beneficiaries that may benefit from the funds, assets or other resources provided by a conduit PBO. The separate identification of a PBO and an association of persons in PBA 10 means that the respective associations of persons differ, the former being a formally approved PBO and the latter an informal voluntary association of persons.

¹⁰ Section 30(5).

¹¹ *J A v S d’Oliveira, D W Butler, G J Pienaar et al Associations/Nature and Formation/Formation* Volume 2, Third Edition Volume *LAWSA* [online] (My LexisNexis: 28 February 2015) in paragraph 155.

¹² Paragraph (a)(i) of the definition of “PBO” in section 30(1).

An association of persons contemplated in PBA 10(iii) is required to carry on one or more PBAs in South Africa, other than the provision of funds, assets or other resources under paragraph 10 of Part I.

The term “carrying on” in the present context means that the association of persons must itself conduct and use its funds, assets or other resources received from a conduit PBO to carry on PBAs in South Africa.

An association of persons may not pass on any of its funds, assets or other resources received from a conduit PBO to any other organisation.

Example 3 – Association of persons

The following are examples of associations of persons contemplated in PBA 10(iii):

- A rural community in a remote village does not have running water. The leaders in the community are committed to embarking on a project to provide their community members with running water. A PBO has undertaken to provide assistance by overseeing the project at no cost and also to provide funds for the cost of the installation of pipes and a water pump accessible to all the members of the community. The community leaders are regarded as the “association of persons” contemplated in PBA 10(iii), who may be regarded as carrying on PBA 1(p).
- A group of women in a remote rural community have formed an informal association to provide home-based care to terminally-ill members in their community. The informal association does not have a constitution and can therefore not be approved as a PBO. A PBO has undertaken to provide the informal association with the relevant training, supplying nutritional food parcels as well as donating a vehicle to enable women to reach remote patients in need of care. The informal association of women is regarded as the “association of persons” contemplated in PBA 10(iii), who may be regarded as carrying on PBA 2(a).

5. Section 18A

Section 18A provides for a deduction (subject to a limit) relating to *bona fide* donations made by a taxpayer during a year of assessment to any PBO, or institution, board or body contemplated in section 10(1)(cA)(i), to be used solely in carrying on activities listed in Part II, in South Africa.¹³ In the case of a conduit PBO, section 18A receipts may only be issued to the extent that the funds or assets are to be provided to other PBOs, institutions, boards or bodies which use the funds in carrying on PBAs listed in Part II in South Africa.¹⁴

A conduit PBO (see 4.1) does not qualify for approval under section 18A because it is carrying on a PBA listed in Part I and not Part II. Furthermore, it provides funds, assets or other resources to an association of persons which is not approved as a PBO.

¹³ See the *Basic Guide to Tax-Deductible Donations* and the *Tax Exemption Guide for Public Benefit Organisations in South Africa* which are available on the SARS website.

¹⁴ Section 18A(1)(b).

6. Conclusion

A PBO may provide funds, assets or other resources to any association of persons which carries on one or more PBAs in South Africa, even though such an association of persons is not approved as a PBO. The Commissioner must, however, be satisfied that the PBO has taken reasonable steps to ensure that the funds, assets or other resources are used by the association of persons to carry on one or more PBAs in South Africa.

Legal and Policy Division
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Annexure – The law**The definition of a “public benefit organisation” in section 30(1)**

30. Public benefit organisations.—(1) For the purposes of this Act—

“public benefit organisation” means any organisation—

- (a) which is—
 - (i) a non-profit company as defined in section 1 of the Companies Act or a trust or an association of persons that has been incorporated, formed or established in the Republic; or
 - (ii) any branch within the Republic of any company, association or trust incorporated, formed or established in any country other than the Republic that is exempt from tax on income in that other country;
- (b) of which the sole or principal object is carrying on one or more public benefit activities, where—
 - (i) all such activities are carried on in a non-profit manner and with an altruistic or philanthropic intent;
 - (ii) no such activity is intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee; and
 - (iii)
- (c) where—
 - (i) each such activity carried on by that organisation is for the benefit of, or is widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups);

Section 30(3)(f)

(3) The Commissioner shall, for the purposes of this Act, approve a public benefit organisation which—

- (f) the Commissioner is satisfied that, in the case of any public benefit organisation which provides funds to any association of persons contemplated in paragraph 10(iii) of Part 1 of the Ninth Schedule, has taken reasonable steps to ensure that the funds are utilised for the purpose for which it has been provided; and

PBA 10 of Part I**NINTH SCHEDULE****PUBLIC BENEFIT ACTIVITIES**

(Section 30)

PART I**PROVIDING OF FUNDS, ASSETS OR OTHER RESOURCES**

10. The provision of—

- (a) funds, assets, services or other resources by way of donation;
- (b) assets or other resources by way of sale for a consideration not exceeding the direct cost to the organisation providing the assets or resources;
- (c) funds by way of loan at no charge; or

(d) assets by way of lease for an annual consideration not exceeding the direct cost to the organisation providing the asset divided by the total useful life of the asset,

to any—

- (i) public benefit organisation which has been approved in terms of section 30;
- (ii) institution, board or body contemplated in section 10(1)(cA)(i), which conducts one or more public benefit activities in this part (other than this paragraph);
- (iii) association of persons carrying on one or more public benefit activity contemplated in this part (other than this paragraph), in the Republic; or
- (iv) department of state or administration in the national or provincial or local sphere of government of the Republic, contemplated in section 10(1)(a).