30 April 2014

South African Revenue Service
Private Bag X923
PRETORIA
0001

BY E-MAIL: policycomments@sars.gov.za

SUBMISSION: COMMENTS ON THE DRAFT INTERPRETATION NOTE ON PUBLIC BENEFIT ORGANISATIONS: WRITTEN UNDERTAKING FURNISHED TO THE COMMISSIONER CONFIRMING COMPLIANCE WITH THE PRESCRIBED REQUIREMENTS

Dear Sir/Madam,

We refer to the Draft Interpretation Note (on Public Benefit Organisations: Written undertaking furnished to the Commissioner confirming compliance with the prescribed requirements) circulated by the South African Revenue Service to invite comments from the public. Please find SAICA’s comments relating to this draft Interpretation Note.

Any reference to the Act in this letter will be to the Income Tax Act, No. 58 of 1962.

Comments regarding the Preamble

Fiduciary

Section 30(3)(b)(i) requires that the constitution of a PBO must require that at least three persons (not connected) accept fiduciary responsibility. It then continues to state that no single person can directly control the decision making powers relating to that organisation. The definition of “fiduciary” does not recognise this. We accept that section 30(4) only refers
to one of the person, but submit that in all cases this would be a person authorised by the persons who accept the fiduciary responsibility.

We propose the following change:

“fiduciary” means one of the persons who hold a position of trust or responsibility including decision-making powers relating to the affairs of an organisation.

We make further comments in this regard later in this document.

**Founding document**

The draft Note states that “‘founding document’ means the constitution, will or other written instrument under which an organisation is established and governed” and later that a “‘written instrument’ means the founding document”.

We submit that it the term “written instrument” is not necessary and should be omitted from the Interpretation Note. The Interpretation note should then only use the term “founding document” when reference is made to the document envisaged in section 30(3)(b).

**Comments relating to paragraph 1 - Purpose**

It is clear that the intention is to issue this as an Interpretation Note. As such it will set out SARS’s practice with regard to the application of a tax Act (the Income tax Act in this regard). It is stated that the purpose of this note is to provide “guidance on the interpretation and application of section 30(4)…”

The following part that elaborates on the purpose of section 30(4) should be amended:

“…which provides for a written undertaking to be submitted under certain circumstances before an organisation can be approved as a PBO by the TEU.”

Section 30(4) principally does no more than to provide that a founding document is deemed to comply with the provisions of section 30(3)(b). In order to achieve this section 30(4) requires
that a person responsible in a fiduciary capacity must provide SARS with a written undertaking. The fact that this is necessary for approval of the organisation is not relevant to the purpose of the document. It could be dealt with in the paragraph 2 where the background information is given.

Comments relating to paragraph 2 – Background

The draft Note state that “…the person responsible in a fiduciary capacity for the funds and assets of the organisation…” must furnish “the Commissioner with a written undertaking that the organisation will be administered in compliance with the prescribed requirements.”

See our specific comments with regard to this later in this document.

Comments relating to paragraph 4 – Application of the law

Requirements under section 30(3)(b)

It is not clear why paragraph 4.1 is included here. It may well be better to include it in the background information. It certainly does not provide any guidance on the interpretation and application of the law.

The detail provided is then also not complete – the requirements relating to tax avoidance, remuneration and support for political parties are for instance not listed here. If it is considered necessary to include this detail in the Interpretation Note it should be provided as background information.

Comments relating to paragraph 4.2 - Written undertaking under section 30(4)

Written undertaking

We agree that the term “written undertaking” is not defined in the Act, but submit that it is not necessary to do so.
It should also not be interpreted as indicated in the draft Note. Principally it is required that an undertaking is given that the organisation will be administered in compliance with the provisions of section 30(3)(b). The Act requires that this undertaking is to be given in writing (as opposed to for instance verbally).

As the words are not defined they will take their normal meaning. The Electronic Oxford Dictionaries (at http://www.oxforddictionaries.com/definition/english/undertaking?q=undertaking) defines the noun “undertaking” as “…a formal pledge or promise to do something…” The draft Note alludes to this as well.

As we mentioned earlier it is not possible for this undertaking to be provided by a single person. The person will have to be mandated to do so and will have been duly authorised to do so. The draft Note states the following:

“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 paragraph 5).”

We agree that it follows from the meaning of the word undertaking that it must be binding and also that in practice it would have to be binding on the organisation. That is principally why we also stated that in practice this undertaking can’t be given by one person only. We accept that it would be wrong if the persons then do not administer the organisation as they undertook to do – effectively if they renge.

We wish to point out that section 30B itself makes no mention of a penalty. The statement in the draft Note should therefore be clarified (see also our comment in this regard later on).

**Finding the form on the SARS website**

It certainly is not as easy as merely “selecting “Find a Form” under Useful Tools” to then get to the form. It requires one to physically type in “EI 2” to get closer to finding the form. It is suggested that a link be provided in the final document to make it easy to find.
Comments relating to paragraph 4.2 - Person responsible in a fiduciary capacity

As indicated earlier in our comments we would agree that the undertaking should be signed by the persons (i.e. not only one) who accepted the fiduciary responsibility. It is in line with the principle that no single person can control decision making powers.

Comments relating to paragraph 4.4.2 - Testamentary trusts

The deletion, in relation to trusts, of the words “who died on or before 31 December 2003” removed the requirement that a trust established in terms of a will of a person must comply with section 30(3)(b)(i). It does not only, as the draft Note states, remove the requirement to have “three unconnected persons”. The interpretation of the words “the provisions of this subparagraph shall not apply” must be that the trust deed (or will) of such a trust does not have to require someone to accept fiduciary responsibility. There is therefore no need for such a person.
We submit that a trustee of the trust can then, if mandated to do so, provide the undertaking in terms of section 30(4).

Comments relating to paragraph 4.5 - Interim measure

It is quite clear from the draft Note that, whilst the undertaking would normally be an interim measure, in some instances it will be a permanent one. The foreign branch and testamentary trusts are examples where this may not be temporary.

We then accept that, where the founding document needs to be amended, the practice generally prevailing would be able to do so within one year. One would accept that the organisation would be able to agree with SARS for additional time if this proves not to be possible to meet.
Comments relating to paragraph 5 - Non-compliance [section 30(5), 30(6), 30(7) and 30(11)]

This part is not relevant to section 30(4) and it is not clear why it is in the draft Note.

The authority to withdraw the approval sits with the Commissioner. We accept that it may be delegated to the TEU.

The comment referred to earlier in our document (relating to the penalties) should be linked to the one covering section 30(11). We agree that it is relevant to the persons acting in a fiduciary capacity.

Conclusion

It is not clear why it is considered necessary to issue this as an Interpretation Note. The draft Note does not really add much guidance on the interpretation and application of section 30(4). It may well be appropriate to include the information contained in the draft Note in the guide.

Please do not hesitate to contact us, should you have any questions regarding the above.

Yours faithfully

Piet Nel CA(SA)
PROJECT DIRECTOR: TAX

*The South African Institute of Chartered Accountants*