

# SOUTH AFRICA

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## TABLE OF CONTENTS

- [Summary](#)
  - [Types of Organisations](#)
  - [Tax Laws](#)
- [Applicable Laws](#)
- [Relevant Legal Forms](#)
- [Public Benefit Status](#)
- [Specific Questions Regarding Local Law](#)
  - [Inurement](#)
  - [Proprietary Interest](#)
  - [Dissolution](#)
  - [Activities](#)
  - [Political Activities](#)
  - [Racial Discrimination](#)
  - [Control of Organisation](#)
- [Tax Laws](#)
  - [Tax Exemptions](#)
  - [Deductibility of Donations](#)
  - [Value Added Tax](#)
  - [Double Taxation Treaty](#)
  - [Foreign Entities](#)
- [Knowledgeable Contacts](#)

## I. SUMMARY

### A. TYPES OF ORGANISATIONS

The legal framework for not-for-profit, non-governmental organisations ("NPOs") in South Africa consists of four primary tiers.

The first tier (*establishment*) allows for the establishment under statutory and common law of the following three forms of NPOs:

- Voluntary associations, established under common law;
- Non-profit trusts, established under statutory law; and

- Non-profit companies incorporated for a public benefit objective or an objective relating to one or more cultural or social activities, or communal or group interests, established under statutory law. [1]

The second tier of legislation (*voluntary registration*) allows any of these organisational forms to apply for the status of a “registered non-profit organisation.” Among other requirements, registered non-profit organisations cannot distribute profits, and they must meet certain governance criteria.

The third legislative tier (*partial tax exemption*) enables an NPO to apply for the status of “public benefit organisation” (PBO). Among other requirements, the organisation’s sole purpose must be to undertake one or more public benefit activities, carried out in a not-for-profit manner and with an altruistic or philanthropic intent. PBOs may not use their resources to directly or indirectly support, advance, or oppose any political party, but they are not restricted from lobbying. They are entitled to a broad range of fiscal benefits, including a partial income tax exemption, an exemption on donations tax, and for some, an exemption on transfer duty on immovable property. [2]

Finally, the fourth legislative tier (*donor deductibility status*) allows public benefit organisations to apply for the right to receive tax-deductible donations.

Other not-for-profit legal forms, which are outside the scope of this Note due to their limited interaction with U.S. grantmakers, include trade unions, employers' organisations, political parties, and friendly societies established for the benefit of their members.

## **B. TAX LAWS**

The Income Tax Act provides two major benefits to non-profit organisations operating for the public benefit, namely: partial tax exemption for organisations that qualify as PBOs, and donor deductibility for contributions to those PBOs that carry out certain specified public benefit activities (“Public Benefit Organisations with Donor-Deductible Status”). PBOs may also access benefits with regard to donations tax, estate duty, transfer duty, and the skills development levy. Finally, certain organisations are eligible for Value Added Tax preferences. South Africa and the United States have entered into a double taxation treaty.

## **II. APPLICABLE LAWS**

- [Constitution of the Republic of South Africa](#), Act 108 of 1997 (as amended)
- [Companies Act of 2008](#) (as amended by the Companies Amendment Act of 2011)
- [Non-Profit Organisations Act 71](#) of 1997 (as amended) ("NPO Act")
- [Trust Property Control Act 57 of 1988](#) ("TPCA")
- [Income Tax Act 58 of 1962](#) (as amended) ("ITA")
- [Value Added Tax Act 89](#) of 1991 ("VATA")
- [Financial Intelligence Centre Act 38](#) of 2001 ("FICA") and [Financial Intelligence Centre Amendment Act](#), 2017 (Act 1 of 2017)

Other Material Consulted

- [Tax Exemption Guide for Public Benefit Organisations in South Africa](#)

### III. RELEVANT LEGAL FORMS

#### Voluntary Associations

The voluntary association is the most common legal form of NPO in South Africa. No office of registry exists for voluntary associations. Forming a voluntary association requires only that three or more people agree to achieve a common objective that is primarily not-for-profit. The agreement may be oral or written, although it is customary for the agreement to take the form of a written constitution. Voluntary associations are a product of the common law and are not regulated by statute. This can be confusing because the common law is not easily accessible and sometimes is contradictory. Voluntary associations may be classified as follows:

1. Corporate bodies under the common law, known as "*universitas*"; and
2. Bodies that remain unincorporated at common law, known as "non-corporate associations."

When deciding how to classify a voluntary association, a court will consider the organisation's constitution as well as its nature, objectives, and activities. An organisation generally must meet three requirements in order to be a *universitas*:

1. It must be structured to continue as an entity notwithstanding a change in membership;
2. It must be able to hold property distinct from its members; and
3. No member can have any rights, based on membership, to the property of the association.

If all of these requirements are met, the organisation will be deemed a *universitas* with legal personality.

#### Non-profit Trusts

Trusts in South Africa are governed under the Trust Properties Control Act and common law. A trust can be established for private benefit or for a charitable purpose. In order to determine whether a trust qualifies as a charitable trust under South African law, a grantmaker must look to the trust deed.

A trust is created when property is transferred by a trust deed. The trust then manages the property for the benefit of others or for the achievement of a particular goal. The property can be transferred by written agreement, testamentary writing, or court order. The person who administers the trust property is called a trustee [[TPCA §1](#)]. A court official, called a Master of the High Court, has jurisdiction over a trust if the majority of the trust property is situated in his or her jurisdiction [[TPCA §3](#)]. The Master holds the trust instruments, oversees the appointment of trustees, and polices the trustees' performance with respect to the trust property [TPCA §4; §§6-7; §§16-20].

A trust does not have separate legal personality, but trustees still enjoy limited liability. All rights and responsibilities vest collectively in the trustees in their capacity as trustees.

#### Non-profit Companies

The South African Companies Act of 2008, which came into force on May 1, 2011, provides for the incorporation of a non-profit company, which is recognized as a separate category of company. The non-profit company can be established with or without members, but it must have at least three directors [Companies Act §3(1)]. The non-profit company is incorporated with the Companies Commission; it can be incorporated for a public benefit objective, or an objective relating to one or more cultural or social activities or communal or group interests [Companies Act Schedule 1 para 1]. The non-profit company is subject to the non-distribution constraint requirement. Non-profit companies have legal personality and therefore offer limited liability to their members and directors. They can enter into contracts and sue and be sued in their own name.

The Companies Act of 2008, in contrast to its predecessor, does not provide for the registration of branches of foreign not-for-profits as separate legal entities. Per the terms of the old Companies Act, such branches (known as Section 21A companies) were incorporated as new legal entities in South Africa. Under the 2008 Companies Act, however, foreign companies carrying on not-for-profit activities in South Africa for six months or more must register as an “external non-profit company” with the Companies Commission [Companies Act §23]. (A separate legal entity is not incorporated when a foreign company registers as an external company.) The external non-profit company must maintain at least one office in South Africa [Companies Act §23]. Registration as an external non-profit company is required, for example, for the foreign company to enter into employment contracts.

## **IV. PUBLIC BENEFIT STATUS**

### **Registered Non-profit Organisation**

In 1997, South Africa adopted the Non-Profit Organisations Act (the NPO Act). [3] Registration under the NPO Act is voluntary, however it is often required in order to access funding from government departments and some corporate donors.

To be eligible, an organisation must meet all of the following criteria:

1. It is a trust, company, or other association of persons established for a “public purpose” (a term that is not further defined) [[NPO Act §1\(1\)\(x\)\(a\)](#)];
2. It does not distribute income or property to members or officers except for "reasonable compensation for services rendered" [[NPO Act §1\(1\)\(x\)\(b\)](#)];
3. It is not "an organ of state" [[NPO Act §12\(1\)](#)]; and
4. It includes certain internal governance provisions in its founding document [[NPO Act §12\(2\)](#)].

An organisation seeking registered non-profit organisation status under the NPO Act must apply to the Directorate for Non-Profit Organisations, which falls under the auspices of the Department of Social Development. If the organisation qualifies, the Directorate issues a certificate and registration number. To retain this status, the organisation must submit narrative and financial reports to the Directorate annually.

As of December 16, 2017, according to the [website](#) of the Directorate for Non-Profit Organisations, there were 185,382 registered organisations. [4]

### **Approved Public Benefit Organisation**

To qualify as a public benefit organisation (PBO), an organisation must comply with all of the following requirements of Section 30 of the Income Tax Act:

1. It must be a non-profit company formed and incorporated under the Companies Act; a trust established in the Republic and registered with the Master of the High Court whose founding document is a trust deed; a voluntary association; or “any agency or branch within the Republic of any company, association, or trust incorporated, formed, or established in terms of the laws of any country other than the Republic that is exempt from tax on income in that other country” (i.e., the definition of PBO under ITA Section 30(1)).
2. Its sole or principle objective must be to carry out one or more public benefit activities as listed in the Ninth Schedule of the Act; it cannot pursue any other principle objectives.
3. The activities must be carried out in a non-profit manner and with altruistic or philanthropic intent. No activity can promote the economic self-interest of any fiduciary or employee, other than reasonable remuneration to employees or officers.
4. Each of the organisation's activities must be for the benefit of, or widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups).

Public benefit organisations are allowed to carry out public benefit activities beyond the borders of South Africa without restriction. PBOs with donor-deductible status must, however, carry out at least one of their public benefit activities in South Africa. The qualifying public benefit activities for partial tax exemption appear in Part I of the Ninth Schedule to the Income Tax Act, and those for donor deductible status appear in Part II. The Minister of Finance may, however, determine additional activities from time to time. At present, more than 60 activities qualify [[ITA Schedule Nine §1-11](#)]. They fall under the following headings:

- Welfare and Humanitarian;
- Health Care;
- Land and Housing;
- Education and Development;
- Religion, Belief or Philosophy;
- Cultural;
- Conservation, Environment and Animal Welfare;
- Research and Consumer Rights;
- Sport;
- Providing of Funds, Assets or Other Resources; and
- General.

The registration process for PBO status has become simpler in recent years. According to a process introduced by the South African Revenue Service (SARS) in 2014, organisations seeking PBO status had to first apply to the nearest SARS branch office to be registered as a taxpayer, and then apply separately to the Tax Exemption Unit of SARS. This process has changed, however; now organisations only need to submit their

applications for PBO status at the local SARS branch office as part of the tax registration process. Organisations are no longer permitted to submit their applications for tax exemptions directly to the Tax Exemption Unit of SARS, located in Pretoria.

Additional PBO requirements are discussed below.

## **V. Specific Questions Regarding Local Law**

### **A. INUREMENT**

#### **Voluntary Associations**

Specific prohibitions against private inurement would be included in a voluntary association's founding documents. In general, governing board members of voluntary associations are bound by the common law fiduciary duty to act in good faith and avoid conflicts of interest in their dealings with the organisation.

#### **Trusts**

A trustee's remuneration may be regulated by the instrument establishing the trust. If the instrument is silent on the issue, the Trust Property Control Act allows for trustees to receive reasonable remuneration when executing their official duties [[TPCA §22](#)]. In the event of a dispute, the Master (a court official appointed under Section 2 of the Administration of Estates Act) will set the amount. An auditor of the trust's accounts must report any apparent material irregularities in the accounts to the trustee [[TCPA §15](#)]. The Trust Property Control Act requires trustees to "act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another" [[TPCA §9\(1\)](#)]. A trustee's improper accounting in administering the trust violates this fiduciary duty and constitutes grounds for removal [[TPCA §20\(2\)\(e\)](#)].

#### **Non-Profit Companies**

Paragraph 3 of Schedule 1 to the Companies Act prohibits a non-profit company from directly or indirectly paying any portion of its income or transferring any of its assets, regardless of how the income or asset was derived, to any incorporator, director or member of the company. This prohibition has the following exceptions: reasonable remuneration for goods delivered or services rendered; reimbursement for expenses incurred to advance the company's objectives; payment payable in terms of a bona fide agreement; payment in respect of any rights of that person to advance a stated objective of the company; and payment in respect of any legal obligation binding the company. Sections 66(8) and (9) of the Companies Act, dealing with the payment of remuneration to directors for their service as directors, do not apply to non-profit companies [Companies Act §10(2)(c)].

#### **Registered Non-Profit Organisations**

In order to register under the NPO Act, a non-profit organisation must state in its founding document (or the legislation under which it has been established must specify) that its income and property are not distributable to its members, officers, or trustees, except as reasonable compensation for services rendered [[NPO Act/1997 §12\(2\)\(c\)](#)].

#### **Approved Public Benefit Organisations**

In order to obtain approval from the Commissioner as a PBO under Section 30 of the ITA, an organisation cannot conduct any activity intended directly or indirectly to promote the economic self-interest of any fiduciary or employee of the organisation, other than

through reasonable remuneration. In addition, the organisation must not distribute any of its funds to any person, other than in the course of undertaking a public benefit activity; and it must use its funds solely for the objective for which it has been established [[ITA §\(30\)\(3\)\(b\)\(ii\)](#)].

## **B. PROPRIETARY INTEREST**

### **Voluntary Associations**

If a voluntary association prohibits its members, directors, or employees from having a proprietary interest in the organisation's assets, the prohibition will appear in the organisation's founding documents.

### **Trusts**

The Trust Property Control Act provides that trust property may not form part of the personal estate of a trustee, unless the trustee is also a beneficiary entitled to the property under the trust instrument [[TPCA §12](#)]. The trust documents identify the beneficiaries of the trust.

### **Non-Profit Companies**

A non-profit company must apply all of its assets and income to advance its stated objectives as set forth in its Memorandum of Incorporation [Companies Act Schedule 1 para 2]. A non-profit company must, upon winding-up or dissolution, distribute the entire net value of the company to one or more non-profit companies, “registered external non-profit companies” carrying on activities in South Africa, non-profit trusts, or voluntary associations having objectives similar to its main objective. No past or present member or director is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied [Companies Act Schedule 1 para 4].

### **Registered Non-Profit Organisations**

The founding document of a non-profit organisation registered under the NPO Act must provide that the members, officers, and trustees have no rights to the assets of the organisation solely by virtue of being members, trustees, or officers [[NPO Act/1997 §12\(2\)\(f\)](#)].

### **Approved Public Benefit Organisations**

In order to become approved as a PBO under 30 of the Income Tax Act, an organisation cannot accept any donation that is revocable at the donor's request. Moreover, the donor may not impose conditions that could enable the donor or any person related to the donor to benefit, directly or indirectly, from the application of such donation [[ITA §\(30\)\(3\)\(b\)\(v\)](#)]. In addition, the organisation must apply its funds solely to the objectives for which it was formed [[ITA §\(30\)\(3\)\(b\)\(ii\)](#)].

## **C. DISSOLUTION**

### **Voluntary Associations**

The founding documents contain any provisions governing the transfer of assets of a voluntary association, whether a *universitas* or an informal voluntary association, upon its dissolution.

### **Trusts**

In limited situations, the trustee, or a person the court finds to have a sufficient interest in the trust property, can petition the court to alter trust provisions or to terminate the trust altogether. These situations include: where the terms of the trust hamper the achievement of the founder's objective, prejudice the interests of trust beneficiaries, or are against the public interest [[TPCA §13](#)]. No provision in the Trust Property Control Act explicitly addresses the treatment of assets upon termination of a trust. The trust deed, however, must address the issue if the trust is a registered non-profit organisation or an approved PBO.

### **Non-Profit Companies**

As stated earlier, a non-profit company must, upon winding-up or dissolution, distribute the entire net value of the company to one or more non-profit companies, "external non-profit companies" carrying on activities in South Africa, non-profit trusts, or voluntary associations having objectives similar to its main objective. The transferee(s) can be identified in its Memorandum of Incorporation, by its members, if any, or directors, or by a court of law if the members or directors fail to make such a determination. No past or present member or director is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied [Companies Act Schedule 1 para 4].

### **Registered Non-Profit Organisations**

To register under the NPO Act, the organisation must stipulate in its founding document that any assets remaining upon dissolution or winding up will be transferred to another non-profit organisation with similar objectives [[NPO Act/1997 12\(2\)\(o\)](#)]. Failure to transfer the assets to such an organisation may result in a fine, imprisonment, or both for the person responsible [[NPO Act/1997 §30](#)].

### **Approved Public Benefit Organisations**

In order to obtain approval from the Commissioner as a PBO under the Income Tax Act, Section 30, an organisation must provide in its founding document that any assets remaining upon dissolution or winding up must be transferred to: (1) a similar public benefit organisation approved under Section 30; (2) an institution, board, or body which is exempt from tax under the provisions of Section 10(1)(cA)(i) of the ITA, which has as its principal objective any public benefit activity; or (3) a department of the state [[ITA §\(30\)\(3\)\(b\)\(iii\)](#)]. If these and other conditions are not contained in the organisation's founding document, three fiduciaries of the organisation must sign a written undertaking confirming that the organisation will comply with the relevant provisions of Section 30 of the Income Tax Act [[ITA §\(30\)\(4\)](#)].

## **D. ACTIVITIES**

### **1. GENERAL**

#### **Voluntary Associations**

A voluntary association can engage in any lawful activities in pursuit of a legitimate objective, as long as those activities are not for gain and are in line with its founding document.

#### **Trusts**

Trustees can engage in any lawful activities as long as they remain within the bounds of their fiduciary duty to the trust beneficiaries and within the confines of the trust deed.

## **Non-Profit Companies**

Non-profit companies can carry on activities aimed at promoting the public benefit or relating to one or more cultural or social activities, or communal or group interests. [Companies Act Schedule 1 para 1].

## **Registered Non-Profit Organisations**

The [NPO Act](#) does not address permissible activities. Because a registered non-profit organisation will ordinarily be a trust or a non-profit company, the laws governing those legal forms and the tax laws provide guidance on permissible activities. A voluntary association's founding documents will specify its activities.

## **Approved Public Benefit Organisations**

The Tax Act defines public benefit activity by listing over 60 permissible activities (see Section IV for further discussion).

## **2. ECONOMIC ACTIVITIES**

### **Voluntary Associations**

An association can conduct subsidiary activities to make some profits, as long as its main objective is not the acquisition of gain.

### **Trusts**

Trusts are generally flexible structures that can be used for a variety of purposes. The Trust Property Control Act allows for the trust instrument to designate the objective or beneficiaries, but it does not specify limitations to such objectives or beneficiaries [[TPCA §1](#)]. The purpose of a discretionary trust must be lawful and sufficiently certain [See [Deedat and Others v. The Master and Others](#) 1995 (2) SA 377 (A)]. If a trust has a charitable primary purpose, the fact that it has a non-charitable subsidiary purpose will not invalidate it.

### **Non-Profit Companies**

Non-profit companies may carry on any business, trade, or undertaking consistent with or ancillary to its stated objectives, i.e., the promotion of the public benefit or one or more cultural or social activities, or communal or group interests [Companies Act Schedule 1 para 2(a)] .

### **Approved Public Benefit Organisations**

The law explicitly limits the extent to which the economic activities of organisations approved as a PBO under [Section 10\(1\)\(cN\) of the Income Tax Act](#) will be tax exempt. The receipts and accruals from such undertakings or activities shall be exempt from normal tax only if one of the following criteria applies:

A) The undertaking or activity meets all of the following requirements:

- It is integral and directly related to the sole objective of the public benefit organisation;
- Substantially the whole of its revenues are directed toward the recovery of its costs; and
- It does not result in unfair competition in relation to taxable entities.

B) The undertaking or activity is of an occasional nature and substantially performed by uncompensated volunteers.

C) The undertaking or activity is approved by the Minister of Finance by notice in the Gazette, taking into account the following factors:

- The scope and benevolent nature of the undertaking or activity;
- The direct connection between the undertaking or activity and the sole purpose of the public benefit organisation;
- The profitability of the undertaking or activity; and
- The economic distortion that may result from allowing a tax-exempt organisation to carry out the undertaking or activity.

D) The undertaking or activity does not qualify under any of the above criteria, and the revenues it generates do not exceed the greater of the following:

- 5 percent of the public benefit organisation's total receipts and accruals during the relevant year of assessment; or
- 200,000 South African Rand.

[\[ITA §10\(1\)\(cN\) as amended\]](#).

PBOs are allowed to invest their funds, subject only to restrictions that may exist in the common law.

## **E. POLITICAL ACTIVITIES**

The Income Tax Act restricts PBOs from using their resources to directly or indirectly support, advance, or oppose any political party [\[ITA § 30\(3\)\(h\)\]](#). South African law does not restrict the political activities of organisations that are not approved as PBOs, however. Moreover, the law does not clearly restrict lobbying by any organisations.

## **F. RACIAL DISCRIMINATION**

The [Constitution of the Republic of South Africa](#) (1997) provides that neither the State nor any person may unfairly discriminate against anyone on the basis of race (among other grounds) [\[Constitution §§9\(3\) and \(4\)\]](#). Section 29 of the Constitution establishes an individual's right to receive a basic education and to further his/her education [\[Constitution §29\(1\)\]](#). The right to receive a public education in the language of one's choice, where reasonably practicable, is also guaranteed [\[Constitution §29\(2\)\]](#). The Constitution further provides that everyone has the right to establish and maintain independent educational institutions, so long as those institutions do not discriminate on the basis of race [\[Constitution §29\(3\)\(a\)\]](#).

## **G. CONTROL OF ORGANISATION**

South African law does not restrict individuals or legal entities from serving as members, promoters, or trustees of NPOs. Foreign individuals can also serve as directors of local companies, but legal persons in general cannot serve as directors of a non-profit company. It is, subject to this limitation, possible for a South African NPO to be controlled by an American grantor charity. It has, however, become increasingly difficult for new NPOs with foreign trustees, directors, or governing board members to open a bank account in South Africa, due to the requirements implemented pursuant to the Financial Intelligence Centre Act. [\[5\]](#)

## VI. TAX LAWS

### A. TAX EXEMPTIONS

In order to be eligible for exemption from income tax and certain other taxes, an organisation operating for the public benefit first must qualify as a Public Benefit Organisation under Section 30 of South Africa's Income Tax Act, as summarized in Section IV. Eligibility for tax exemption further requires the PBO to satisfy additional conditions on its governance and operations. For example, the organisation's founding document must provide that at least three unrelated persons have fiduciary responsibility for the organisation, and that no single person can directly or indirectly control the decisions relating to the organisation [[ITA § 30\(3\)\(b\)\(i\)](#)]. In addition, the law limits the extent to which the business activities of the organisation are tax exempt (see Section V(D)(2)) [[ITA §10\(1\)\(cN\)](#)]. Upon the organisation's termination, its assets must be transferred to a) a similar, approved PBO; b) an entity exempt from tax under Section 10(1)(cA)(i), which has as its sole or principal objective the carrying on of any public benefit activity; or c) the state [[ITA § 30\(3\)\(b\)\(iii\)](#)]. [6]

A PBO approved for exemption from income tax may also be exempted from other taxes, including: capital gains tax, donations tax, estate duty, transfer duty, and – in certain cases – the skills development levy if the property will be devoted to public benefit activities [[Tax Exemption Guide for Public Benefit Organisations in South Africa, pages 37 to 46](#), see pages 35-37].

Other not-for-profit organisations (that are not approved PBOs or are not exempted from paying tax elsewhere under Section 10 of the Income Tax Act) are liable for income tax and other taxes and duties on the same basis as ordinary taxpayers.

A dividend tax was introduced by the [Revenue Laws Amendment Act, No. 60 of 2008](#); it entered into force on April 1, 2012. According to the Act, approved PBOs are exempt from paying dividends tax when dividends (that do not consist of a dividend *in specie*) from for-profit companies are paid to PBOs.

### B. DEDUCTIBILITY OF DONATIONS

An individual or company is entitled to deduct from taxable income a donation (in cash or in kind) to a PBO carrying out specified public benefit activities. These organisations are sometimes referred to as “Public Benefit Organisations with Donor-Deductible Status.” The donation must be supported by a receipt issued by the PBO and the donation cannot, for any given fiscal year, exceed 10 percent of the taxable income of the taxpayer in order to qualify for this deduction.

The public benefit activities approved by the Minister of Finance for purposes of Section 18A are set out in Part II of the Ninth Schedule of the [Income Tax Act](#). A variety of activities are approved, and they fall under the following headings:

- Welfare and Humanitarian
- Health Care
- Education and Development
- Conservation, Environment and Animal Welfare
- Land and Housing [[ITA Schedule Nine §2\(1-5\)](#)]

### C. VALUE ADDED TAX

The Value Added Tax (VAT) Act imposes a 14 percent tax on the value of goods or services supplied by a vendor, imported goods, or services provided by a resident supplier or one carrying out business outside of South Africa to a resident of South Africa who uses the services in South Africa [[VATA §7\(1\)](#)].

The VAT Act confers certain benefits on organisations that qualify as "associations not for gain," "welfare organisations," or both. [[VATA § 1](#)] Qualifying organisations can claim the VAT they incur as input tax and, generally speaking, must pay output tax only when they charge for goods or services.

An "association not for gain" is defined as a religious institution or other society, association, or organisation (including an educational institution of a public character), which is not established for profit and which is required to use any property or income solely to further its aims and objectives. An association not for gain is treated much like any other business if it makes taxable supplies, but the following special provisions apply:

- No output tax is payable on any "unconditional gifts" received, such as a club member's donation of money to cover the costs of new equipment for the club's soccer team.
- A VAT exemption applies to the sale of any donated goods or services, and to the sale of manufactured goods where donated goods and services constitute at least 80 percent of the value thereof.
- Certain subsidies and grants received from National or Provincial Governments (public authority) are zero-rated.

Some associations not for gain also qualify as "welfare organisations," which entitles them to the benefits listed above plus additional ones. In order to qualify as a "welfare organisation," an organisation must:

1. Be an association not for gain;
2. Be exempt from tax in terms of Section 10(1)(cN) of the Income Tax Act; and
3. Carry on activities in the following categories:
  1. Welfare and humanitarian;
  2. Health care;
  3. Land and housing;
  4. Education and development; or
  5. Conservation, environment, and animal welfare.

Along with the benefits listed above for associations not for gain, a welfare organisation is eligible for the following additional benefits:

- Even where no charge is made for supplies, the organisation can register for VAT and obtain input tax relief on its purchases.
- A subsidy or grant received from the Government (or local authorities) related to welfare activities will be zero-rated.

## **D. DOUBLE TAXATION TREATY**

South Africa has entered into double taxation treaties with a number of countries, including the United States. [<http://www.irs.gov/pub/irs-trty/safrica.pdf>].

## E. Foreign Entities

As of 2006, a tax exemption is granted to branches of foreign legal entities operating in South Africa, on the condition that they qualify for tax exemption in the country in which they are established [RLAA §24]. Upon termination of these activities, however, they must transfer the assets of such branch to a local PBO, organ of state, or designated institution if more than 15 percent of the branch's receipts and accruals (earned during the three years preceding the termination) were derived from a source within the Republic [[ITA § 30\(3\)\(b\)\(iiiA\)](#)].

Providing funding to foreign not-for-profit entities that are exempt in their countries of origin constitutes a public benefit activity.

The Revenue Laws Amendment Act, No. 60 of 2008 amended Section 18A of the Income Tax Act to allow donations made to certain specialized agencies operating in South Africa to be deductible. The amendment covers agencies such as: the International Labour Organisation, the World Health Organisation, the Food and Agriculture Organisation of the United Nations, and the International Monetary Fund.

A new [Taxation Laws Amendment Bill, 2017](#) (the Bill) proposes additional changes pertaining to certain specialized agencies, as defined in the Diplomatic Immunities and Privileges Act of 2001, that qualify for tax deductible donations. The specialized agencies must comply with the conditions contained in the Income Tax Act to access such benefits. New specialized agencies to be included are: the United Nations Educational, Scientific and Cultural Organization; the International Civil Aviation Organization; the International Bank for Reconstruction and Development; the United Nations Development Programme; the United Nations Children's Emergency Fund; the United Nations High Commissioner for Refugees; the United Nations Population Fund; the United Nations Office on Drugs and Crime; and the United Nations Environmental Programme.

## VII. KNOWLEDGEABLE CONTACTS

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## FOOTNOTES

[1] The new Companies Act (No. 71 of 2008) was signed into law in April 2009 and entered into force on May 1, 2011. It changed the way in which non-profit companies are incorporated and regulated. The new Companies Act establishes two categories of companies: 1) non-profit companies, and 2) profit companies. The Act contains a special set of fundamental principles that are applicable to non-profit companies and clearly sets out which parts of the Act are applicable to non-profit companies. Effective May 1, 2011, pre-existing non-profit companies incorporated under the old Companies Act of 1973 (known as Section 21 companies), are governed by the new Companies Act.

[2] The Davis Tax Committee (DTC) published its [Report on the Public Benefit Organisation and the Tax System](#) in April 2018. The Report will be considered by the

Minister of Finance and could potentially result in further amendments to the Income Tax Act as it relates to public benefit organisations.

[3] The Department of Social Development (the DSD), in August 2012, published a document entitled “Policy Framework on Non-Profit Organisations Law” (The Policy). The Policy captures the foundational principles of the state’s intended review of the legislative framework affecting the non-profit sector. The Policy states that, “The objective of the review is to ensure that the new regulatory framework is appropriate to the legal and socio-economy contexts of South Africa as a constitutional democracy and an open society.” The aim of the review is “to enhance the existing enabling environment for the non-profit organisations to flourish and protect the sector from abuse as well as minimize undue disruptions to many of the positive contributions.” The initial version of the Policy received some opposition from non-profit organisations because of its focus on enforcement measures; an amended version of the Policy was released in 2014. The DSD has subsequently published a toned-down Policy and appointed a research company to review the legislative framework affecting the non-profit sector. During March and May 2017, the DSD hosted dialogue sessions with the non-profit sector to share some of the research findings, which have not yet been published. The findings shared at the dialogues reflected high levels of non-compliance by organisations registered under the NPO Act. The researchers concluded that the NPO regulatory framework dealing with establishment, registration, tax exemption, and social welfare legislation, is complicated by inadequate alignment among the different laws.

[4] In 2013, the Directorate for Non-Profit Organisations introduced an online registration and reporting facility. This has significantly reduced the processing times of applications to register in terms of the Non-Profit Organisations Act.

From October 2012 until January 2013, the Directorate for Non-Profit Organisations de-registered more than 23,000 organisations. It also deemed more than 35,000 organisations non-compliant with the NPO Act. Following public outcry, however, all organisations were reinstated and re-registered. Organisations were given a six-month period to become compliant; this period expired at the end of March 2014, but since that time, no large-scale de-registration of organisations has taken place. Furthermore, in July 2015, the Minister of Social Development issued a moratorium on the de-registration of NPOs altogether, and said that no more NPOs would be de-registered until the Ministry had taken extensive measures to help NPOs comply with the NPO Act.

In its [Annual Report](#) for the period ending March 31, 2016, the Department of Social Development states:

“Civil society organisations play an important role in delivering services to communities, especially those who remain beyond the reach of government, as a result of the limited resources at our disposal. The Department implemented a range of national interventions to improve the registration and access to information of non-profit organisations (NPOs). These interventions included road shows and capacity-building that reached out to NPOs at municipal level: 107 roadshows were conducted in 93 local municipalities. To encourage NPOs to submit their annual reports, the Department partnered with the South African Institute of Tax Practitioners and the South African Institute of Business Accountants supported by First National Bank, to enable NPOs to access financial management software and services free of charge. The Department finalised the NPO Policy that culminated in the development of the NPO Draft Bill, which

is the first step towards the amendment of the Non-Profit Organisations Act, 1997 (Act No. 71 of 1997).” (page 12)

Also, on page 29, the Annual Report provides that: “The Department implemented a range of national interventions to improve the registration and access to information of nonprofit organisations (NPOs). The Department processed all of the 31,183 applications received from organisations seeking registration, with 30,711 (98.5 percent) being processed within two months of receipt.”

[5] The Financial Intelligence Centre Amendment Act, No. 1 of 2017 (the Amendment Act) was signed into law by the South African President on April 26, 2017 (various sections became operational in June 2017). The Amendment Act introduced a risk-based method to verify the identities and addresses of customers; it came into effect on October 1, 2017. The Amendment Act is a law of general application, but it will require board members of non-profit organisations to be verified (under the new requirements) with accounting institutions, especially banks. Failure to do so may result in bank accounts of non-profit organisations becoming inaccessible.

[6] Sections 30 and 18A of the Income Tax Act were amended in 2012 to allow for the criminal prosecution of board members of any approved PBO who intentionally fails to comply with any provision of those sections or the organisation’s founding document.