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#DIFFERENCE MAKERS

THE TAXATION OF COMMUNAL PROPERTY ASSOCIATIONS AND THEIR MEMBERS

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1. Definitions

"Companies Act"	the Companies Act 71 of 2008
"CPA"	a communal property association registered or qualifying for registration under section 8 of the CPA Act as defined in section 1 of that Act
"CPA Act"	the Communal Property Associations Act 28 of 1996
"Minister"	the Minister of Rural Development and Land Reform as defined in section 1 of the CPA Act
"PBO"	a public benefit organisation
"Registrar"	the Registrar of CPAs as defined in section 1 of the CPA Act[1]
"SAICA"	the South African Institute of Chartered Accountants
"Schedule"	the Schedule to the CPA Act, unless otherwise stated
"section"	a section of the Act, unless otherwise stated
"TA Act"	the Tax Administration Act 28 of 2011
"the Act"	the Income Tax Act 58 of 1962
any other word or expression bears the meaning ascribed to it in the Act	

2. Introduction

The Communal Property Association Act ("CPA Act") enables disadvantaged communities to acquire, hold and manage property in common. The CPA Act requires that the land must be managed by a Communal Property Association ("CPA") for "communal benefit", which could include making land available for grazing or renting to third parties for various purposes such as accommodation and farming.

There are two sets of taxpayers with regards to CPAs which is the CPA itself and its members who receive distributions from the CPAs in relation to the income producing operations mentioned above. There is no specific tax legislation that applies to these taxpayers and therefore the general tax principles apply. In this regard there has been some confusion as to how to tax these taxpayers and therefore an opinion was requested from the South African Revenue Service in November 2024. This guide is based on that opinion.

3. Communal Property Associations

All CPAs are required to register with the Department of Rural Development and Land Reform under the CPA Act. The Director General of Rural Development and Land Reform will consider and approve the application for registration, if the requirements are met, which, amongst other things, include an application and constitution aligned with the CPA Act.

The CPA Act contains a definition of "similar entity" allowing the Minister to approve such similar entity as a CPA. The term "similar entity" as defined means –

> *"a trust, association of persons or company registered in terms section 21 of the Companies Act, 1973 (Act No. 61 of 1973)"*.

The constitution of a CPA should provide clear rules as to who can be members. Members of a CPA have the right to vote on the management of the CPA as well as receive a distribution or share of the profits as a result of their membership. The CPA Act is silent on the exact nature of the benefits that can and should be afforded to the members of the CPA. There is no legal requirement

[1] See section 2C(1) of the CPA Act

compelling a CPA to distribute amounts such as rental income and other types of income to members. The CPA Act requires a CPA's constitution to make such a determination.

The members of the CPA do not own the property. The property is owned by the CPA as a separate legal entity with *legal persona* under the CPA Act.[2]

The purpose of the CPA Act[3] is to enable communities[4] to form juristic persons,[5] to be known as CPAs,[6] in order to acquire, hold and manage property in common.[7]

A CPA is either registered or qualifies[8] for registration under the CPA Act.[9]

A community wishing to register a CPA must adopt[10] a constitution,[11] which must comply with the prescribed general principles[12] in the CPA Act[13] and deal with specific matters referred to in the Schedule. Any CPA constituted as an association of persons established and governed by a constitution adopted by the majority of its members[14] qualifies for registration under the CPA Act. If the Registrar is satisfied that the association qualifies for registration it will be registered,[15] allocated a registration number[16] and issued with a certificate of registration.[17]

On registration, the CPA –[18]

- is a juristic person, with the capacity to sue and be sued;
- may acquire rights and incur obligations on behalf of the community in its own name in accordance with its constitution;
- may on behalf of the community, subject to the provisions of its constitution, acquire and dispose of immovable property and real rights therein and encumber such immovable property or real rights by mortgage, servitude, or lease or in any other manner;
- will have perpetual succession regardless of changes in its membership; and
- will be bound by the constitution, a legally binding agreement between the CPA, its members, and members of the committee[19] and will be deemed to be a matter of public knowledge.

A CPA registered under the CPA Act, which becomes a juristic person, is not established under any specific law. The CPA Act is a general enabling Act conferring legal personality on CPAs complying

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2 Section 8(6) of the CPA Act
3 Preamble to the Act
4 The term "community" as defined in section 1 of that Act means a group of persons wishing to have its rights to or in particular property determined by shared rules under a constitution and who wish or is required to form a CPA
5 Section 8(6) of the CP Act
6 See the defined term "association" in section 1 of that Act
7 The term "holding of property in common" as defined in section 1 of the CPA Act means the acquisition, holding and management of property by a CPA on behalf of its members, in accordance with the terms of a constitution
8 See the defined term "association" in section 1 of that Act
9 Section 8(2) of the CPA Act
10 A constitution will under the proviso of section 7(1) of the CPA Act be adopted by a resolution of no less than 60% of the total number of the verified members of the CPA having the right to make decisions
11 The term "constitution" as defined in section 1 of that Act means a constitution adopted under section 7 by a CPA
12 Includes, amongst other things, fair and inclusive decision-making processes, equality of membership, democratic processes, fair access to the property, accountability and transparency
13 Section 9 of that Act
14 The term "members" as defined in section 1 of the CPA Act means the members of an association or the members of a community, as the case may be, including members who comply with the provisions of paragraph (i) of item 5 (deals with qualifications for membership, including list of names and identity numbers of intended members) of the Schedule, and for the purposes of section 12 (deals with the approval for certain transactions), section13 (deals with the administration, liquidation and deregistration) and section 14 (deals with offences), will mean those members whose names appear on a list contemplated in the said item 5
15 Section 8(3)(*a*) of the CPA Act
16 The registration number must in accordance with section 8(9) of the CPA Act be reflected on all correspondence and contracts
17 See Form A to Government Notice Regulations 1908 of 28 November 1996 for an example of a registration certificate
18 Section 8(6) of the CPA Act
19 The term "committee" as defined in section 1 of the CPA Act means

with the requirements of that Act. The CPA Act therefore does not establish or bring into being a specifically named CPA but merely empowers the registration of CPAs under that Act.

4. Discussion and application of the law

4.1 Taxation of communal property associations

A CPA therefore falls within the ambit of paragraph (*d*) of the definition of "company" in the Act,[20] which includes –

> *"any association formed in South Africa to serve a specified purpose, beneficial to the public or a section of the public".*

Any CPA constituted as an association of persons, a company or a co-operative in terms of section 1(1) of the Act, which is registered under the CPA Act, will be registered and treated as a "company" for purposes of income tax. The member of a CPA and the CPA are therefore separate taxable entities.

The legislative provisions applicable to a company should then be applied in the determination of the tax liability of CPAs constituted as associations of persons established and governed by a constitution. Therefore, the receipts and accruals derived by a CPA should accrue to the CPA, with the members being entitled to a distribution of profits from the CPA in accordance with the provisions of the CPA's constitution.

4.2 Taxation of members of communal property associations

The taxation of a company and its shareholder must be distinguished. The company is liable for normal tax while a shareholder is liable for dividends tax.

Dividends tax is levied, amongst other things, on a dividend paid by a resident "company", other than a headquarter company.[21]

4.2.1 Definition of "share"

The term "dividend" is defined in section 1(1) as, amongst other things, any amount applied or transferred by a resident company for the benefit or on behalf of any person in respect of any share in that company.

The company only withholds the dividends tax on behalf of its members (holders of shares), assuming no exemptions apply, when a cash dividend is distributed to them.

The term "share" as defined in the Act in relation to any company means –

> *"any unit into which the proprietary interest in that company is divided".*

Corbett JA in *Standard Bank of South Africa Ltd & Another v Ocean Commodities Inc & others* stated the following regarding the meaning of a share:[22]

> *"A share in a company consists of a bundle, or conglomerate, of personal rights entitling the holder thereof to a certain interest in the company, its assets and dividends."*

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[20] Section 1(1)
[21] A "headquarter company" as defined in section 1(1) is not subject to dividends tax since it is specifically excluded under section 64E(1)
[22] 1983 (1) SA 276 (A) at 288

The main object of a CPA is the holding of property, which is registered[23] in its name,[24] on behalf of its members. Property under the CPA Act includes –[25]

> *"movable and immovable property and any right or interest in and to movable or immovable property or any part thereof".*

A CPA's constitution must deal with matters such as the –

- land or property to be owned by the CPA, if known;[26]
- purpose for which the property is reserved[27] and may be used,[28] namely, –[29]
  - ➢ economic, social, environmental and sustainable development and infrastructure investment for the entire community;
  - ➢ crop fields, grazing land, water ways, wood lands, conservation, recreational and any other purpose for the entire community;
  - ➢ the provision of economic, social and other services for the entire community; and
  - ➢ subdivided portions for residential, industrial and commercial purposes;
- the physical division and allocation of the property.[30]

The share in relation to any CPA is therefore the members' interest relating to their rights to or in a property determined by shared rules under its constitution.

The expression "proprietary interest" referred to in the definition of "share" is not defined in the Act and should therefore be interpreted according to the ordinary meaning as applied to the subject matter with regard to which they are used.[31] The *Law Dictionary* provides the following explanation regarding the concept "proprietary interest":[32]

> *"The owner of a property, whether tangible or intangible, has certain rights that are accorded to them. This is a right to an advantage, share or interest in the property or an asset."*

Having regard to the above, the concept "proprietary interest" is often used in legal contexts to describe ownership and the associated rights that come with it, for example, an individual who holds shares in a company has a proprietary interest in that company and may generally have voting rights and rights to certain distributions.

Normally the names and identity numbers of members of a CPA on whose behalf the property is acquired, held and managed by that CPA are listed in the Constitution. However, if that information is not readily available, the constitution must provide for –

- the qualifications for membership of the intended members of the CPA;[33]
- the classes of membership (if any) and the rights of members of different classes;[34]
- the rights of members to the use of the CPA's property;[35]

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23 Under the Deeds Registries Act 47 of 1937
24 Section 2A(1) of the CPA Act
25 The term "property" is defined in section 1 of that Act
26 Paragraph 4 in the Schedule
27 For purposes of the registration of the property under the Land Survey Act 8 of 1997 a general plan, if required, will in accordance with section 2A(2) of the CPA Act be prepared in consultation with the Department of Rural Development and Land Reform and the community
28 Paragraph 10 in the Schedule
29 Section 2A(3) of the CPA Act
30 Paragraph 10 in the Schedule
31 Kellaway, E A. (1995). *Principles of Legal Interpretation of Statutes, Contracts and Wills.* Butterworths. Also, see Steyn, L C. (1981). *Die Uitleg van Wette* (Fifth Edition) at 4 to 7. Juta and Company (Pty) Ltd
32 https://thelawdictionary.org/proprietary-interest/
33 Paragraph 5 in the Schedule
34 Paragraph 6 in the Schedule
35 Paragraph 7 in the Schedule

- whether members may sell their rights and, if so, to whom;[36]
- what happens to a member's rights on his or her death;[37] and
- financial matters, amongst other things, the distribution and division of profits of the CPA;[38] and
- how the CPA may be dissolved and what will happen to its assets.[39]

A CPA may not undertake or conclude various transactions relating to the property held by that CPA on behalf of its members without the consent of the majority of members present at a general meeting of members.[40]

Every member, based on the above that must be addressed in the constitution of a CPA and the provisions of the CPA Act, potentially has the right to: certain profits, income, assets, the return of capital on the winding-up of the CPA and the right to exercise control and influence over the CPA's management, attend and vote at meetings. These rights, however, will be determined and specified in the constitution establishing and governing a CPA.

4.2.2 Definition of "dividend"

A dividend can constitute the transfer of cash or assets41[41] to a holder of shares. The definition of "dividend" has specific inclusions and exclusions.

Paragraph (*a*) of the definition of "dividend" in section 1(1) includes any amount transferred or applied by a resident company by way of a distribution, which could, amongst other things, take the form of a distribution of profits (dividends), which amount must be for the benefit or on behalf of any person. An amount, which is unrelated to a person's shareholding, will not be derived in respect of a share.

Any distribution and division of profits to any member of the CPA, as determined by its constitution, will therefore fall within the definition of "dividend".

The person entitled to the benefit of the dividend attaching to the share will be the person liable for dividends tax, although the tax will be withheld by the company paying the dividend or by the regulated intermediary. Dividends tax is not a payment towards a person's normal tax liability.

5. Trusts

The Minister may under certain circumstances make any provision of the CPA Act applicable to a "similar entity", which includes –[42]
- a trust contemplated in the Trust Property Control Act 57 of 1988;
- a co-operative contemplated in the Co-operatives Act 14 of 2005;
- any other recognised association of persons; or
- a company registered under the Companies Act 71 of 2008.

The trust conduit-pipe principle and section 25B of the Act can apply only to a CPA formed as a trust and not formed as a company.

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[36] Paragraph 11 in the Schedule
[37] Paragraph 12 in the Schedule
[38] Paragraph 18 in the Schedule
[39] Paragraph 20 in the Schedule
[40] Section 12 of the CPA Act
[41] Dividend in specie
[42] The term "similar entity" is defined in section 1 of the CPA Act

If the CPA is constituted as an association of persons, a company or a co-operative, the conduit-pipe principle cannot apply to such an entity, and it must be assessed as a company for income tax purposes. Please refer to our guide on The Taxation of Trusts and the Parties to a Trust for the relevant tax consequences.

6. Public benefit organisation

For a CPA to enjoy the exemption of its receipts and accruals under section 10(1)(*c*N) of the Act, it must be approved by the Commissioner as a PBO under section 30(3) of the Act and be compliant under all of the relevant provisions. Section 10(1)(cN) exempts receipts and accruals of registered and approved public benefit organisations from normal tax under certain circumstances as listed in section 10(1)(cN).

A CPA must fall within the ambit of the definition of "public benefit organisation" in section 30(1), namely, be incorporated as a non-profit company as defined in the Companies Act, formed as a trust or established as an association of persons. All the requirements of the definition of "public benefit organisation" must be met to qualify and be approved by the Commissioner as a PBO under section 30(3).

The CPA Act applies to a community if such community is –[43]

- entitled by order of the Land Claims Court or any other competent court[44] to restitution under the Restitution of Land Rights Act[45] on condition that a CPA is formed;
- entitled to restitution and has entered into an agreement[46] with the Minister under the Restitution of Land Rights Act on condition that a CPA is formed;
- entitled to restitution under the Restitution of Land Rights Act and is the beneficiary of land purchased, acquired or expropriated in accordance with that Act[47] on condition that a CPA is formed;
- entitled to or receiving property or other assistance from the state under an agreement or under any law approved by the Minister on condition that a CPA is formed;
- approved by the Minister, to whom any property has been donated, sold or otherwise disposed of by any person on condition that a CPA is formed;
- is a group acquiring land or acquiring rights to land approved by the Minister wishing to form a CPA; and
- approved by the Minister to which any property has been awarded under any legislation on condition that a CPA is formed.

In view of the above, the sole or principal object of a CPA may be the carrying on of the public benefit activity contemplated in paragraph 3(*e*) in Part I of the Ninth Schedule to the Act, which reads as follows:

> *"The promotion, facilitation and support of access to land and use of land, housing and infrastructural development for promoting official land reform programmes."*

In addition to meeting the requirements of the definition of "public benefit organisation", a CPA must also comply with the prescribed requirements of section 30(3), which, amongst other things, include the –

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43 Section 2(1) of that Act
44 Pending amendment to be substituted by section 36 read with item 6 of the Schedule to the Land Court Act 6 of 2023 with effect from a date determined by the President by proclamation in the *Government Gazette*, which date has not yet been determined
45 Act 22 of 1994
46 Section 42D of the Restitution of Land Act
47 Section 42E of the Restitution of Land Act

- prohibition that none of its funds may be distributed directly or indirectly to any person otherwise than in the course of undertaking any public benefit activity and is required to use its funds solely for the object for which it has been established;[48] and

- requirement that on dissolution its assets must be transferred to any public benefit organisation approved under section 30, any institution, board or body exempt under section 10(1)(*c*A)(i), which has as its sole or principal object the carrying on of any public benefit activity, the government in the national, provincial or local sphere contemplated in section 10(1)(*a*), or the National Finance Housing Corporation contemplated in section 10(1)(*t*)(xvii), who are required to use those assets solely for purposes of carrying on one or more public benefit activity.[49]

Whether a CPA qualifies for approval as a PBO will be a factual enquiry. Therefore, each application will be considered on its own merits based on the provisions contained in its founding document, namely, the memorandum of incorporation, trust deed, constitution, or other written instrument.

A CPA, however, will enjoy preferential tax treatment only after it has been granted approval as a PBO by the Commissioner and continues to comply with the relevant prescribed requirements of section 30(3) of the Act.

If you want to pursue PBO approval you will need to have applied the relevant legislation correctly and the SARS PBO Guide (Issue 7, 18 March 2025) may assist in understanding the legislation.

7. Regularising of tax affairs

In order to correct the tax treatment of taxable income in CPAs, affected CPAs will need to retrospectively quantify the taxes payable, potential penalties and interest, which in some cases may be as far back as 28 years. Affected CPA members would also need to go back to previous tax returns, if they are required to submit tax returns, and include further income and pay penalties and interest, which may push previously non-taxed CPA members into a taxpaying bracket.

In view of the above, CPAs and their members could make use of the Voluntary Disclosure Programme (VDP) administered under Part B of Chapter 16 of the TA Act (sections 225 to 233 in the TA Act), which also contains the requirements for a valid voluntary disclosure and available relief granted on applicable understatement penalties, qualifying administrative penalties and criminal prosecution on the conclusion of a valid voluntary disclosure agreement.[50]

The requirements for a valid VDP are that the disclosure must
(a) be voluntary;
(b) involve a 'default' which has not occurred within five years of the disclosure of a similar 'default' by the applicant or a person referred to in section 226 (3);
(c) be full and complete in all material respects;
(d) involve a behaviour referred to in column 2 of the understatement penalty percentage table in section 223 i.e. "substantial understatement, reasonable care not taken in completing a return, no reasonable grounds for tax position taken, impermissible avoidance agreement, gross negligence or intentional tax evasion;
(e) not result in a refund due by SARS; and

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48 Section 30(3)(*b*)(ii)
49 Section 30(3)(*b*)(iii)
50 Section 225 to 233 of the TA Act

(f) be made in the prescribed form and manner.

A person is deemed to have been notified of an audit or criminal investigation, if the following relevant persons have given notice of the audit or investigation—
(a) a representative of the person;
(b) an officer, shareholder or member of the person, if the person is a company;
(c) a partner in partnership with the person;
(d) a trustee or beneficiary of the person, if the person is a trust; or
(e) a person acting for or on behalf of or as an agent or fiduciary of the person,

The VDP application is a separate application and process that is considered by the VDP Unit within SARS. Any enquiries relating to the VDP application may be addressed to **vdp@sars.gov.za**.

8. Executive summary

- A CPA registered as a company as defined in section 1 of the Act must be taxed as a company;

- The member of such a CPA who receives distributions is subject to dividends withholding tax per the Act;

- Only CPAs registered as a trust may be able to apply the conduit principle;

- Only if a CPA is registered as a PBO in terms of section 30(1) of the Act will the benefits of a PBO apply;

- In order to regularise the tax affairs of the affected CPAs and its members they will need to go back and correct their tax returns or re-submit tax returns for previous years that may not have been compliant. The VDP route may be available to those affected CPAs and their members.

- The following SARS guides are available on the SARS website at www.sars.gov.za:
  - ➢ *Guide to the Voluntary Disclosure Programme*.
  - ➢ Comprehensive Guide to Dividends Tax.
  - ➢ For further information on trusts under South African law, see the *Guide to the Taxation of Special Trusts* and the *Comprehensive Guide to Capital Gains Tax* (Issue 9) in Chapter 14.
  - ➢ Tax Exemption Guide for Public Benefit Organisations in South Africa.

This Tax Guide provides an overview of the relevant tax provisions for CPAs and their members. The Guide does not constitute tax or legal advice and, since a taxpayer's tax obligations depend on their specific / personal circumstances it is strongly suggested that you seek professional advice that is specific to your circumstances.

This Guide is understood to be correct as at **17 June 2025**, but please remember that tax laws and practices can change over time.

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