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THE SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS
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Submission File Ref: #771186

8 October 2021

South African Revenue Service

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Pretoria

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

Dear SARS

COMMENTS ON THE DRAFT TAX EXEMPTION GUIDE FOR INSTITUTIONS, BOARDS OR BODIES

1. We herewith take an opportunity to present our comments on behalf of the South African Institute of Chartered Accountants (SAICA) on the Draft Tax Exemption Guide for Institutions, Boards or Bodies which provides general guidance on the exemption from income tax of these entities qualifying under section 10(1)(cA)(i).

2. We set out below our comments in this regard.

COMMENTS

Preface

3. On page ii, it is stipulated that "*The guide deals with the following taxes that may affect institutions, boards or bodies:…*"

4. Submission: Duties should be included as it is not only taxes that are discussed.

5. On page ii, it is stipulated that "*The guide is based on legislation as at the time of issue.*"

6. Submission: It should be ensured that the date of issue is included on the final version of the Guide.

Disclaimer

7. On page iii, it is stipulated that "*The use of an entity in an example in this guide is not confirmation of its tax-exempt status.*"

8. Submission: It should be clarified that the entity is not exempt, but its receipts and accruals are.

2.1 Meaning of any law

9. On page 4, it is stipulated that "all law" used in section 10(1)(cA)(i) means any law, such as the Constitution, which is the supreme law of South Africa, or an Act that has been passed by the Parliament of South Africa. It then continues to state that "*Provincial legislation will therefore not be considered for the purposes of the exemption under this section."*

10. Judge Kriegler in Du Plessis and Others v De Klerk and Another (CCT8/95 [1996], ZACC 10) stipulated that the words ""*all law in force" may have some ambiguity, in that they are capable of being read as being limited to statute law. … It governs all law in force during the currency of the Constitution. There is no qualification, no exception. All means all. As the Chapter governs all administrative decisions taken and all administrative acts performed, so it governs all law".*

11. Submission: Although we agree with SARS' interpretation, we would appreciate SARS' views on the reference to "any law" in light of Judge Krigler's interpretation in respect of the exclusion of provincial legislation.

3.1 The carrying on of prescribed activities in the furtherance of the sole or principal object

12. On page 6, section 3.1 deals with the activities in the furtherance of the sole or principal object of the institution.

13. Submission: Including a reference to the ABC Company v CSARS (14106) [2019] ZATC case might be useful as the central issue in dispute was whether the sole or principal object of ABC was as required in terms of the law.

3.3.7 State

14. On page 13, the meaning and effect of the word "include" is discussed in the context of ITC 1878.

15. Submission: The interpretation of this word was also covered in a SCA court case, Glencore Operations SA (Pty) Ltd v CSARS, and reference was made to the Constitutional Court decisions in this regard. It is suggested that this case be included in the Guide.

3.4.4 Financial assistance

16. On page 18, it is stated that the reference to loans is merely an example of activities, which may be designed to promote commerce, industry or agriculture or any branch thereof.

17. Submission: The reference to loans is not an example but a specific inclusion in the context of what the word “include” means.

4 Founding document

18. On page 19, it is stated under the first bullet point of section 4 that any institution, board or body established by South African law will have either national legislation establishing such an institution, board or body.

19. Submission: The word ‘either’ should be removed.

5.1 Prohibition on distributions

20. On page 20, it is stipulated that an institution, board or body is not permitted to distribute any amount to any person. The dictionary meaning of the word “distribute” is provided as it is not defined in the Act. The ordinary meaning describes “distribute” as “to give something out to several people, or to spread or supply something”.

21. Submission: We submit that this word cannot take its ordinary meaning and should be limited to distributions to “members/shareholders”. A distribution to conduct research, to provide commodities or to promote its activities is not intended to be caught here. Clarity should be provided explaining the distinction between expenditure incurred by the institution, board or body and distributions made by them.

22. A distribution when the entity is dissolved should also be included in this discussion.

5.2 Use of funds

23. On page 21, the word “funds” is explained and it is stated that it can refer to financial resources, namely, money for spending in the form of cash, liquid securities and credit lines.

24. Submission: It needs to be clarified if “funds” would include dividends, interest and capital gains.

25. On page 21, the last paragraph states that the funds of an institution, board or body may be invested as desired provided the investment does not amount to an indirect distribution of profits.

26. Submission: It submitted that an investment would not constitute a distribution but rather a movement in assets. This should also be included and clarified under point 5.1 in the Guide.

5.3 Dissolution

27. On page 23, it is stated that the amount of accumulated net revenue is the total undistributed profits or revenue which can include amounts of a capital or revenue nature.

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28. Submission: This concept should be linked back to the amount as reflected in the statement of financial position for these entities (if the wording in the financial statements of these entities is different).

7 Withdrawal of the exemption

29. On page 24, it explains that the Commissioner must provide adequate reasons relating to the non-compliance or failure to comply with section 10(1)(cA)(i) before the exemption is withdrawn.

30. Submission: This is not specifically stipulated in section 10(1)(cA)(i) so it is appreciated that this is included in the Guide. It will be recommended in SAICA's Annexure C submission that this requirement is included in a proviso to section 10(1)(cA)(i) as entities do require advance warning that SARS intends withdrawing the exemption and not only finding out about this when the exemption has been withdrawn and receiving reasons for this after the fact.

9.1 Company

31. On page 26 at the bottom, it is stated that "*a non-profit company (NPC) incorporated generally for a public benefit object and whose income and property many not be distributed to its incorporators, members, directors, officers or persons except for payment of reasonable remuneration*", is a type of company which may be formed or incorporated under the Companies Act.

32. Submission: The word "many" should be "may". It should also be stated that the prohibition to not distribute the income or property is as stipulated in the founding document of the NPC.

10.2 Control measures

33. On page 31, it is stated that the section 18A-approved institution, board or body is required to retain the audit certificate as part of its records.

34. Submission: Reference should be made here to Interpretation Note 112 providing further guidance on the section 18A audit certificates.

35. We do, however, once again bring SARS' attention to SAICA's concerns with regard to the issuing of these certificates being the fact that the type of audit engagement that is required in order to issue the audit certificates contemplated in section 18A does not fit within the ambit of the pronouncements issued by the International Auditing and Assurance Standards Board by registered auditors, if it is them issuing the certificates. The implications of this is that the PBO's would become non-compliant with the legislation which could ultimately affect the PBO's tax exempt status

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36. Further information is provided in SAICA's submissions made to SARS on [2 May 2018]() and 9 March 2020.

10.2 *Bone fide* donations

37. At the bottom of page 33, the last sentence, it is stated that there must be no *quid pro quo*, no reciprocal obligations and no personal benefit for the donor.

38. Submission: As the donor will not always be a natural person, the benefit will not always be a personal benefit. It would be better to state that "…no benefit to the donor….:

11.1.1 Donations tax

39. On page 41, second paragraph, it is stated that "Donations made by or to an institution, board or body are exempt from the payment of donations tax".

40. Submission: Would a donation made by an institution, board or body not be regarded as a distribution – which an institution, board or body cannot do?

11.1.2 Estate duty

41. On page 41, fourth paragraph, it is stated that "Any property bequeathed to an institution, board or body having as it sole or principal object the carrying on of any PBAs is excluded from the value of the estate and not subject to estate duty".

42. Submission: We suggest that it rather be stated that the property would qualify for a deduction rather than it being excluded from the estate.

11.1.3 Transfer duty

43. On page 41 and 42, the transfer duty implications, should a property be used for a purpose other than for carrying on any PBAs are discussed.

44. Submission: For completeness, we suggest that reference is also made to the SARS Transfer Duty Guide for further information in this regard.

11.1.4 Dividends tax

45. On page 42, the provisions relating to dividends tax are discussed.

46. Submission: It is suggested that it be made clear that the institution, board or body can't distribute a dividend as it can't make a distribution and thus these entities can't have a liability to withhold the dividends tax.

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47. On page 43, it is stated that it is important for any institution, board or body that holds investments through a trust to determine whether it has a vested right to a dividend before it is paid by the company to ensure that the necessary declaration of exemption filed with the company or regulated intermediary.

48. Submission: It should be clarified how an institution, board or body can hold investments through a trust.

12 Applications for the exemption under section 10(1)(cA)(i) and approval under section 18A

49. On page 46, it states that "Any entity not formally approved by the Commissioner, as an institution, board or body must complete the prescribed application form EI1".

50. Submission: It is uncertain what is meant by an entity that is not formally approved by the Commissioner. This should be clarified.

51. In the last paragraph on page 46, it states that "Retrospective approval will be granted only if the Commissioner is satisfied that the institution, board or body complied with the requirements of section 10(1)((cA)(i) during the period before it lodged its application for approval as an institution, board or body".

52. Submission: This clarity is appreciated as this information is not contained in the section itself as is done in other sections such as section 30(3B) and 30A(4)(b).

16 Record-keeping

53. On page 49, it states that if an objection or appeal against an assessment or decision is lodged, then the records relevant to the objection or appeal must be kept until the disputed assessment/decision becomes final or the applicable five-year period has elapsed, whichever is the later.

54. Submission: It should be clarified that a decision by SARS not to approve the application for the exemption from income tax made by an institution, board or body is an example of a decision that is subject to an objection or appeal or reference should be made to paragraph 18 of the Draft Guide where this is made explicit.

17.3 Year of assessment

55. On page 52, it states that an institution, board or body established by or under any law will have a year of assessment ending on the date that coincides with its financial year. It then processed to provide an example of an institution with a June financial year.

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56. Submission: It should be mentioned that in terms of the definition of “financial year” in section 1 of the Income Tax Act, if the institution, board or body has a financial year other than February, then the taxpayer will need to get the Commissioner’s approval for this.

57. It is our understanding that this is done by correcting the details on the RAV from on eFiling, but this should be clarified in the Guide.

Yours sincerely

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The South African Institute of Chartered Accountants