



# Tax Exemption Guide for Recreational Clubs

Income Tax

# Tax Exemption Guide for Recreational Clubs

## Preface

This guide provides general guidance on the approval of qualifying recreational clubs under section 30A and the partial taxation of the receipts and accruals under section 10(1)(cO).

The guide provides a basic overview of the following taxes and duties that may affect recreational clubs:

- Capital gains tax
- Dividends tax
- Donations tax
- Employees' tax
- Estate duty
- Income tax
- Securities transfer tax
- Skills development levy
- Transfer duty
- Unemployment insurance contributions
- Value-added tax

This guide is not an “official publication” as defined in section 1 of the Tax Administration Act 28 of 2011 and accordingly does not create a practice generally prevailing under section 5 of that Act.

It is also not a general binding ruling under section 89 of the Tax Administration Act. Should an advance tax ruling be required, visit the SARS website at [www.sars.gov.za](http://www.sars.gov.za) for details of the relevant application procedure.

This guide is based on legislation as at the time of issue. Information relating to taxes, duties, levies and contributions reflect the rates applicable as at the date of issue of this guide.

All amendment Acts, explanatory memorandums, forms, *Government Gazettes*, guides, interpretation notes, returns, BGRs and tables referred to in this guide are the latest versions unless the context indicates otherwise, which are available on the **SARS website** or on request via eFiling at [www.sarsefiling.co.za](http://www.sarsefiling.co.za), whichever is applicable.

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- contact your nearest SARS branch office; preferably after making an appointment via the **SARS website**;
- have a virtual consultation with a SARS consultant by making an appointment via the **SARS website**;
- contact the SARS National Contact Centre –
  - if calling locally, on 0800 00 7277; or

- if calling from abroad, on +27 11 602 2093 (only between 8h00 and 16h30 South African time); or
- contact your own tax advisor or tax practitioner.

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### **Leveraged Legal Products**

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## Glossary

In this guide unless the context indicates otherwise –

- **“basic exemption”** means the exempt amount determined under section 10(1)(cO)(iv) as a threshold and applied to the total receipts and accruals from any source other than receipts and accruals derived in the manner specified in section 10(1)(cO)(i), (ii) and (iii);
- **“CGT”** means capital gains tax, being the portion of income tax payable by a taxpayer on a taxable capital gain arising from the disposal of assets determined under the Eighth Schedule;
- **“Commissioner”** means the Commissioner for the South African Revenue Service appointed under section 6 of the South African Revenue Service Act 34 of 1997, or the Acting Commissioner designated under section 7 of that Act;
- **“Companies Act”** means the Companies Act 71 of 2008;
- **“fiduciary”** means a person who holds a position of trust or responsibility including decision-making powers over the affairs of a recreational club;
- **“founding document”** means the written instrument such as the constitution or memorandum of incorporation under which a recreational club is established and governed;
- **“general public”** means natural persons who are members of the community at large<sup>1</sup> as opposed to natural persons who are members of a recreational club;
- **“non-member”** means a person who is not a member of a club but may be entitled to the enjoyment and use of a recreational club’s amenities or facilities by virtue of being a family member or a guest of a member of that club;
- **“NPC”** means a “non-profit company” as defined in section 1 of the Companies Act;
- **“partial taxation”** means the method of taxing the receipts and accruals derived from any other source falling outside the exemptions, including the basic exemption as set out in section 10(1)(cO);
- **“PAYE”** means employees’ tax, which is often referred to as Pay-As-You-Earn;
- **“PBO”** means “public benefit organisation” as defined in section 30(1) approved by the Commissioner under section 30(3);
- **“prescribed requirements”** mean the formal conditions and requirements set out in section 30A(2)(a), which a club must comply with to qualify for approval as a recreational club;
- **“recreational club”** means a “recreational club” as defined in section 30A(1) approved by the Commissioner under section 30A(2);
- **“Schedule”** means a Schedule to the Act;
- **“SDL”** means the skills development levy;
- **“SDL Act”** means the Skills Development Levies Act 9 of 1999;
- **“section”** means a section of the Act;

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<sup>1</sup> See *CIR v Plascon Holdings Ltd* 1964 (2) SA 464 (A), 26 SATC 101 at 109.

- “**section 10(1)(cO)**” means the section providing for the exemption from income tax of certain receipts and accruals of a recreational club and the taxation of receipts and accruals falling outside the parameters of the exemptions provided in that section;
- “**section 30A**” means the section setting out the prescribed requirements a club must comply with to obtain and retain approval as a recreational club;
- “**STT**” means securities transfer tax;
- “**STT Act**” means the Securities Transfer Tax Act 25 of 2007;
- “**TA Act**” means the Tax Administration Act 28 of 2011;
- “**the Act**” means the Income Tax Act 58 of 1962;
- “**Transfer Duty Act**” means the Transfer Duty Act 40 of 1949;
- “**UIF**” means the unemployment insurance fund;
- “**Unemployment Insurance Act**” means the Unemployment Insurance Act 63 of 2001;
- “**VAT**” means value-added tax;
- “**VAT Act**” means the Value-Added Tax Act 89 of 1991; and
- any other word or expression bears the meaning ascribed to it in the Act.

## 1. Introduction

A recreational club will enjoy preferential tax treatment only after it has been granted approval by the Commissioner and continues to comply with the relevant requirements and conditions set out in section 30A. The qualifying receipts and accruals of an approved recreational club are exempt from income tax under section 10(1)(cO), however, non-qualifying receipts and accruals are subject to partial taxation to the extent that they exceed the basic exemption.

The underlying principle in establishing a recreational club is that members provide money by way of membership fees or subscriptions that in turn are used by the club to finance amenities or facilities for their collective enjoyment. Members therefore contribute to share the cost of providing a collective benefit, namely, the social or recreational amenity or facility. Essentially no business or trade is carried on and there is no personal financial gain for the individual members. Under this principle, the sharing of expenses by various members joining based on mutuality does not generate additional taxable income for a recreational club.

Recreational clubs fall outside the scope and tax rules for PBOs.<sup>2</sup> The main difference between a recreational club and a PBO is that a PBO operates for the benefit of the general public at large, while a recreational club operates for the benefit of its members. A PBO predominantly relies on donations, grants or bequests to fund its objects, while a club receives its income from its members who contribute by way of membership fees or subscriptions.

Any *bona fide* donations made to a recreational club are not tax-deductible under section 18A<sup>3</sup> in determining the taxable income of a donor.

## 2. Definition of “recreational club”

The term “recreational club” is defined and means –<sup>4</sup>

“any non-profit company as defined in section 1 of the Companies Act, society or other association of which the sole or principal object is to provide social and recreational amenities or facilities for the members of that company, society or other association”.

A club must meet all the requirements of the definition of “recreational club” to be considered by the Commissioner for approval under section 30A(2) for purposes of the exemption of certain of its receipts and accruals under section 10(1)(cO).

Although the types of clubs that may qualify under the definition of “recreational club” may seem infinite and diverse in nature, an important common distinguishing feature is that such clubs do not have a profit motive nor do they provide any pecuniary gain or material advantage for their individual members.

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<sup>2</sup> For further commentary, see the *Tax Exemption Guide for Public Benefit Organisations in South Africa*.

<sup>3</sup> For further commentary, see the *Basic Guide to Section 18A Approval*.

<sup>4</sup> Section 30A(1).

*Claassen's Dictionary of Legal Words and Phrases* describes "club" as follows:<sup>5</sup>

"Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing, They are not partnerships, they are not associations for gain, and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed, but understood by everyone, that clubs are formed, and this distinguishing feature has been often judicially recognised."

Even though clubs are established to conduct their activities with and for the benefit of their members, they are not prohibited from dealing with non-members or the general public within certain parameters.

**Example 1 – Non-exhaustive examples of recreational clubs providing social and recreational amenities or facilities**

- A golf club providing grounds and facilities for playing the game of golf.
- Social and recreational clubs providing recreational facilities such as tennis courts, a swimming pool, squash courts and social facilities such as a restaurant or a bar.
- Soccer, tennis or rugby clubs providing members with the facility to play the relevant sport.
- Vintage car, motorcycle or cycling clubs.
- Angling, flying, hang gliding, hiking, mountaineering or yacht clubs.
- Hobby clubs such as stamp collecting, literary, quilting or gardening clubs.
- Bird watching, dog breeders or photography clubs.

## 2.1 Type of clubs qualifying for approval

A recreational club must be constituted as –

- an NPC incorporated in South Africa;<sup>6</sup>
- an association established in South Africa; or
- a society formed in South Africa.

<sup>5</sup> RD Claassen *Claassen's Dictionary of Legal Words and Phrases* [online] (My LexisNexis: June 2021).

<sup>6</sup> Pre-existing companies as defined in section 1 of the Companies Act incorporated or deemed to be incorporated under section 21 of the repealed Companies Act 61 of 1973 continue to exist under the Companies Act and will qualify for approval as a recreational club provided all the conditions and requirements of section 30A are complied with.

The term “non-profit company” as defined in the Companies Act means –<sup>7</sup>

“a company (a) incorporated for a public benefit or other object as required by item 1(1) of Schedule 1;<sup>8</sup> and (b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3) of Schedule 1”.<sup>9</sup>

An NPC does not automatically qualify for exemption from income tax<sup>10</sup> and must satisfy the statutory requirements of the Act to qualify for approval as a recreational club in order for certain of its receipts and accruals to be exempt from income tax. The primary difference between an NPC and a for-profit company is that an NPC does not have shares or shareholders and the members of an NPC are not entitled to receive distributions of profits or gains from the operations of the company. Profits and gains generated by a recreational club incorporated as an NPC are therefore generally used by the club for general administration and for making capital improvements.

The words “association” and “society” are not defined in the Act and should therefore be interpreted according to their ordinary meaning as applied to the subject matter with regard to which they are used.<sup>11</sup>

LAWSA describes an “association” as follows:<sup>12</sup>

“It is today accepted that an association is founded on a basis of mutual agreement. This entails that it will come into being if the individuals who propose forming it have the serious intention to associate and are in agreement on the essential characteristics and objectives of the *universitas* or unincorporated association. The latter aspect is usually manifested by the approval and adoption of a constitution.”

(Footnotes omitted.)

The word “society” is described in *The Free Dictionary* as –<sup>13</sup>

“a group of people broadly distinguished from other groups by mutual interests, participation in characteristic relationships, shared institutions, and a common culture”.

A trust<sup>14</sup> is not an association of persons or a society and therefore does not qualify for approval as a recreational club. A trust does not have members sharing collectively in a common purpose. In addition, the beneficiaries of a trust are not members of the trust.

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<sup>7</sup> Section 1(1) of that Act.

<sup>8</sup> The reference to an “other object” in item 1(1) of Schedule 1 to the Companies Act refers to cultural or social activities or communal or group interests.

<sup>9</sup> An NPC under item 1(3) of Schedule 1 to the Companies Act, for example, may pay reasonable remuneration for goods or services rendered, pay or reimburse expenses incurred to advance a stated object of the company, or make payments in accordance with any legal obligation binding on the company.

<sup>10</sup> See item 1(6) of Schedule 1 of the Companies Act.

<sup>11</sup> EA Kellaway *Principles of Legal Interpretation of Statutes, Contracts and Wills* (1995). Butterworths, South Africa Series. Also, see LC Steyn *Die Uitleg van Wette* 5 ed (1981) Juta and Company (Pty) Ltd at 4 to 7.

<sup>12</sup> GJ Pienaar “Association” 2 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in 155.

<sup>13</sup> [www.thefreedictionary.com/society](http://www.thefreedictionary.com/society) [Accessed 6 July 2022].

<sup>14</sup> The term “trust” as defined in section 1(1) means any trust fund consisting of cash or other assets that are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person.

## 2.2 Sole or principal object

A recreational club must have as its sole or principal object the provision of social and recreational amenities or facilities for its members.<sup>15</sup>

The words “sole”, “principal” and “object” are not defined in the Act. The words are described in the *Dictionary.com* as follows:

- “Sole” as “being the only one; only”.<sup>16</sup>
- “Principal” as “first or highest in rank, importance, value, chief”.<sup>17</sup>
- “Objective” as “something that one’s efforts or actions are intended to attain, accomplish, purpose, goal, target”.<sup>18</sup>

In ITC 1569,<sup>19</sup> the judge referred to the following two meanings of “principal” in the *Oxford English Dictionary*:

“1. First or highest in rank or importance; that is at the head of all the rest; of the greatest account or value; foremost.

2. Less definitely: belonging to the first or highest group in rank or importance; of the first order; main, prominent, leading.”

The word “principal” is used in conjunction with “sole” and this concept therefore implies that the recreational club must have as the only, predominant, or foremost aim or objective the provision of social and recreational amenities or facilities for its members. The word “principal” within this context means not less than 90%, having regard to the expression “substantially the whole”<sup>20</sup> applied to recreational clubs (see **8.2.2**)<sup>21</sup>. It is unacceptable for a recreational club –

- to provide its amenities or facilities mainly to members of the general public for, say, five days of the week and use the resulting income to subsidise the maintenance and upkeep of the facilities for use by its members over the weekend; and
- to engage in commercial business undertakings or trading activities (see **3.2.3, 7 and 8.2**)<sup>22</sup> to provide the necessary funds to maintain the social and recreational amenities or facilities for use by its members.

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<sup>15</sup> Section 30A(1).

<sup>16</sup> [www.dictionary.com/browse/sole](http://www.dictionary.com/browse/sole) [Accessed 6 July 2022].

<sup>17</sup> [www.dictionary.com/browse/principal?s=t](http://www.dictionary.com/browse/principal?s=t) [Accessed 6 July 2022].

<sup>18</sup> [www.dictionary.com/browse/objective](http://www.dictionary.com/browse/objective) [Accessed 6 July 2022].

<sup>19</sup> (1993) 56 SATC 86 (C) at 90.

<sup>20</sup> The expression “substantially the whole” was introduced in the revised tax system for PBOs in 2000 to achieve a more supportive fiscal environment and to give effect to the proposals and recommendations by the Katz Commission set out in the *Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa* at 9 and 18. The expression “substantially the whole” has also been introduced into legislation dealing with the exemption from income tax of a recreational club.

<sup>21</sup> For further commentary, see Binding General Ruling (Income Tax) 20 “Interpretation of the Expression ‘Substantially the Whole’ ”.

<sup>22</sup> Depending on the facts applicable there may be additional considerations that need to be taken into account in determining whether a commercial business undertaking or trading activity is being conducted. All relevant facts and circumstances must be examined on a case-by-case basis.

The “object” of a recreational club is not the subjective goals of its controllers but the activities that it is mandated by its founding document (see 3.1) to perform and is the aim, intention, purpose, thing sought to be accomplished and the goal to be obtained.

Since a recreational club approved under section 30A receives tax privileges, the expression “sole or principal” must be considered strictly having regard to the facts of each case.<sup>23</sup>

### 2.3 Provision of social and recreational amenities or facilities

The definition of “recreational club” requires that such a club provide social and recreational amenities or facilities for its members. This requirement is fundamental because a recreational club must have this as its sole or principal object (see 2.2) and the purpose for the establishment of the club.

The words “provide”, “social”, “recreational”, “amenities”, and “facilities” are not defined in the Act. The words are described in the *Cambridge English Dictionary* as follows:

- “Provide” as “to give something to a person, company, or organization, or to make it available for them to use, to produce something useful that can be used as part of a process or activity.”<sup>24</sup>
- “Social” as “related to meeting and spending time with other people for pleasure.”<sup>25</sup>
- “Recreational” as “connected with ways of enjoying yourself when you are not working.”<sup>26</sup>

The *White Paper on Sport and Recreation for the Republic of South Africa* describes “recreation” as –<sup>27</sup>

“includes services and programmes which an individual would voluntarily engage in during one’s free time to achieve a satisfying experience”.

The *Merriam-Webster Dictionary* describes the following words:

- “Amenity” as “something that helps provide comfort, convenience, or enjoyment”<sup>28</sup> and “something adding to pleasure or comfort but not absolutely necessary.”<sup>29</sup>
- “Facility” as “something that makes an action, operation, or course of conduct easier”<sup>30</sup> and “a structure that is designed and built for a particular purpose.”<sup>31</sup>

The main difference between amenities and facilities appears to be that amenities refer to things that are designed to provide comfort and enjoyment while facilities essentially refer to places or even equipment built to facilitate specific needs. Amenities are therefore additional features or comfort things inside a property or building, for example, high-quality products or equipment, internet, free Wireless Fidelity (Wi-Fi), air-conditioning, television, hairdryers in dressing rooms, a playground, childcare services or centre, or a swimming pool. Facilities are places that are built, constructed, installed or established to perform some

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<sup>23</sup> *CIR v D & N Promotions (Pty) Ltd* 1995 (2) SA 296 (A), 57 SATC 178 at 182.

<sup>24</sup> <https://dictionary.cambridge.org/dictionary/english/provide> [Accessed 6 July 2022].

<sup>25</sup> <https://dictionary.cambridge.org/dictionary/english/social> [Accessed 6 July 2022].

<sup>26</sup> <https://dictionary.cambridge.org/dictionary/english/recreational> [Accessed 6 July 2022].

<sup>27</sup> [www.srsa.gov.za/sites/default/files/Whitepaper-inners.pdf](http://www.srsa.gov.za/sites/default/files/Whitepaper-inners.pdf) [Accessed 6 July 2022].

<sup>28</sup> [www.merriam-webster.com/dictionary/amenity](http://www.merriam-webster.com/dictionary/amenity) [Accessed 6 July 2022].

<sup>29</sup> [www.merriam-webster.com/thesaurus/amenity](http://www.merriam-webster.com/thesaurus/amenity) [Accessed 6 July 2022].

<sup>30</sup> [www.merriam-webster.com/dictionary/facilities](http://www.merriam-webster.com/dictionary/facilities) [Accessed 6 July 2022].

<sup>31</sup> [www.merriam-webster.com/thesaurus/facilities](http://www.merriam-webster.com/thesaurus/facilities) [Accessed 6 July 2022].

particular function to render a specific service to meet certain needs.<sup>32</sup> Club facilities are the physical recreational facilities the members of a club are entitled to use by virtue of their membership of a particular club. The amenities or facilities provided by the recreational club must be of a social and recreational nature that the members use for a pastime, hobby or to engage socially. For example, such amenities or facilities may include –

- sporting facilities such as tennis courts, squash courts or polo fields; or
- a venue such as a clubhouse for meeting or getting together for members to socialise or partake in hobbies of mutual interest.

The provision of holiday accommodation is not regarded as the provision of a social and recreational amenity or facility for purposes of section 30A.

A club may also enter into reciprocal arrangements with other clubs. The *BusinessDictionary.com* describes “reciprocal agreement” in a general context as follows:<sup>33</sup>

“*Quid pro quo* arrangement in which two or more parties agree to share their resources in an emergency or to achieve a common objective.”

Reciprocal arrangements therefore generally allow members of both clubs to use each other’s amenities and facilities in accordance with a reciprocal agreement. A member visiting a reciprocal club is treated as a member of that club. Reciprocal arrangements are an additional benefit of membership. Since the facts and circumstances, pertaining to each recreational club may differ, each case will be considered on its own merits.

## 2.4 Members

It is a requirement that a recreational club must provide social and recreational amenities or facilities to its members. Section 30A does not define the word “member” or prescribe a minimum or maximum number of members that should belong to a recreational club. Section 30A, however, does require that members of a recreational club must be entitled to annual or seasonal membership (see 3.2.7). A member of a club will therefore be a person who pays an annual or seasonal membership for the right to use the social and recreational amenities or facilities provided by the club. Such a person may include an inactive member who pays an annual membership fee but infrequently uses the social and recreational amenities or facilities of the club.

The word “member” is described in the *Oxford Dictionary, Thesaurus and Wordpower Guide* as –<sup>34</sup>

“a person or organisation belonging to a group or society”.

Members of a recreational club will be natural persons and not artificial or juristic persons such as companies or corporations, since it is natural persons who obtain the right to use and enjoy the social and recreational amenities or facilities provided by the recreational club. It is, however, acceptable for a company or corporate business or another association to pay or sponsor an individual’s membership to a recreational club.

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<sup>32</sup> <https://pediaa.com/difference-between-amenities-and-facilities/> [Accessed 6 July 2022].

<sup>33</sup> [www.businessdictionary.com/definition/reciprocal-agreement.html](http://www.businessdictionary.com/definition/reciprocal-agreement.html) [Accessed 6 July 2022].

<sup>34</sup> M Wait, S Hawker and C Soanes *Oxford Dictionary, Thesaurus and Wordpower Guide* (2001) Oxford University Press.

A recreational club incorporated as an NPC electing to have members must set out in its memorandum of incorporation the –<sup>35</sup>

- qualifications for membership;
- process for applying for membership;
- cost of membership in any class;
- rights and obligations of membership in any class; and
- grounds on which the membership may be suspended or terminated.

LAWSA provides the following explanation regarding the membership of associations:<sup>36</sup>

“The rules of an association determine in the first instance which persons are eligible for membership of the association, . . . . The rules of an association will usually set out the procedure which must be followed before prospective members are admitted. This could take the form of a written application coupled with formal notification of acceptance from the management committee, the payment of the prescribed membership fee and the placing of a new member’s name on the membership list.”

(Footnotes omitted.)

It is clear from the above that a recreational club irrespective of whether it is constituted as an NPC, association or society should set out the requirements and conditions for that club’s membership in its founding document. Membership will usually be granted if the particular qualifying criteria and requirements relating to membership of the recreational club have been met.

The qualifying criteria and requirements as well as the membership categories a member may qualify for will differ from club to club. A member may or may not be required to pay a registration, joining or entrance fee, a membership fee, or a subscription to belong to a club. The membership fees or subscriptions (see **8.1**) applicable to a particular membership category may also vary from club to club. A club may have a fee structure charging different amounts to different membership categories proportional to the use of the club’s social and recreational amenities or facilities.

The validity of membership of a club is therefore evidenced by the presence of formal procedures for membership eligibility, acceptance and admittance as well as membership rights (see **3.2.8**) obtained after being accepted as a member. The personal particulars of qualifying members together with their privileges and rights are generally recorded in a membership register. This distinguishes members of a recreational club from members of the general public because a member of the general public does not have any continual interest in the club and does not share in the mutuality principle.

The *CollinsDictionary.com* describes “general public” as –<sup>37</sup>

“you can refer to the people in a society as the general public, especially when you are contrasting people in general with a small group”.

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<sup>35</sup> See item 4 of Schedule 1 to the Companies Act.

<sup>36</sup> GJ Pienaar “Associations” 2 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in 162 to 164.

<sup>37</sup> [www.collinsdictionary.com/dictionary/english/general-public](http://www.collinsdictionary.com/dictionary/english/general-public) [Accessed 6 July 2022].

It will therefore be unacceptable for a recreational club to grant membership to any member from the general public who merely uses the club's social and recreational amenities or facilities infrequently or occasionally. A club operated in such a manner will not qualify for approval as a recreational club or if approved, will jeopardise its approval as a recreational club. Whether a person is merely a member of the general public and not a member of a recreational club is a question of fact, which should be determined by considering the circumstances of each case.

### 3. Approval by the Commissioner

The Commissioner must approve a recreational club for purposes of exempting certain of its receipts and accruals under section 10(1)(cO) if –<sup>38</sup>

that club has submitted a copy of its founding document to the Commissioner (see **3.1**) under which it is established and that provides for certain prescribed requirements (see **3.2**);<sup>39</sup>

the club undertakes to submit to the Commissioner a copy of any amendment to its founding document (see **3.3**);<sup>40</sup> and

the Commissioner is satisfied that the club did not knowingly participate in any tax-avoidance scheme (see **3.4**).<sup>41</sup>

Any club not yet approved by the Commissioner as a recreational club must complete and submit to SARS, the prescribed application form EI 1.<sup>42</sup> In the event that the founding document does not comply with the prescribed requirements, the application must include a signed written undertaking by the persons responsible in a fiduciary capacity for the funds and assets of the club (see **4**).

The approval by the Commissioner of a club as a recreational club is generally effective from the date of the notice of approval, that is, it is prospective, unless granted with retrospective effect.<sup>43</sup> A recreational club on written request may apply for the approval to be applied to years of assessment before the approval date. Retrospective approval as a recreational club will be granted only if the Commissioner is satisfied that the club complied with the requirements of section 30A, during the period before it lodged its application for approval as a recreational club.<sup>44</sup> The club will be responsible to prove to the Commissioner that it complied with the requirements relative to the approval during the period before it lodged its application for approval as a recreational club. To prevent any potential abuse, each request for retrospective approval will be considered on its own merits and facts.

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<sup>38</sup> Section 30A(2).

<sup>39</sup> Section 30A(2)(a).

<sup>40</sup> Section 30A(2)(b).

<sup>41</sup> Section 30A(2)(c).

<sup>42</sup> Information on the application process can be obtained from the SARS website.

<sup>43</sup> Section 30A(4) was amended by section 36 of the Taxation Laws Amendment Act 34 of 2019. The amendment is effective from date of promulgation, namely, 15 January 2020.

<sup>44</sup> Section 30A(4)(a).

The Commissioner, however, may not extend retrospective approval<sup>45</sup> to a club that has complied with all its obligations under Chapter 4,<sup>46</sup> Chapter 10<sup>47</sup> and Chapter 11<sup>48</sup> of the TA Act to years of assessment that have prescribed.<sup>49</sup> An assessment may not be made three years after the date of assessment of an original assessment by SARS.<sup>50</sup> If the club complied with the above chapters of the TA Act, it would have submitted its returns when due, and the three-year period will encompass the earliest year of assessment (see **15.3**) for which an assessment was issued during that period. For example, if the club applied for approval as a recreational club on 31 March 2022, the three-year period would begin on 1 April 2019. If the club has a February year-end and its first assessment after 1 April 2019 was for the 2019 year of assessment, the retrospective approval can be made for the 2019 to 2022 years of assessment.

If a club has not complied with the above chapters of the TA Act, the Commissioner may not extend retrospective approval to years of assessment that would have prescribed if the income tax returns relating to those years had been submitted in accordance with section 25(1) of the TA Act.<sup>51</sup> It will therefore be necessary to determine when it would have been assessed had it complied with the return submission requirements under that section of the TA Act. This determination will require the club to establish when its returns should have been submitted under the public notice issued annually by the Commissioner (see **15**). For example, the 2019 notice required that a company lodge its return for the 2019 year of assessment within 12 months of its financial year-end. Thus, a company with a February year-end would have had to submit its 2019 return of income on or before 28 February 2020, and it is the latter date that must fall within the three years preceding the date of application for retrospective approval.

The notification of approval as a recreational club is issued by the Commissioner by letter. The letter contains a unique reference number generally referred to as an exemption reference number, which is a different reference number to the taxpayer reference number (see **15.1**). The recreational club is required to retain the letter confirming approval as part of its records (see **14**).

A written notification will also be issued by the Commissioner to the club should the approval not be granted together with reasons why the club failed to meet the prescribed requirements.

The receipts and accruals of any years of assessment not complying with the retrospective approval requirements, as discussed above, and a club not approved by the Commissioner as a recreational club or which has had its approval withdrawn (see **5**) will be liable for income tax and other taxes and duties as a normal taxpayer. A club constituted as an NPC, society, or other association<sup>52</sup> is liable for tax on all its taxable income, namely, gross income less exempt income and allowable deductions, at the rate applicable to companies, which is currently 28%.<sup>53</sup> The Minister of Finance may announce different rates in the national annual budget. The rates are published annually in the Rates and Monetary Amounts and Amendment of Revenue Laws Act.

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<sup>45</sup> Section 30A(4)(b)(i).

<sup>46</sup> That chapter deals with returns and records.

<sup>47</sup> That chapter deals with tax liability and payment.

<sup>48</sup> That chapter deals with the recovery of tax.

<sup>49</sup> Section 99 of the TA Act.

<sup>50</sup> Section 99(1)(a) of the TA Act.

<sup>51</sup> Section 30A(4)(b)(ii).

<sup>52</sup> See paragraph (d) of the definition of "company" in section 1(1).

<sup>53</sup> Section 5(2)(a).

### 3.1 Founding document

A club applying for approval as a recreational club must have a founding document. A copy of the founding document must be submitted to the Commissioner as part of the application for approval as a recreational club.<sup>54</sup>

The founding document will depend on the type of club incorporated, formed or established:

- An NPC will have a memorandum of incorporation.<sup>55</sup>
- An association or a society will have a constitution adopted by its members.

An NPC is incorporated by a memorandum of incorporation, which sets out, among other things, the object of the NPC, the rights, duties and responsibilities of members, directors and others within and in relation to the company.

LAWSA provides the following information on the founding document of an association:<sup>56</sup>

“The constitution of an association together with all its rules or regulations collectively constitute the agreement which is entered into by its members. This agreement is the crucial factor in the existence of an association. It not only determines the nature and scope of the association’s existence and activities but also, where necessary, prescribes and demarcates the powers of, *inter alia*, the executive committee, the secretary and the members of the association in a general meeting. In addition, it expresses and regulates the rights of members and provides for certain procedural aspects.”

(Footnotes omitted.)

Having regard to the above, the founding document establishing and governing a recreational club irrespective of the type of founding document should, among other things, set out policies relating to the following affairs of the club:

- Membership privileges, for example, a description of the club amenities or facilities a member is entitled to use and any membership privileges extending to non-members.
- Member disputes, for example, guidelines on refund rights on resignation or other termination of membership, ownership of membership in the event of death, divorce or bankruptcy, rights of members and the club regarding suspension, cancellation or withdrawal of membership owing to violations of club rules.
- Operational matters, for example, rules for the use and reservation of the club amenities or facilities, hours of operation and club governance.
- Financial matters, for example, a description of the club’s revenue sources such as membership or subscription fees and other charges a member may be liable to pay.

In addition to a founding document, a recreational club may also have a separate document setting out rules or regulations addressing matters not fully dealt with in the founding document. These rules or regulations, for example, may cover the regulation of the governance of a club such as the frequency of member meetings, notice, quorum, voting requirements, number of directors, nomination, election or removal procedures, powers and duties, and officers required together with their relevant duties. The rules or regulations may include specific requirements and prohibitions, for example, on the use of the recreational amenities or facilities of the recreational club, issuing of membership cards, payment of fees,

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<sup>54</sup> Section 30A(2)(a).

<sup>55</sup> See definition of “memorandum of incorporation” in sections 1 and 15 of the Companies Act.

<sup>56</sup> GJ Pienaar “Association” 2 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in 156.

procedures for the reservation of facilities, attire, non-member privileges, and rules regarding the use of the amenities or facilities offered by the club. The content of the rules or regulations may differ from club to club. Any rules or regulations must also be submitted to the Commissioner as part of the application for approval as a recreational club (see 3).

### 3.2. Prescribed requirements

The prescribed requirements must be included in the founding document.<sup>57</sup> The founding document as a whole will be examined to ensure that the prescribed requirements are included.

#### 3.2.1 Fiduciary responsibility

A recreational club is required to have at least three persons who are not connected persons in relation to each other to accept fiduciary responsibility for the recreational club.

The words “fiduciary responsibility” are not defined in the Act. The *BusinessDictionary.com* describes “fiduciary duty” as follows:<sup>58</sup>

“A legal obligation of one party to act in the best interest of another. The obligated party is typically a fiduciary, that is, someone entrusted with the care of money or property. Also called fiduciary obligation.”

The *Estate Planning and Fiduciary Services Guide* provides the following explanation on “fiduciary”:<sup>59</sup>

“The term ‘fiduciary’ has its origins in the Latin word ‘*fiducia*’, which means confidence, trust, reliance, assurance. The term, therefore, implies acting with the utmost good faith when delivering services in order to build a relationship of confidence and trust between client and fiduciary. At its root also lies a fiduciary duty, namely, the duty to always act in the best interests of the person to whom the service is being rendered.”

The persons accepting fiduciary responsibility for a recreational club are therefore required at all times to put the interests of the recreational club ahead of their own self-interest and are prohibited from profiting when dealing on behalf of the recreational club.

The term “person” is defined in the Act, and includes –<sup>60</sup>

- “(a) an insolvent estate;
- (b) the estate of a deceased person;
- (c) any trust; and
- (d) any portfolio of a collective investment scheme,

but does not include a foreign partnership”.

Section 1(1) provides definitions of certain terms or words used in the Act. Generally, these definitions control the meaning of terms used throughout the Act, in the absence of a contrary intention. The introduction to section 1(1) confirms this principle as follows:

“In this Act, unless the context otherwise indicates”.

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<sup>57</sup> Section 30A(2)(a).

<sup>58</sup> [www.businessdictionary.com/definition/fiduciary-duty.html](http://www.businessdictionary.com/definition/fiduciary-duty.html) [Accessed 6 July 2022].

<sup>59</sup> R King, B Victor and L van Vuren *et al Estate Planning and Fiduciary Services Guide* [online] (My LexisNexis: 2016 Edition) in 1.1.

<sup>60</sup> Section 1(1).

The method of attributing meaning to the words used in legislation involves, as a point of departure, examining the language of the provision at issue, the language and design of the statute as a whole and its statutory purpose.<sup>61</sup>

In *C: SARS v Dunblane (Transkei) (Pty) Ltd*<sup>62</sup> the court held that words in a section of an Act of Parliament must not be looked at in isolation but in the context in which they are found, both in the immediate context of the sub-section in which they occur and in the general context of the Act. Furthermore, in *C: SARS v Terraplas South Africa (Pty) Ltd*<sup>63</sup> the court confirmed that a dictionary meaning of a word could not govern the interpretation. It can only be used as a guide. The question is, therefore, what is the meaning applicable to the words in the context of the specific document, or section under consideration.

The ordinary dictionary meaning of “person” should therefore also be consulted to establish the meaning of the word in this context.

The *Cambridge Dictionary* defines “person” as –<sup>64</sup>

“a human, man, woman or child”.

The *Collins Dictionary* defines “person” as –<sup>65</sup>

“an individual human being.”

From the above analysis it can be seen that a person for purposes of the Act, includes natural persons, companies, other incorporated entities, associations of persons, and statutory bodies, however, foreign partnerships are specifically excluded. A South African partnership is not a legal entity<sup>66</sup> and a partnership is not a person at common law.<sup>67</sup> A partnership is not a person for income tax purposes. Rather, the individual partners are persons for income tax purposes.

The term “person” should not be read in isolation but must be considered in the context and purpose of section 30A since it is a requirement that the person must –

- not be a connected persons in relation to each other;
- accept fiduciary responsibility of the club;
- not have the ability or authority, either directly or indirectly, to control the decision-making powers of the club (see **3.2.2**); and
- must submit to the Commissioner a written undertaking (see **4**) if the founding document of does not provide for the prescribed requirements (see **3.2**).

Although persons other than natural persons may accept fiduciary responsibility it is, however, having regard to the context and purpose of section 30A submitted that the three persons, who are not connected persons in relation to each, who accept fiduciary responsibility for a recreational club must be natural persons and do not include a juristic person such as a company or close corporation. Furthermore, legally only a natural person can be imprisoned (see **6**). If the legislature did not intend to limit persons accepting fiduciary responsibility for a recreational organisation to natural persons the reference to imprisonment would be

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<sup>61</sup> See *Chetty t/a Nationwide Electrical v Hart NO & another* 2015 (6) SA 424 (SCA), 4 All SA 401.

<sup>62</sup> 2002 (1) SA 38 (SCA), 64 SATC 51 at 57.

<sup>63</sup> [2014] 3 All SA 11 (SCA), 76 SATC 377.

<sup>64</sup> <https://dictionary.cambridge.org/dictionary/english/person> [Accessed 6 July 2022].

<sup>65</sup> [www.collinsdictionary.com/dictionary/english/person](http://www.collinsdictionary.com/dictionary/english/person) [Accessed 6 July 2022].

<sup>66</sup> *Michalow, NO v Premier Milling Co Ltd* 1960 (2) SA 59 (W) at 61.

<sup>67</sup> *Chipkin (Natal) (Pty) Ltd v C: SARS* 2005 (5) SA 566 (SCA), 67 SATC 243 at 246.

superfluous.

It is a further requirement that the three natural persons accepting fiduciary responsibility for the recreational club may not be not connected persons in relation to each other. The term “connected person” in relation to a natural person is defined as –<sup>68</sup>

“any relative; and any trust (other than a portfolio of a collective investment scheme) of which such natural person or such relative is a beneficiary”.

The term “relative” in relation to any person is defined as –<sup>69</sup>

“the spouse of that person or anybody related to that person or that person’s spouse within the third degree of consanguinity, or any spouse of anybody so related, and for the purpose of determining the relationship between any child referred to in the definition of ‘child’ in this section and any other person, that child shall be deemed to be related to the adoptive parent of that child within the first degree of consanguinity”.

Natural persons are therefore connected persons in relation to one another if they are relatives in relation to one another. A relative includes a person’s spouse and anyone related to the person or the person’s spouse within the third degree of consanguinity.<sup>70</sup>

There will be adverse consequences for persons in a fiduciary capacity responsible for the management or control of the income and assets of a recreational club, who intentionally fails to comply with the requirements of section 30A (see 6).

#### **(a) Persons accepting fiduciary responsibility for a non-profit company**

A recreational club incorporated as an NPC is required under the Companies Act, to have a minimum of three persons to incorporate the NPC<sup>71</sup> and to appoint at least three directors.<sup>72</sup> The duties of the directors include both a fiduciary duty and a duty of reasonable care. A director’s fiduciary responsibilities are incorporated into legislation and provide that all powers and functions arising from the capacity of a director must be exercised –<sup>73</sup>

- in good faith, which generally requires the fiduciary at all times to treat any persons in relation to the company fairly and equally;
- for a proper purpose;
- in the best interest of the company; and
- with a reasonable degree of care, skill and diligence expected of a person in the position of a director (the reasonable person test).

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<sup>68</sup> Section 1(1).

<sup>69</sup> Section 1(1).

<sup>70</sup> For further commentary, see Interpretation Note 67 “Connected Persons”.

<sup>71</sup> Section 13(1) read together with item 3 of Schedule 1 to the Companies Act.

<sup>72</sup> Section 66(2)(b) of the Companies Act.

<sup>73</sup> Section 76 of the Companies Act.

The *Essential Guide for South African Companies* explains the concept of a fiduciary of a company as follows:<sup>74</sup>

“A director stands individually, from the date of his appointment or from the time he begins to act as a director, in a fiduciary relationship to the company. From the time he accepts the appointment as a director, he immediately becomes a fiduciary and is obliged to display ‘utmost good faith towards the company and in all dealings on its behalf.

Each member of the board owns his fiduciary duty individually and directly to the company as a separate legal entity, and may be held personally liable for a breach of these duties. The board of directors as a group, however, cannot owe a fiduciary duty as the board is not incorporated as a legal entity and has no independent legal persona – it remains a collective of individual directors. Therefore, whilst directors act as a group, their fiduciary duties are incumbent upon them and vest in them as individuals. The directors of a company can never divest themselves of their fiduciary duties to the company, nor can they be relieved of their obligations to comply with their fiduciary duties by provisions in the company’s memorandum of incorporation”.

**(b) Persons accepting fiduciary responsibility for an association of persons**

The following explanation is provided by *LAWSA* on the fiduciaries of an association:<sup>75</sup>

“Members of an association can be elected to office. The word ‘office’ ordinarily has a fairly wide connotation, meaning a position or post to which prescribed duties are attached. Where an association’s constitution prescribes the duties of the president, vice-president, treasurer, trustees and secretary, these posts are all ‘offices’. Certain persons holding office may be required to fulfil managerial functions.

The proper functioning of an association requires the appointment of a group of persons with executive powers. The constitution of the association usually regulates the matter by entrusting the management of the association’s affairs to a management (executive) committee. The election of persons to serve on the management committee takes place in accordance with the constitutional provisions. When a person is elected to serve on a management committee, he or she obtains certain rights and undertakes certain obligations in relation to the conduct of the affairs of the association. Members of the management committee may resign or be removed from office in conformity with the terms of the constitution. A duly elected management committee holds office until it is dismissed or retires of its own accord.”

(Footnotes omitted.)

In view of the above, any person elected to office, such as the chairperson, vice-chairperson, treasurer, secretary, or any person appointed to the management or executive committee may accept fiduciary responsibility for a recreational club established as an association or society.

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<sup>74</sup> R Naidoo (Third Edition Volume) [online] (My LexisNexis: 2016).

<sup>75</sup> GJ Pienaar “Association” 2 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in 166 and 178.

### 3.2.2 Decision-making powers

No single person may have the ability or authority, either directly or indirectly, to control the decision-making powers of the recreational club.<sup>76</sup>

The expression “decision-making powers” is not defined in the Act. The words are described separately in the *BusinessDictionary.com* as follows:

- “Decision-making” as “the thought process of selecting a logical choice from the available options. When trying to make a good decision, a person must weigh the positives and negatives of each option, and consider all the alternatives. For effective decision making, a person must be able to forecast the outcome of each option as well, and based on all these items, determine which option is the best for that particular situation.”<sup>77</sup>
- “Power” as “the ability to cause or prevent an action, make things happen; the discretion to act or not act.”<sup>78</sup>

The organisational and managerial activities of a recreational club are determined by decisions taken by persons given such authority in accordance with the founding document. No individual person, however, is permitted to directly or indirectly control the decision-making powers of a recreational club. The word “directly” means that the cause and effect of any decision is inextricably linked without any intervening factors. Indirect control may not come from an obvious decision; there may be a knock-on effect in that a decision may change something that will in turn affect the recreational club.

### 3.2.3 Manner in which activities must be carried on

The activities of the recreational club must be carried on in a non-profit manner.<sup>79</sup>

The word “non-profit” is not defined in the Act. The ordinary meaning in the *Cambridge English Dictionary* is –<sup>80</sup>

“not intended to make a profit, but to make money for a social or political purpose or to provide a service that people need”.

*Investopedia* describes “not for profit” as –<sup>81</sup>

“a type of organization that does not earn profits for its owners. All of the money earned by or donated to a not-for-profit organization is used in pursuing the organization's objectives and keeping it running”.

A club operating for the financial gain of individual persons or members will not qualify for approval as a recreational club. A recreational club may not conduct activities for purposes of making a distributable profit (see **3.2.4**). It will be unacceptable for a recreational club to conduct profit-making activities to fund the cost of running the club.

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<sup>76</sup> Section 30A(2)(a)(i).

<sup>77</sup> [www.businessdictionary.com/definition/decision-making.html](http://www.businessdictionary.com/definition/decision-making.html) [Accessed 6 July 2022].

<sup>78</sup> [www.businessdictionary.com/definition/power.html](http://www.businessdictionary.com/definition/power.html) [Accessed 6 July 2022].

<sup>79</sup> Section 30A(2)(a)(iA).

<sup>80</sup> <https://dictionary.cambridge.org/dictionary/english/non-profit> [Accessed 6 July 2022].

<sup>81</sup> [www.investopedia.com/terms/n/not-for-profit.asp](http://www.investopedia.com/terms/n/not-for-profit.asp) [Accessed 6 July 2022].

It is not always desirable from a club's perspective to run on a break-even basis, since clubs may need to create reserves for future expenditure such as the cost of replacing equipment, resurfacing tennis courts and replanting grass. The activities carried on by a recreational club should not be to maximise profits but rather to recover direct and reasonable indirect costs (see **8.2.2**).

Profitable activities carried on by a recreational club may not necessarily result in the withdrawal of the club's approval. However, the club must take every measure possible to ensure that the profits derived from such activities result only as an incidental effect of the sole or principal object of the club (see **8.2.1**). Income derived from a club's restaurant and bar facilities for the use by the general public or the hiring out of its amenities or facilities to the general public will, however, be regarded as the carrying on of a commercial business undertaking or trading activity.

### **3.2.4 Prohibition on distributions**

A recreational club may not distribute any surplus funds directly or indirectly to any person, unless the distribution occurs on dissolution of the recreational club (see **3.2.5**)<sup>82</sup> or if surplus funds are donated (see **9.1**). The prohibition on distributions is an absolute prohibition. The requirement is not subject to the discretion of the Commissioner and cannot in general or in a particular instance be waived, deferred or reduced. Even if a minimal amount is distributed or a distribution occurs as an isolated or once-off event, the recreational club may be subject to the withdrawal of the approval (see **5**).

The words "distribute", "surplus", and "funds" are not defined in the Act.

The ordinary meaning of "distribute" in the *Dictionary.com* is –<sup>83</sup>

"to divide and give out in shares; deal out; allot".

*Investopedia* explains "surplus" within an accounting context as follows:<sup>84</sup>

"A surplus is the amount of an asset or resource that exceeds the portion that is utilized. A surplus is used to describe many excess assets including income, profits, capital, and goods. A surplus often occurs in a budget, when expenses are less than the income taken in or in inventory when fewer supplies are used than were retained."

The word "funds" is described in the *BusinessDictionary.com* as follows:<sup>85</sup>

"All the financial resources of a firm, such as cash in hand, bank balance, accounts receivable. Any change in these resources is reflected in the firm's financial position."

The term "funding" is described in the *Dictionary.com* as –<sup>86</sup>

"funds, money immediately available; pecuniary resources".

Having regard to the above, "funds" refer to the financial resources, namely, money available to a business for spending in the form of cash, liquid securities and credit lines.<sup>87</sup>

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<sup>82</sup> Section 30A(2)(a)(ii).

<sup>83</sup> [www.dictionary.com/browse/distribute](http://www.dictionary.com/browse/distribute) [Accessed 6 July 2022].

<sup>84</sup> [www.investopedia.com/terms/s/surplus.asp](http://www.investopedia.com/terms/s/surplus.asp) [Accessed 6 July 2022].

<sup>85</sup> [www.businessdictionary.com/definition/funds.html](http://www.businessdictionary.com/definition/funds.html) [Accessed 6 July 2022].

<sup>86</sup> [www.dictionary.com/browse/funding](http://www.dictionary.com/browse/funding) [Accessed 6 July 2022].

<sup>87</sup> See the meaning of "financial resources" in the *BusinessDictionary.com* available online at [www.businessdictionary.com/definition/financial-resources.html](http://www.businessdictionary.com/definition/financial-resources.html) [Accessed 6 July 2022].

A person for purposes of this prohibition requirement is not limited to only a natural person, since the definition of “person” does not exclude companies, other incorporated entities, associations of persons, or statutory bodies (see **3.2.1**).

A recreational club must use its income to carry on its sole or principal object (see **2.2**), namely, to provide social and recreational amenities or facilities for its members. Any surplus funds not used for this purpose may, however, not be distributed in any way to any person. It will be acceptable for a recreational club to accumulate or invest surplus funds for future use in carrying on its sole or principal object. The surplus funds may be invested as chosen provided such investment does not amount to an indirect distribution of profits or the award of an impermissible benefit. It is expected that the fiduciaries should act with prudence, integrity and reasonable care. Investment income, however, is taxable income, subject to the basic exemption (see **8.4**).

The distribution to club members by way of prizes for winning social or recreational events hosted by a recreational club is acceptable provided the prize is considered reasonable. It will be unacceptable, for example, if funds are distributed by a recreational club by way of –

- making a loan to a member that is later written off;
- paying excessive salaries or wages that are not commensurate with services rendered (see **3.2.6**);
- entering into transactions with members on terms not reflecting an arm’s length transaction;<sup>88</sup> or
- donating assets to members.

The sale by members of their membership rights (see **3.2.8**) or any entitlement to them could also be construed as the indirect distribution of profits of a recreational club.

### **3.2.5 Dissolution**

On dissolution, a recreational club must transfer its remaining assets and funds to one or more of the following organisations –<sup>89</sup>

- another recreational club;
- a PBO;<sup>90</sup>
- any institution, board or body<sup>91</sup> exempt under section 10(1)(cA)(i) having as its sole or principal object the carrying on of any public benefit activity listed in Part I of the Ninth Schedule; or
- the government of the Republic in the national, provincial or local sphere contemplated in section 10(1)(a).

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<sup>88</sup> To determine whether the transactions are conducted at “arm’s length”, the relationship between the parties, the substance and nature of the transactions and the surrounding circumstances should be examined. See *Philip Claasen t/a Mostly Media v Andre Delpont t/a AD Industrial Chemicals* [2009] JOL 23885 (WCC) in [4]. The “arms-length principle” requires that the amount charged and the terms and conditions for a given transaction must be the same as if the parties were not related. See [www.ustransferpricing.com/arms\\_length\\_principle.html](http://www.ustransferpricing.com/arms_length_principle.html) [Accessed 6 July 2022].

<sup>89</sup> Sections 30A(2)(a)(iii) and (7A).

<sup>90</sup> This excludes a branch of a foreign tax-exempt organisation contemplated in paragraph (a)(ii) of the definition of “public benefit organisation” in section 30(1). For further commentary, see the *Tax Exemption Guide for Public Benefit Organisations in South Africa*.

<sup>91</sup> For further commentary, see the *Tax Exemption Guide for Institutions, Boards or Bodies*.

A process referred to as “winding-up” usually precedes the formal dissolution process. During the winding-up process all the assets of the recreational club are recovered and realised. The proceeds of such realisation are applied firstly to discharge the costs of liquidation, and then to pay claims of creditors in accordance with the relevant provisions of the law relating to insolvency. On dissolution of a recreational club, all its assets, or the proceeds of realised assets should have been realised and transferred. However, if any assets or funds remain after debts have been satisfied, they must be distributed in accordance with the dissolution requirement.

The winding-up of a company may occur voluntarily or compulsorily by the court. A winding-up by the court is initiated by an application to court while a voluntary winding-up<sup>92</sup> is initiated by a resolution of the company.<sup>93</sup> A company remains a juristic person and retains all of its powers during winding-up. From the beginning of the company’s winding-up, it must stop carrying on its business except to the extent required for its beneficial winding-up.<sup>94</sup> A company is dissolved as from the date that its name is removed from the companies register.<sup>95</sup>

The dissolution of an association is described by *LAWSA* as follows:<sup>96</sup>

“If an association ceases or is unable to carry on with the main object and purpose for which it was formed, it may be validly dissolved. It may also be dissolved in accordance with the terms of its constitution or with the consent of all its members.

An association cannot simply disregard the provisions of its constitution and ‘by silent and unexpressed individual concurrence of members dissolve into thin air’. In the case of a club, where the rules do not regulate the matter differently, dissolution is effected by a resolution of a general meeting of members of the club called for this purpose. Upon its dissolution, the assets of an association will, after debts have been satisfied, devolve in accordance with the provisions of the constitution.”

(Footnotes omitted.)

A recreational club may not, on dissolution, distribute any of its assets and funds to individuals or other tax-paying entities and in so doing enable the recipients to share in the tax concession that it has enjoyed. A recreational club may choose to whom it will distribute its remaining assets and funds on dissolution, without the prior approval from the Commissioner, provided the recipient meets the dissolution requirement.

Failure to transfer, or take reasonable steps to transfer the remaining assets as required on dissolution will result in an amount equal to the market value of the assets not transferred less the amount of the *bona fide* liabilities of the recreational club, being deemed to be taxable income accruing to the recreational club during the year of assessment in which dissolution took place.<sup>97</sup>

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<sup>92</sup> Section 80 of the Companies Act.

<sup>93</sup> Section 80(6) of the Companies Act.

<sup>94</sup> Section 80(8) of the Companies Act.

<sup>95</sup> Section 83(1) of the Companies Act.

<sup>96</sup> GJ Pienaar “Association” 2 (Third Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in 192 and 195.

<sup>97</sup> Section 30A(8).

The term “taxable income” is defined as –<sup>98</sup>

“the aggregate of—

- (a) the amount remaining after deducting from the income of any person all the amounts allowed under Part I of Chapter II to be deducted from or set off against such income; and
- (b) all amounts to be included or deemed to be included in the taxable income of any person in terms of this Act”.

A recreational club guilty of such a transgression will therefore not be allowed to deduct any further tax allowances or deductions from its net revenue, since its net revenue is deemed to be taxable income, which is after allowances and deductions.

### 3.2.6 Remuneration

A recreational club may not pay any remuneration to any person, for example, employees, office bearers, members, directors, or any other person that is excessive, taking into account the particular service rendered and what is considered reasonable in the particular sector. A recreational club may also not pay any remuneration determined as a percentage of any amounts received or accrued to the recreational club.<sup>99</sup>

The word “reasonable” is not defined in the Act. *The Free Dictionary* describes it as follows:<sup>100</sup>

- “1. Capable of reasoning; rational.
- 2. Governed by or being in accordance with reason or sound thinking.
- 3. Being within the bounds of common sense.
- 4. Not excessive or extreme, fair.”

The term “remuneration”<sup>101</sup> is defined for purposes of employees’ tax and generally means any amount of income paid or payable to any person whether in cash or otherwise, for example, a fringe benefit, and whether or not for services rendered. Remuneration, among other things, may include amounts of income paid or payable by way of any salary, fee, bonus, wage, gratuity, pension, leave encashment, emolument, voluntary award, commission, annuity, stipend, overtime, superannuation allowance, retirement allowance, lump sum benefit payment, director’s remuneration. The normal employees’ tax rules will apply to any remuneration paid or payable to any employees of the recreational club (see **10.5**).

There must be a causal connection between the remuneration paid in relation to the service rendered by that person and the amount generally charged for such a service in that sector. The determination whether remuneration paid to any person is excessive will be a question of fact, and, since the facts and circumstances pertaining to each recreational club may differ, each case will be considered on its own merits.

It will be unacceptable for office bearers to be paid a salary without any obligation to perform any services other than attending meetings. It, however, will be acceptable to reimburse them for reasonable and actual expenses incurred. An honorarium paid to the secretary or treasurer will be acceptable provided it is reasonable. A salary paid to a person in the capacity of chairperson would generally not be acceptable. It may, for example, be acceptable for a manager, under an employment contract, to qualify for an incentive bonus of R10 000 if the

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<sup>98</sup> Section 1(1).

<sup>99</sup> Section 30A(2)(a)(iv).

<sup>100</sup> [www.thefreedictionary.com/reasonable](http://www.thefreedictionary.com/reasonable) [Accessed 6 July 2022].

<sup>101</sup> Paragraph 1 in Part I of the Fourth Schedule.

annual target for a recreational club exceeds R100 000. However, it would be unacceptable if the manager qualified for an incentive bonus of 10% of the excess of the annual budgeted turnover.

The ultimate test remains whether the remuneration is reasonable in the sector in relation to the service rendered and the burden is on the recreational club to motivate that the remuneration is not excessive.

### 3.2.7 Membership

All members of a recreational club must be entitled to annual or seasonal membership.<sup>102</sup> The words “entitled”, “annual”, “seasonal”, and “membership” are not defined in the Act.

The word “entitled” is described in the *BusinessDictionary.com* as follows:<sup>103</sup>

“Having rights and privileges to something either by legal mandates or by policies set in place”.

The word “annual” is described in the *Oxford Dictionary, Thesaurus and Wordpower Guide* as –<sup>104</sup>

“occurring or recurring once in each year; continuing for the period of a year”.

The word “annual” referred to in the membership requirement means lasting for a year, which is a period of 12 months. The annual period is not required to coincide with a calendar year, the financial year or year of assessment of a recreational club.

The *Cambridge English Dictionary* describes “seasonal” as –<sup>105</sup>

“relating to or happening during a particular period in the year”.

It is clear from the above ordinary meaning that the distinction between “annual” and “seasonal” membership is that seasonal membership is for a period of less than 12 months, while annual membership is for a period of 12 months. It will therefore be acceptable for a member who joins a recreational club half way through the year to pay only a *pro rata* amount of the annual or seasonal membership fee.

The *BusinessDictionary.com* describes “membership” as follows:<sup>106</sup>

“Belonging, either individually or collectively, to a group. Some memberships may require a fee to join or participate while some do not. Others, as in the case of MENSA, have specific skill requirements that must be reached prior to be accepted into the group. Special privileges or benefits are entitled to members although not all members may have the same rights and privileges. For example, a leader might have special rights that allow the individual to preside over meetings or create rules and guidelines for the group.”

Reciprocal membership will be acceptable provided the member has either seasonal or annual membership at his or her home club (see **2.4**).

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<sup>102</sup> Section 30A(2)(a)(v).

<sup>103</sup> [www.businessdictionary.com/definition/entitled.html](http://www.businessdictionary.com/definition/entitled.html) [Accessed 6 July 2022].

<sup>104</sup> M Wait, S Hawker and C Soanes *Oxford Dictionary, Thesaurus and Wordpower Guide* (2001) Oxford University Press.

<sup>105</sup> <https://dictionary.cambridge.org/dictionary/english/seasonal> [Accessed 6 July 2022].

<sup>106</sup> [www.businessdictionary.com/definition/membership.html](http://www.businessdictionary.com/definition/membership.html) [Accessed 6 July 2022].

It will be unacceptable for a recreational club to register members of the general public on a temporary basis or only for the duration of the use of its facilities. It will, however, be acceptable for a recreational club to offer other membership periods other than annual or seasonal, for example, month-to-month membership.

#### **Example 2 – Non-exhaustive examples of annual or seasonal membership**

- A club provides recreational facilities in the form of squash courts. It requires members to pay an annual membership fee of R960 plus R20 per half hour for the use of the court. The half-hourly fee is determined on a cost-recovery basis, taking into account the use of electricity and maintenance of the squash court. The club will meet the requirement of annual membership.
- A club providing outdoor swimming facilities makes its facility available only during the summer months from October to March. It requires that the members pay a membership fee only for the duration of this period. This arrangement will be regarded as a seasonal membership.

### **3.2.8 Membership rights**

Members are not allowed to sell their membership rights or any entitlement to such rights.<sup>107</sup> The rights and duties originate from a person's membership to a club. Members pay a membership fee or subscription entitling them to certain privileges and the entitlement to the usage of the club's amenities or facilities. A member will typically have some right to vote, be eligible to hold office, and determine the club's management, operation and control. The membership rights and duties will generally be set out in the founding document of a club. The extension of membership rights to non-members should be stipulated in the founding document of the club.

A club that has granted membership to a qualifying person will typically enter into a membership agreement with the member. Such an agreement may set out, among other things, the amount and the payment terms of the initiation or joining fee and membership fee or subscription, membership obligations, the membership period and procedures for resignation, resale or reissuance of membership. The membership agreement is a contractual agreement between the club and the member. Members are therefore not allowed to sell their membership rights or any entitlement to such rights.

#### **Example 3 – Membership rights**

*Facts:*

The AP Cultural Club provides social facilities to its members who are required to pay an annual membership fee. It also provides restaurant and bar facilities to its members on a cost-recovery basis (that is, not on a market-related basis).

*Result:*

It will be unacceptable for members of the club to sell their right to membership or right to enjoy the restaurant and bar facilities to any third party.

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<sup>107</sup> Section 30A(2)(a)(vi).

### 3.3. Amendments to the founding document

A recreational club must submit a copy of any amendment to its founding document to the Commissioner as soon as it has been affected.<sup>108</sup> This requirement will enable the Commissioner to ensure that any amendment is not contrary to the prescribed requirements.

It will be unacceptable for a club to submit a founding document that complies with the Act at the time of applying for approval and then, after obtaining such approval, to amend the founding document to include non-qualifying provisions.

LAWSA states the following on the amendment of the memorandum of incorporation:<sup>109</sup>

“The amendment to a company’s memorandum of incorporation takes effect, in the case of an amendment that changes the name of the company, on the date set out in the amended registration certificate issued by the commission, or in any other case, on the later of the date on and time at which the notice of amendment is filed or the date, if any, set out in the notice of amendment.”

(Footnotes omitted.)

Pre-existing companies approved as recreational clubs that may have amended their memoranda and articles of association or replaced the latter with a memorandum of incorporation under the Companies Act must ensure that the prescribed requirements remain included in the amended or replacement founding documents. A copy of the amended or replacement founding documents must be submitted to the Commissioner.

LAWSA states the following on amendments to a constitution:<sup>110</sup>

“Where a constitution does not provide for its amendment by majority (or special majority) vote, the amendment can be effected only by the unanimous vote of the members concerned. But even where the constitution empowers the majority of members to amend it, there are other factors which must be taken into account. So, for instance, the proposed amendment must be passed in the *bona fide* belief that it is to the benefit of the association and in accordance with the procedure prescribed by the constitution. Whether or not the majority can alter a fundamental object depends on the nature and character of the association, as well as its constitution and objects. A rule in the constitution which provides for the alteration of the constitution may itself be amended in the prescribed way.”

(Footnotes omitted.)

#### Example 4 – Amendments to the founding document

*Facts:*

The EV Gardening Club incorporated all the prescribed requirements in its constitution and was approved by the Commissioner as a recreational club. Two years after having obtained approval, the membership of the club had diminished. The constitution was amended to make provision for only two persons, who may be connected persons in relation to each other, to accept the fiduciary responsibility of the club. The Commissioner was not informed of the amendment to the club’s constitution as required in section 30A(2)(b).

<sup>108</sup> Section 30A(2)(b).

<sup>109</sup> RC Williams “Companies: Part I” 4(1) (Second Edition Volume) *LAWSA* [online] (My LexisNexis: 30 November 2012) in 113.

<sup>110</sup> GP Pienaar “Associations” 2 (Second Edition Volume) *LAWSA* [online] (My LexisNexis: 28 February 2015) in 158.

*Result:*

The amendment to the constitution is contrary to the requirements for approval as a recreational club. Furthermore, the club did not submit a copy of the amendment to its constitution under which it is established to the Commissioner. Consequently, the tax status of the club is placed in jeopardy and the club is exposed to transgression penalties (see 5).

### **3.4. Participation in tax avoidance schemes**

A recreational club may not be a party to or permit itself to be used for any transaction, operation or scheme, the sole or main purpose of which is or was to reduce, postpone or avoid any tax, duty or levy<sup>111</sup> that would otherwise have been or would have become payable by any person under the Act or under any other Act administered by the Commissioner.<sup>112</sup> This rule will apply irrespective of whether the recreational club itself or any other person benefitted from the reduction, postponement or avoidance of any applicable tax, duty or levy.

In *Smith v CIR* the court noted that the ordinary meaning of avoiding a liability for a tax is –<sup>113</sup> “to get out of the way of, escape or prevent an anticipated liability”.

The Act contains anti-avoidance provisions<sup>114</sup> that the Commissioner may use when taxpayers and their advisers enter into schemes with the sole purpose of avoiding tax.<sup>115</sup> In these circumstances, the Commissioner is entitled to determine the taxpayer’s liability for any tax, duty or levy imposed by the Act as if the transaction, operation, or scheme had not been entered into.

## **4. Written undertaking**

The founding document (see 3.1) of a club may in some instances not comply with the prescribed requirements for approval at the time of application (see 3). In these circumstances, the persons who are acting in a fiduciary capacity (see 3.2.1) may provide a written undertaking that the club will be administered in accordance with the prescribed requirements (see 3.2).<sup>116</sup> The written undertaking must be submitted to the Commissioner as part of the application for approval as a recreational club. In such instances, the founding document will be deemed to comply with the prescribed requirements. The written undertaking will be binding on the recreational club and non-compliance with its terms will result in the same penalties and actions as if the prescribed requirements were contained in the founding document (see 5).

The written undertaking is an interim measure and the prescribed requirements must be incorporated into the founding document within a reasonable period. SARS considers a reasonable period to be 12 months from the date of the letter confirming approval, or the date on which any other amendment is effected to the founding document, whichever comes first. A different period may, however, be prescribed depending on the facts and circumstances of the particular case.

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<sup>111</sup> These taxes, duties or levies, among other things, may include income tax (including CGT), VAT, or employees’ tax.

<sup>112</sup> Section 30A(2)(c).

<sup>113</sup> 1964 (1) SA 324 (A), 26 SATC 1 at 12.

<sup>114</sup> Sections 80A to 80L and 103.

<sup>115</sup> M Kowitz “Tax Avoidance” [online] (My LexisNexis: October 1999).

<sup>116</sup> Section 30A(3).

A specimen written undertaking EI 2C is available to assist persons accepting fiduciary responsibility to administer a recreational club in accordance with the prescribed requirements.

## 5. Withdrawal of the approval

### 5.1 Circumstances under which the approval may be withdrawn

The Commissioner may withdraw the approval of a recreational club if that club has, in any year of assessment in any material respect or on a continuous or repetitive basis, failed to comply with section 30A or with its founding document as it relates to section 30A.<sup>117</sup>

The Act does not specify what constitutes a “material, continuous, or repetitive” failure by a recreational club to comply with section 30A or with the founding document as it relates to that section.

These words are described in the *CollinsDictionary.com* as follows:

- “Material” as “material evidence or information is directly relevant and important in a legal or academic argument.”<sup>118</sup>
- “Continuous” as “a continuous process or event continues for a period of time without stopping.”<sup>119</sup>
- “Repetition” as “a thing, word, action etc that is repeated.”<sup>120</sup>

A failure by a recreational club to comply with section 30A in any material respect may therefore include a significant, relevant, and important failure. A failure on a continuous basis may be prolonged without interruption, while a failure on a repetitive basis may be done many times in the same manner by the recreational club.

The Commissioner may withdraw the approval in any of the above circumstances but must decide each case on its own facts and circumstances. However, notice must be given to the transgressing club of the intention to withdraw the approval as a recreational club and specify a period determined by the Commissioner within which corrective steps must be taken.<sup>121</sup>

If the recreational club takes no corrective steps within the period stated in the notice, the approval will be withdrawn from the beginning of the year of assessment in which the non-compliance or failure by the recreational club occurred.<sup>122</sup>

The decision of the Commissioner to withdraw the approval is subject to objection and appeal (see **16**).

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<sup>117</sup> Section 30A(5)(a) and (b).

<sup>118</sup> [www.collinsdictionary.com/dictionary/english/material](http://www.collinsdictionary.com/dictionary/english/material) [Accessed 6 July 2022].

<sup>119</sup> [www.collinsdictionary.com/dictionary/english/continuous](http://www.collinsdictionary.com/dictionary/english/continuous) [Accessed 6 July 2022].

<sup>120</sup> [www.collinsdictionary.com/dictionary/english/repetition](http://www.collinsdictionary.com/dictionary/english/repetition) [Accessed 6 July 2022].

<sup>121</sup> Section 30A(5).

<sup>122</sup> Section 30A(6).

## 5.2 Consequences of the withdrawal

On withdrawal of the approval as a recreational club, the affected club must transfer or take reasonable steps to transfer its remaining assets (see 3.2.5) within six months or a longer period allowed by the Commissioner to –<sup>123</sup>

- another recreational club;
- a PBO;
- any institution, board or body exempt under section 10(1)(cA)(i) having as its sole or principal object the carrying on of any public benefit activity listed in Part I of the Ninth Schedule; or
- the government of the Republic in the national, provincial or local sphere contemplated in section 10(1)(a).

Failure to transfer, or to take reasonable steps to transfer the remaining assets of the club on withdrawal of its approval as a recreational club will result in an amount equal to the market value of the assets not transferred less the amount of the *bona fide* liabilities of the club, being deemed to be taxable income that accrued to the club during the year of assessment in which the approval was withdrawn.<sup>124</sup> The same principle will apply to taxable income as discussed in 3.2.5.

## 6. Non-compliance by responsible person

Any person who is in a fiduciary capacity responsible for the management or control of the income and assets of a recreational club who intentionally fails to comply with section 30A or a provision of the founding document under which such a recreational club is established and governed to the extent that it relates to section 30A, will be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding two years.<sup>125</sup>

## 7. Partial taxation

Many clubs engage in business or trading activities such as bars, restaurants, and shops on the club premises where sporting equipment, clothing and other goods are sold to members, non-members and the general public. It has also become common practice for clubs to hire out their amenities and facilities to members, non-members and the general public for social events such as weddings, parties, and corporate events such as conferences. Certain receipts and accruals of a recreational club are subject to partial taxation because of the carrying on of business undertakings or trading activities that are far removed from the club's sole or principal object (see 2.2).

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<sup>123</sup> Section 30A(7).

<sup>124</sup> Section 30A(8).

<sup>125</sup> Section 30A(9).

The receipts and accruals (see **8**) of a recreational club approved by the Commissioner under section 30A could be subject to partial taxation under section 10(1)(cO) if derived from any source other than –

- in the form of membership fees and subscriptions paid by its members (see **8.1**);<sup>126</sup>
- from any business undertaking or trading activity (see **8.2**) that –<sup>127</sup>
  - is integral and directly related (see **8.2.1**) to the provision of social and recreational amenities or facilities for the members of a club (see **2.4**);<sup>128</sup>
  - is carried out on a basis substantially the whole of which is directed towards the recovery of cost (see **8.2.2**);<sup>129</sup> and
  - does not result unfair competition in relation to taxable entities (see **8.2.3**);<sup>130</sup> and
- from any occasional fundraising activities (see **8.3**).<sup>131</sup>

There is no limit on the amount of receipts and accruals that are exempt from income tax under the exemptions in **8.1**, **8.2** and **8.3**. There is, however, a limitation on the amount of the basic exemption discussed in **8.4**.

A recreational club is therefore potentially taxable on investment income on surplus funds invested, investment income on capital reserves created to fund future capital expenditure and business or trading income not integral and directly related to its sole or principal object if such receipts and accruals exceed the basic exemption threshold (see **8.4**).<sup>132</sup>

A recreational club with receipts and accruals from any other source that in total exceed the basic exemption threshold will pay tax on that taxable income at the rate of 28%, or as prescribed annually in the *Rates and Monetary Amounts and Amendment of Revenue Laws Act*, irrespective of whether it is established as an NPC, an association, or a society.<sup>133</sup>

## 8. Receipts and accruals exempt from income tax

The receipts and accruals, which are the total amount, in cash or otherwise, received by or accrued to or in favour of a recreational club, will be exempt from income tax to the extent that they are derived in the manner specified (see **8.1**, **8.2** and **8.3**). The type of receipts or accruals envisaged are those that are included in the definition of “gross income”.<sup>134</sup>

An amount will be “received” by a person as envisaged in the Act, only if the person receives it on his or her own behalf and for his or her own benefit.<sup>135</sup> An amount “accrues” to a person when the person is entitled to it and when the person’s right to the amount is unconditional.<sup>136</sup> An amount is included in a person’s gross income in the year of assessment in which that

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<sup>126</sup> Section 10(1)(cO)(i).

<sup>127</sup> Section 10(1)(cO)(ii).

<sup>128</sup> Section 10(1)(cO)(ii)(aa).

<sup>129</sup> Section 10(1)(cO)(ii)(bb).

<sup>130</sup> Section 10(1)(cO)(ii)(cc).

<sup>131</sup> Section 10(1)(cO)(iii).

<sup>132</sup> Section 10(1)(cO)(iv).

<sup>133</sup> For tax rates relating to previous years of assessments see the *Guide for Tax Rates / Duties / Levies*.

<sup>134</sup> The term “gross income” is defined in section 1(1).

<sup>135</sup> *Geldenhuis v CIR* 1974 (3) SA 256 (C), 14 SATC 419.

<sup>136</sup> *Lategan v CIR* 1926 CPD 203, 2 SATC 16; *Ochberg v CIR* 1933 CPD, 6 SATC 1.

person receives it or the year of assessment in which it accrues to that person, whichever comes first.<sup>137</sup>

The receipts and accruals of a recreational club will be exempt irrespective of whether the income is derived from members or non-members, provided the permissible business undertaking or trading activity requirements are met (see **8.2**). This concession has been made to overcome complex and practical difficulties of keeping separate accounts for income and expenditure related to the use of a recreational club's amenities or facilities by non-members. It is therefore not a requirement that a recreational club keep separate records of transactions with its members and non-members.

Receipts or accruals of a capital nature are taken into account in determining a taxable capital gain, which is included directly in paragraph (b) of the definition of "taxable income" in section 1(1). While a taxable capital gain is potentially subject to income tax, the exemptions in section 10 do not apply to it because a taxable capital gain is included directly in taxable income and does not comprise "income" (gross income less exempt income). Paragraph 62 of the Eighth Schedule provides exemption from CGT for donations and bequests to clubs and paragraph 65B of the Eighth Schedule grants roll-over relief for the disposal of recreational club property (see **9.3**).

## **8.1 Membership fees or subscriptions**

A recreational club is fully exempt from income tax on membership fees and subscriptions paid by members.<sup>138</sup>

Membership fees and subscriptions may include –

- amounts paid by members for the right to belong to the recreational club and to use its facilities;
- entrance fees; and
- annual or seasonal membership fees or subscription fees.

Separate payments by members for the use of facilities, such as squash courts, green fees or golf carts are not regarded as membership fees or subscriptions. For these payments to be exempt from income tax, they must meet the permissible business undertaking or trading activity requirements.

## **8.2 Permissible business undertakings or trading activities**

The term "business" or "business undertaking" is not defined in the Act. *Claassen's Dictionary of Legal Words and Phrases* defines "business" as follows:<sup>139</sup>

"Business is anything which occupies the time and attention of a man for the purpose of profit . . . Generally, the word business is capable of a very wide meaning. It may be a charitable business . . . Even a single, isolated activity enterprise or pursuit may constitute a business."

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<sup>137</sup> *SIR v Silverglen Investments (Pty) Ltd* 1969 (1) SA 365 (A), 30 SATC 199.

<sup>138</sup> Section 10(1)(cO)(i).

<sup>139</sup> RD Claassen *Claassen's Dictionary of Legal Words and Phrases* [online] (My LexisNexis: June 2021).

On the issue of what constitutes “carrying on business”, Beadle CJ, in *Estate G v COT* said the following:<sup>140</sup>

“The sensible approach, I think, is to look at the activities concerned as a whole, and then to ask the question: Are these the sort of activities which, in commercial life, would be regarded as ‘carrying on business’? The principal features of the activities which might be examined in order to determine this are their nature, their scope and magnitude, their object (whether to make a profit or not), the continuity of the activities concerned, if the acquisition of property is involved, the intention with which the property was acquired. This list of features does not purport to be exhaustive, nor are any one of these features necessarily decisive, nor is it possible to generalize and state which feature should carry most weight in determining the problem. Each case must depend on its own particular circumstances.”

Based on case law, “business” is therefore generally accepted to include anything that occupies the time, attention and labours of a person for profit. There are not set rules to determine what constitutes “business” and as a result, the answer to the question of whether a person is carrying on “business” requires an inference from facts, taking into account certain factors such as intention, motive frequency and nature of the activity.<sup>141</sup>

The words “trading activity” are not defined in the Act. The term “trade” is not defined other than stating that it includes the examples listed in the definition that include –<sup>142</sup>

“every profession, trade, business, employment, calling, occupation or venture, including the letting of property and the use of or the grant of permission to use any patent as defined in the Patents Act<sup>143</sup> or any design as defined in the Designs Act<sup>144</sup> or trade mark as defined in the Trade Marks Act<sup>145</sup> or any copyright as defined in the Copyright Act<sup>146</sup> or any other property which is of a similar nature”.

*Claassen’s Dictionary of Legal Words and Phrases* defines “trade” as follows:<sup>147</sup>

“A handicraft, occupation or a business carried on by a person for profit.”

The courts have also interpreted trade to be neither exhaustive nor restrictive and will include any activity involving risking something with the object of making a profit, including the continuous turnover of floating capital.<sup>148</sup> The absence of profit will, however, not preclude a taxpayer’s activities from being classified as a trade.<sup>149</sup> Each case will be considered on its own merits to determine whether a trading activity<sup>150</sup> is being carried on.<sup>151</sup>

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<sup>140</sup> 1964 (2) SA 701 (SR), 26 SATC 168 at 173 and 174.

<sup>141</sup> *Estate G v COT* (above). See also *CIR v Stott* 1928 AD 252, 3 SATC 253 at 257 and ITC 1283 (1978) 41 SATC 36 (SW) at 43.

<sup>142</sup> Section 1(1).

<sup>143</sup> Act 57 of 1978.

<sup>144</sup> Act 195 of 1993.

<sup>145</sup> Act 194 of 1993.

<sup>146</sup> Act 98 of 1978.

<sup>147</sup> RD Claassen *Claassen’s Dictionary of Legal Words and Phrases* [online] (My LexisNexis: June 2021).

<sup>148</sup> ITC 1675 (1998) 62 SATC 219 (G); *Burgess v CIR* 1993 (4) SA 161 (A), 55 SATC 185 at 196; ITC 770 (1953) 19 SATC 216 (T) at 216 and 7; ITC 615 (1946) 14 SATC 399 (U) at 402 and *Modderfontein Deep Levels Ltd & another v Feinstein* 1920 TPD 288.

<sup>149</sup> *De Beers Holdings (Pty) Ltd v CIR* 1986 (1) SA 8 (A), 47 SATC 229 at 260.

<sup>150</sup> Section 10(1)(cO)(ii).

<sup>151</sup> For further commentary, see the Interpretation Note 33 “Assessed Losses Companies: The ‘Trade’ and ‘Income from Trade’ Requirements” in 4

The carrying on of a “trade” is not the same as the conducting of a “business”. However, the word “business” is included in the definition of “trade”. The conducting of a “business undertaking” will therefore also constitute “trade”.

The Act does not specify that the recreational club must carry on the business undertaking or trading activity. Legislation merely specifies that receipts and accruals from a business undertaking or trading activity of a recreational club may be exempt from income tax. A club, for example, may be an income beneficiary of a discretionary trust carrying on a business undertaking or trading activity. Any income distributed to the recreational club through the exercise of the trustees’ discretion will therefore be regarded as income from a business undertaking or trading activity. This distribution will be taken into account in the determination of the basic exemption (see **8.4**).

The receipts and accruals from a business undertaking or trading activity will be exempt from income tax only if such business undertaking or trading activity –<sup>152</sup>

- is integral and directly related to the provision of social and recreational amenities or facilities for the members of the club (see **8.2.1**);<sup>153</sup>
- is carried out on a basis substantially the whole of which is directed towards the recovery of cost (see **8.2.2**);<sup>154</sup> and
- does not result in unfair competition in relation to taxable entities (see **8.2.3**).<sup>155</sup>

All of the above requirements must be met for the receipts and accruals to be exempt from income tax.

### **8.2.1 Integral and directly related**

The receipts and accruals from a business undertaking or trading activity will be exempt from income tax only if such business undertaking or trading activity is integral and directly related to the provision of social and recreational amenities or facilities for the members of the club (see **2.3**).

The words “integral”, “directly” and “related” are not defined in the Act.

The word “integral” is described in the *Dictionary.com* as follows:<sup>156</sup>

1. of, relating to, or belonging as a part of the whole; constituent or component: integral parts.
2. necessary to the completeness of the whole.
3. consisting or composed of parts that together constitute a whole.
4. entire; complete; whole.”

The *Cambridge English Dictionary* describes “directly” as –<sup>157</sup>

“without anything else being involved or in between”.

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<sup>152</sup> Section 10(1)(cO)(ii).

<sup>153</sup> Section 10(1)(cO)(ii)(aa).

<sup>154</sup> Section 10(1)(cO)(ii)(bb).

<sup>155</sup> Section 10(1)(cO)(ii)(cc).

<sup>156</sup> [www.dictionary.com/browse/integral](https://www.dictionary.com/browse/integral) [Accessed 6 July 2022].

<sup>157</sup> <https://dictionary.cambridge.org/dictionary/english/directly> [Accessed 6 July 2022].

The word “related” is described in the *Dictionary.com* as –<sup>158</sup>

“associated; connected; allied by nature, origin, kinship, marriage, etc.”.

A business undertaking or trading activity will not be regarded as related to a recreational club’s approved sole or principal object (see **2.2**) if it does not directly contribute to achieving the sole or principal object of the club, which must be to provide social and recreational amenities or facilities (see **2.3**) for the members (see **2.4**). Whether an activity contributes to achieving the club’s sole or principal object will depend on the facts of each case. The size and extent of the activities involved must be considered in relation to the nature and extent of the approved function that they intend to serve to determine whether those activities contribute directly to achieving the approved sole or principal object of a recreational club. The use by the recreational club of the profits derived from any unrelated business undertaking or trading activity does not make the activity directly related to the performance by the recreational club of its approved sole or principal object.

A recreational club may operate a restaurant or bar service for its members and non-members. Thus, the provision of refreshments and meals by a recreational club on the sharing or mutuality principle to members and non-members may be regarded as promoting the club’s sole or principal object and may not necessarily jeopardise its approval or tax-exempt status even if this source of income becomes its primary source of income, provided those activities are carried out on a basis substantially the whole of which is directed towards the recovery of cost (see **8.2.2**) and do not result in unfair competition with other taxable entities (see **8.2.3**).

Recreational clubs making their amenities or facilities available to the general public will be regarded as carrying on a business undertaking or trading activity and income derived in such a manner will be taxable income subject to the basic exemption (see **8.4**). Any income derived from activities that are not integral and directly related to the sole or principal object of the recreational club is taxable if it exceeds the basic exemption.

**Example 5 – Non-exhaustive examples of related business undertakings or trading activities**

- A golf club provides cart, club and caddy hire services for a set fee to members and non-members.
- A country club provides squash, bowls, golf and tennis facilities as well as restaurant and bar facilities to members and non-members.

**Example 6 – Non-exhaustive examples of unrelated business undertakings or trading activities**

- The letting of immovable property for purposes of accommodation.
- The letting of immovable property on which a cell phone mast or billboard has been erected.

<sup>158</sup> [www.dictionary.com/browse/related](http://www.dictionary.com/browse/related) [Accessed 6 July 2022].

## 8.2.2 Substantially the whole towards the recovery of cost

The expression “substantially the whole” is regarded by SARS to mean 90% or more. However, since recreational clubs operate in an uncertain environment making proper planning difficult, SARS will accept a percentage of not less than 85%.<sup>159</sup> This percentage must be determined using a method appropriate to the circumstances and may be motivated by taking into account time or cost.

It is not always possible to base business undertakings or trading activities on a 100% cost-recovery basis and it is for this reason that legislation requires that substantially the whole, not less than 85%, of the business undertaking or trading activity must be based on the recovery of cost. The concept “recovery of cost” means that the business undertaking or trading activity is not conducted at a mark-up to maximise profits, but rather with the intention of recovering direct and reasonable indirect costs relating to the business undertaking or trading activity.

In *C v COT Goldin J* stated the following on the meaning of “cost”:<sup>160</sup>

“The word ‘cost’, when undefined, may be used in various senses. As Jordan CJ said in the case of *Ex parte Brierley, Re Elvidge* (1947) 47 NSWSR 423 at 427; *Words and Phrases Legally Defined* 2 ed –

‘It may, in the case of manufacture, be used to mean the price paid for the raw material plus the wages paid for turning it into finished articles; and, in the case of trading, the price paid for what is re-sold. Or, in either case, it may include all the other expenses incurred in bringing into existence, or obtaining, and then selling a vendible article – what are generally described as ‘overheads’.’ ”

Goldin J stated further that –<sup>161</sup>

“[t]he word ‘cost’ has to be construed according to its context.”

Trollip JA held in *SIR v Eaton Hall (Pty) Ltd* that –<sup>162</sup>

“in the absence of any definition in the Act of such cost one must look at its ordinary meaning. The *Oxford English Dictionary* defines ‘cost’ as meaning: ‘That which must be given or surrendered in order to acquire, produce, accomplish, or maintain something; the price paid for a thing’ ”.

The “cost” in this context includes reasonable direct and indirect operational costs that may also include reasonable provision for future expenditure such as that incurred in repairing and replacing assets.

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<sup>159</sup> For further commentary, see the Binding General Ruling (Income Tax) 20 “Interpretation of the Expression ‘Substantially the Whole’ ”.

<sup>160</sup> 1973 (4) SA 449 (R), 35 SATC 241 at 246 and 247.

<sup>161</sup> At 247.

<sup>162</sup> 1975 (4) SA 953 (A), 37 SATC 343 at 347.

### **Example 7 – Non-exhaustive examples of cost-recovery**

- The RQ Tennis Club envisages it will have to resurface its tennis courts within the next three years at an estimated cost of R30 000. A reserve fund is created and during the following three financial years an amount of R10 000 is transferred to this account. During each financial year the amount of R10 000 so transferred may be taken into account in determining the “cost”. This cost may not again be claimed or included in the determination of the “cost” when the actual cost of resurfacing the tennis court is incurred. Any deficit or surplus between the actual cost and the amount of the reserve must be taken into account.
- The ST Club provides social and cultural facilities for its members and also serves meals and refreshments on Sundays for a consideration determined by taking into account the cost of the goods supplied, salaries and wages, costs such as telephone, electricity, repairs and maintenance, stationery, cleaning materials and an amount for a reserve created for future replacement costs of capital assets such as a refrigerator, microwave oven or deepfreeze.

### **8.2.3 Unfair competition**

A recreational club should not be in a more favourable position or have an unfair advantage over a taxable entity conducting the same business undertaking or trading activity. A recreational club has an advantage in that it is not required to sacrifice a portion of its profit in the form of tax. Each case will be considered on its own merits to determine whether a recreational club has an unfair advantage. In determining whether a recreational club has an unfair advantage, various factors could be taken into account such as –

- whether the club engages in active advertising or marketing;
- whether the activity is conducted on a competitive basis with the intention of maximising profits;
- the amount of membership fees or other income received;
- location and availability of similar facilities; or
- voluntary assistance provided by other persons.

### **Example 8 – Non-exhaustive examples of business undertakings or trading activities complying with all three requirements under section 10(1)(cO)(ii)**

*Facts 1:*

The AG Club provides social and cultural facilities solely for its members and also serves meals and refreshments on Saturdays and Sundays to the members for a consideration that is determined based on cost plus a small mark-up. The cost in this instance takes into account the purchase price of the goods supplied, salaries and wages, costs such as telephone, electricity, repairs and maintenance, stationery, cleaning materials and an amount for a reserve created for future replacement costs of capital assets such as a refrigerator, microwave oven and deepfreeze.

*Result 1:*

It may be argued that the provision of meals and refreshments is integral and directly related to the provision of social and recreational amenities and facilities of the club to its members taking into account factors such as the –

- restaurant being available only to the members of the club; and
- fact that the price charged is on a cost-recovery basis.

*Facts 2:*

The BG Golf Club provides its members and non-members with recreational facilities for playing golf. Green fees are payable by each player. The club charges a fee for the use of its golf carts taking into account depreciation and the cost of repairs and maintenance.

*Result 2:*

Green fees charged by a golf club to members and non-members could qualify for the exemption, provided all three requirements of section 10(1)(cO)(ii) are met.

The rental income received from the letting of the golf carts may be regarded as being integral and directly related to the provision of the recreational facility to the members and non-members and not being in competition with other taxable entities, in that the golf carts are made available to players only at the BG Golf Club.

**Example 9 – Non-exhaustive examples of business undertakings or trading activities not complying with all three requirements under section 10(1)(cO)(ii)**

*Facts 1:*

The CP Bowling Club has permitted a cell phone provider to erect a cell phone mast on its property for an annual consideration. It has also permitted a car dealer to erect a billboard on its property for which it receives rental income.

*Result 1:*

The rental income received for the use of the land constitutes income derived from a trading activity that is not integral and directly related to the provision of the recreational facility to the club's members. It is also regarded as being in competition with other taxable entities that are required to pay income tax on rental income received for the use of immovable property.

*Facts 2:*

The SA Yacht Club rents its restaurant and bar facilities to a third party company operating the business for its own benefit. Rental income is paid to the club for the use of the restaurant and bar facilities.

*Result 2:*

The rental income received by SA Yacht Club is regarded as income derived from the letting of immovable property comprising income derived from a trading activity not integral and directly related to the provision of social or recreational facilities to the club's members.

If the club itself were to operate the restaurant and in that way provide a social facility to its members and non-members, it could qualify for the income tax exemption, provided all three requirements of section 10(1)(cO)(ii) are met.

### 8.3 Fundraising activities

The receipts and accruals derived from fundraising activities are exempt from income tax only if such activities –<sup>163</sup>

- take place on an occasional basis; and
- are undertaken substantially with assistance on a voluntary basis without compensation.

The Act does not define “occasional”, “substantially” or “compensation”.

The *Longman Dictionary of Contemporary English* describes “occasional” as –<sup>164</sup>

“sometimes, but not regularly and not often”.

The difference between occasional and frequent is that “occasional” occurs irregularly, from time to time, once in a while, therefore rarely, while “frequent” occurs regularly, very often or many times. Fundraising activities will therefore not be regarded as occasional if there is a frequency and continuity to them, and if such activities are pursued in a manner similar to commercial activities of taxpaying entities.

The word “substantial” is described in the *BusinessDictionary.com* as follows:<sup>165</sup>

“Having substance; large; significant.”

It is therefore a requirement that a large or significant part of the fundraising activities must be undertaken with assistance from volunteers without compensation.

The *Dictionary.com* describes “compensation” as –<sup>166</sup>

“1. the act or state of compensating, as by rewarding someone for service or by making up for someone’s loss, damage, or injury by giving the injured party an appropriate benefit.

3. something given or received as an equivalent for services, debt, loss, injury, suffering, lack, etc., indemnity”.

The requirement that compensation be absent does not exclude the reimbursement of reasonable and necessary out-of-pocket expenditure to volunteers in assisting in the carrying on of the club’s fundraising activities.

#### **Example 10 – Non-exhaustive examples of qualifying fundraising activities**

- Fêtes, cake sales, raffles and jumble sales that usually take place on an annual basis and with the assistance of helpers or volunteers who are not remunerated for their services.
- The sale of Christmas cards reconditioned by volunteers.
- Fun runs, dinner or dances held once a year with the assistance of volunteers.
- An annual golf, tennis, or bowling day hosted by volunteers at which the prizes have been donated and the proceeds used to fund capital improvements to the recreational club.

<sup>163</sup> Section 10(1)(cO)(iii).

<sup>164</sup> [www.ldoceonline.com/dictionary/occasionally](http://www.ldoceonline.com/dictionary/occasionally) [Accessed 6 July 2022].

<sup>165</sup> [www.businessdictionary.com/definition/substantial.html](http://www.businessdictionary.com/definition/substantial.html) [Accessed 6 July 2022].

<sup>166</sup> [www.dictionary.com/browse/compensation](http://www.dictionary.com/browse/compensation) [Accessed 6 July 2022].

## 8.4 Basic exemption

The basic exemption is calculated as a threshold amount equal to the greater of –<sup>167</sup>

- 5% of the total membership fees and subscriptions (see **8.1**) due and payable by the recreational club's members during the relevant year of assessment; or
- R120 000.

The words “due” and “payable” have been considered in various judgments. In *CIR v Janke*<sup>168</sup> Stratford J cited the following observation of Searle J in *Stafford v Registrar of Deeds*:<sup>169</sup>

“It is clear that the word ‘payable’ is sometimes construed as meaning ‘payable at a future time’ or ‘in respect of which there is a liability to pay’. It is also true that it is sometimes used to mean ‘payable immediately’ or ‘actually due and presently demandable’.”

In *Singh v C: SARS*, Olivier JA stated the following:<sup>170</sup>

“The word ‘payable’ can have at least two different meanings, viz ‘. . . (a) that which is due or must be paid, or (b) that which may be paid or may have to be paid . . . The sense of (a) is a present liability – due and payable – . . . (b) . . . a future or contingent liability’.”

The point in time at which membership fees and subscriptions are due and payable may be later than the point in time at which they accrue to a club. An amount may thus be due under a contract but not payable. An amount will be payable only when the time for payment arrives. For an amount to be “due and payable”, the amount must not only be owing, but a person must have the right to claim payment of it.

The basic exemption threshold amount must be applied collectively to the total receipts and accruals from all other sources and not individually to such other sources.

Section 10(1)(cO) does not provide for a specific exemption from income tax for interest received on investments but it may be taken into account in determining the basic exemption.

See **Annexure B** for a step-by-step guide to calculating the taxable income of a recreational club by applying the basic exemption.

### Example 11 – Basic exemption

#### *Facts:*

The BB Social Club has been approved as a recreational club. The total receipts and accruals for the year of assessment ended 30 June 2021 was as follows:

	R
Membership fees and subscriptions	450 000
Interest income	<u>45 000</u>
Total receipts	<u>495 000</u>

<sup>167</sup> Section 10(1)(cO)(iv).

<sup>168</sup> 1930 AD 474, 4 SATC 269 at 276.

<sup>169</sup> 1913 CPD 379 at 385.

<sup>170</sup> 2003 (4) SA 520 (SCA), 65 SATC 203 at 216.

*Result:*

The basic exemption is calculated as an amount equal to the greater of 5% of the total membership fees and subscriptions or R120 000.

5% of the total membership fees and subscriptions of R450 000 is R22 500.

The total receipts from investment income (R45 000) will be exempt, since the recreational club receives the benefit of the greater of R22 500 or R120 000.

## **9. Exemption from other taxes and duties**

In addition, to being exempt from the payment of income tax on specified receipts and accruals, recreational clubs also enjoy the benefit of being exempt from other taxes and duties.<sup>171</sup>

### **9.1 Donations tax**

Donations tax is payable on the value of any property disposed of by donation by any resident<sup>172</sup> (the donor) to another person (the donee)<sup>173</sup> at the rate of –

- 20% of that value if the aggregate of that value and the value of any other property disposed of under a taxable donation on or after 1 March 2018 until the date of that donation does not exceed R30 million;<sup>174</sup> and
- 25% of that value to the extent that it exceeds R30 million.<sup>175</sup>

A donation comprises any gratuitous disposal of property including any gratuitous waiver or renunciation of a right, for example, the waiver of debt.<sup>176</sup> The disposal of property at less than its market value will also constitute a donation to the extent that the Commissioner is not satisfied that the consideration was adequate.<sup>177</sup> Donations tax is payable by the donor, but if the donor fails to pay the tax within the prescribed period, the donor and donee are jointly and severally liable for the tax.<sup>178</sup>

Donations made by or to a recreational club are exempt from the payment of donations tax.<sup>179</sup>

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<sup>171</sup> For further commentary, see the *Taxation in South Africa*.

<sup>172</sup> The term “resident” is defined in section 1(1).

<sup>173</sup> The term “donee” is defined in section 55(1).

<sup>174</sup> Section 64(1)(a)(i).

<sup>175</sup> Section 64(1)(a).

<sup>176</sup> The term “donation” is defined in section 55(1).

<sup>177</sup> Section 58(1).

<sup>178</sup> Section 59.

<sup>179</sup> Section 56(1)(h).

## 9.2 Dividends tax

The provisions relating to dividends tax are contained in sections 64D to section 64N and apply to any dividend paid by a company, other than a headquarter company, on or after 1 April 2012.<sup>180</sup> Although dividends tax is part of the Act, it is a separate tax from income tax.<sup>181</sup>

Dividends tax is levied at the rate of 20%<sup>182</sup> of the amount of a dividend paid by a company that is a resident.<sup>183</sup> Dividends tax is also payable on a foreign dividend to the extent that the foreign dividend does not constitute the distribution of an asset *in specie* and it is paid by a foreign company in respect of a listed share.<sup>184</sup>

Dividends tax on a cash dividend is levied on the person entitled to the benefit of the dividend attaching to the share. This person is generally known as the beneficial owner.<sup>185</sup>

Generally, a company declaring and paying a dividend must withhold an amount of dividends tax, except to the extent that the dividend consists of a distribution of an asset *in specie*, in which case, the company paying the dividend is potentially liable for dividends tax unless an exemption applies.

It is not the responsibility of the company or regulated intermediary<sup>186</sup> paying the dividend to determine who the beneficial owner of a dividend is and whether that person qualifies for an exemption from dividends tax. The exemptions from dividends tax for cash dividends are contained in section 64F while the exemptions for dividends *in specie* are contained in section 64FA(1).

Any recreational club that is the beneficial owner of a dividend is exempt from dividends tax.<sup>187</sup> This exemption applies only if the recreational club has submitted a declaration to the company that declared and paid the dividend or to the regulated intermediary that paid the dividend, that it is exempt from dividends tax. The recreational club is also required to submit a written undertaking to the company or regulated intermediary that it will inform such company or regulated intermediary in writing should it cease to be the beneficial owner of the shares or if the circumstances affecting the exemption change.<sup>188</sup>

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<sup>180</sup> Any dividend paid before 1 April 2012 was subject to secondary tax on companies, a tax that was levied on the company paying the dividend.

<sup>181</sup> For further commentary, see the *Comprehensive Guide to Dividends Tax*.

<sup>182</sup> Section 64E(1). The rate of dividends tax increased from 15% to 20% on any dividend paid on or after 22 February 2017.

<sup>183</sup> A reduced or nil rate may apply under specific circumstances.

<sup>184</sup> The term "listed share" is defined in section 1(1) and means a share that is listed on an exchange as defined in section 1 of the Financial Markets Act 19 of 2012 and licensed under section 9 of that Act. A listed share could thus include a share in a foreign company whose shares are listed on a South African exchange.

<sup>185</sup> The term "beneficial owner" is defined in section 64D.

<sup>186</sup> The term "regulated intermediary" is defined in section 64D. A regulated intermediary is generally an entity that temporarily holds a dividend paid by a company before it is paid over to the ultimate beneficial owner.

<sup>187</sup> Section 64F(1)(a) and section 64FA(1)(a).

<sup>188</sup> Section 64G(2)(a) and section 64H(2)(a).

The Commissioner has not issued actual forms to be used for purposes of a declaration or written undertaking but has prescribed the required wording and minimum information required in the forms that are to be prepared by the company, regulated intermediary or beneficial owner.<sup>189</sup>

The obligation lies with the recreational club, which is the beneficial owner of the dividend to ensure that the prescribed declaration and written undertaking are filed timeously with the company or regulated intermediary paying the dividend.

Any recreational club that is a beneficiary of a trust should determine whether it has a vested right to a dividend received by or which accrued to the trust before the dividend is paid by the relevant company in order to ensure that the necessary declaration of exemption is filed with the company or regulated intermediary. A beneficiary that has a vested right in a dividend received by or which accrued to a trust will be regarded as the beneficial owner. Should the trust be the beneficial owner of the dividend, dividends tax at the rate of 20% may become payable. A trust whose beneficiary acquires a vested right to a dividend after it is paid but before the end of the trust's year of assessment may be able to claim a refund of the dividends tax withheld.<sup>190</sup>

A recreational club receiving a dividend that is exempt or partially exempt from dividends tax<sup>191</sup> is not required to submit to SARS a Dividends Tax Return.<sup>192</sup>

### 9.3 Capital gains tax

CGT<sup>193</sup> was introduced in South Africa on 1 October 2001 but in relation to recreational clubs, it became effective only some years later on a variety of dates ranging between 1 April 2007 and 1 April 2010, depending on the year of assessment of the club and when it applied for approval.

With the introduction of the system of partial taxation for recreational clubs under section 10(1)(cO),<sup>194</sup> clubs fell outside paragraph 63 of the Eighth Schedule<sup>195</sup> and were no longer able to automatically disregard capital gains and losses on the disposal of any of their assets. The valuation date of a club<sup>196</sup> is therefore the date on which a recreational club became partially taxable under section 10(1)(cO) that caused it to fall outside paragraph 63 of the Eighth Schedule under which it had previously enjoyed a complete exclusion.<sup>197</sup>

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<sup>189</sup> For further commentary, see the *Business Requirements Specifications: Administration of Dividends Tax* in 14.

<sup>190</sup> For further commentary, see the *Comprehensive Guide to Dividends Tax* in 2.3.1.

<sup>191</sup> Section 64F or section 64FA.

<sup>192</sup> Section 64K(1A) was amended by section 1 of the Tax Administration Laws Amendment Act 22 of 2018 with effect from 17 January 2019.

<sup>193</sup> For further commentary, see the *ABC of Capital Gains Tax for Companies* for a very basic overall understanding of the subject, the *Tax Guide for Share Owners*, which contains a detailed commentary on most aspects of CGT impacting on the holding of shares, and the *Comprehensive Guide to Capital Gains Tax* for a very detailed examination of the subject including recreational clubs.

<sup>194</sup> Section 10(1)(d)(iv)(aa), now repealed.

<sup>195</sup> Paragraph 63 provides that a person must disregard a capital gain or loss when any amount constituting gross income of whatever nature would be exempt from tax under section 10 were it to be received by or to accrue to that person.

<sup>196</sup> The *Comprehensive Guide to Capital Gains Tax* contains two sets of tables that can be consulted to assist in determining the valuation date of a club.

<sup>197</sup> Paragraph (a) of the definition of "valuation date" in paragraph 1.

CGT is a complex subject and a full explanation of all its aspects extends beyond the scope of this guide. All capital gains and capital losses of recreational clubs made on the disposal of assets are potentially subject to CGT unless excluded by a specific provision. A recreational club does not qualify under paragraph 64 of the Eighth Schedule, since that provision specifically excludes any asset used to produce exempt receipts and accruals contemplated in section 10(1)(cO).

Paragraph 65B of the Eighth Schedule provides roll-over relief for assets used in carrying on the club's activities. The roll-over relief granted to clubs entails a deferment or delay in paying the CGT on a taxable capital gain made on the disposal of an asset, provided the proceeds are used to acquire a replacement asset.<sup>198</sup> The liability for CGT will arise on the subsequent disposal of the new asset purchased to replace the asset disposed of.

A person must disregard any capital gain or capital loss determined in respect of the donation or bequest of an asset to an approved recreational club.<sup>199</sup>

## 10. Other tax issues

### 10.1 Provisional tax

Provisional tax<sup>200</sup> is dealt with in the Fourth Schedule.<sup>201</sup> It is not a separate tax but merely a mechanism to assist taxpayers in meeting their tax liability by spreading it over the relevant year of assessment as opposed to paying a large amount at the end of a year of assessment. A provisional taxpayer<sup>202</sup> is required to estimate taxable income for a year of assessment and calculate provisional tax payable on that estimate.

Recreational clubs are excluded from the definition of "provisional taxpayer" in the Fourth Schedule and are not required to submit provisional tax returns.<sup>203</sup> Any liability to income tax on taxable income will become payable on assessment.

### 10.2 Estate duty

Estate duty is levied under the Estate Duty Act 45 of 1955 (Estate Duty Act) at the rate of 20% on the first R30 million of the dutiable amount of the estate of a deceased person, and at the rate of 25% of the dutiable amount that exceeds R30 million.<sup>204</sup>

No exemption for estate duty is provided for bequests to recreational clubs. Any property bequeathed to a recreational club will therefore not qualify as a deduction and therefore will be excluded from the net value of the estate and subject to estate duty.

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<sup>198</sup> Paragraph 65B of the Eighth Schedule.

<sup>199</sup> Paragraph 62(e) of the Eighth Schedule.

<sup>200</sup> The term "provisional tax" is defined in paragraph 1 of the Fourth Schedule.

<sup>201</sup> For commentary on provisional tax, see the *Taxation in South Africa* and the *External Guide – Guide for Provisional Tax*.

<sup>202</sup> The term "provisional taxpayer" is defined in paragraph 1 of the Fourth Schedule.

<sup>203</sup> Paragraph (bb) of the exclusions to the definition of "provisional taxpayer" in paragraph 1 of the Fourth Schedule.

<sup>204</sup> Section 2(2) and at the rate set out in the First Schedule to the Estate Duty Act.

### 10.3 Transfer duty

Transfer duty is levied under the Transfer Duty Act on a sliding scale on the value of any property<sup>205</sup> acquired by any person. The rates vary from 0% to 13% for all persons. The person acquiring the property (the transferee) is normally the person who is liable for the payment of transfer duty.<sup>206</sup>

Section 9 of the Transfer Duty Act provides for certain exemptions that may apply in different circumstances. There, however, is no specific exemption that applies to a recreational club. One of the main exemptions is contained in section 9(15) of the Transfer Duty Act, which provides that if a supply of property is subject to VAT, it will be exempt from transfer duty.

Subject to any exemption that may apply, a recreational club will be liable to pay transfer duty on the acquisition of any property from any person that is not a VAT vendor. Transfer duty will also be payable on property acquired from a vendor that did not use the property for enterprise purposes under the VAT Act. This situation will apply, for example, to a property that was used for private purposes, exempt supplies or other non-taxable purposes by the vendor immediately before being supplied.

### 10.4 Securities transfer tax

The STT Act provides that a STT must be levied at the rate of 0.25%<sup>207</sup> on the taxable amount<sup>208</sup> of the transfer<sup>209</sup> of every security<sup>210</sup> issued by a close corporation or company incorporated in South Africa as well as foreign companies listed on an exchange.<sup>211</sup>

The Securities Transfer Tax Administration Act 26 of 2007 contains the administration provisions governing the payment of STT.<sup>212</sup> Any STT payment must be made electronically through SARS e-STT system.<sup>213</sup>

The exemptions from STT are contained in section 8(1) of the STT Act. There is, however, no specific exemption for STT for recreational clubs.

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<sup>205</sup> See the definition of “property” in section 1(1) of the Transfer Duty Act.

<sup>206</sup> For further commentary on transfer duty in general and the processing of transactions on eFiling, see the *Guide for Transfer Duty via eFiling* and the *Transfer Duty Guide*.

<sup>207</sup> Section 2(1) of the STT Act.

<sup>208</sup> Sections 3(1), 4, 5 and 6 of the STT Act determine the relevant taxable amount.

<sup>209</sup> The term “transfer” is defined in section 1 of the STT Act and, save for certain exclusions, includes the transfer, sale, assignment or cession or disposal in any other manner of a security or the cancellation or redemption of that security.

<sup>210</sup> The term “security” is defined in section 1 of the STT Act and means any share or depository receipt in a company, or any member’s interest in a close corporation.

<sup>211</sup> The term “exchange” means an “exchange” as defined in section 1 of the Financial Markets Act and licensed under section 9 of that Act.

<sup>212</sup> For further commentary, see the *Taxation in South Africa*.

<sup>213</sup> Sections 3(2) and (5) of the STT Administration Act 26 of 2007. For further commentary on the electronic submission of STT declarations and payments on the e-STT system via eFiling, see the *External Reference Guide – Securities Transfer Tax*.

## 10.5 Employees' tax

Employees' tax<sup>214</sup> is dealt with in the Fourth Schedule. The purpose of the employee's tax system is to ensure that an employee's income tax liability is settled at the same time that the employee's remuneration is earned, therefore avoiding burdening the employee with a large tax bill on assessment. Employees' tax deducted serves as an income tax credit that is set off against the income tax liability<sup>215</sup> of an employee, calculated on an annual basis, in order to determine the employees' final income tax liability for a year of assessment.

Employees' tax must be deducted or withheld by every employer (or representative employer<sup>216</sup> when the employer is not resident in South Africa) who pays or becomes liable to pay an amount of remuneration<sup>217</sup> to any person.

A recreational club is not exempted from the obligation to deduct or withhold employees' tax. The recreational club must register as an employer for employees' tax purposes. The PAYE to be deducted or withheld is calculated according to the tax deduction tables prescribed by the Commissioner.

A recreational club that is an employer must, if any of its employees are liable for income tax, register for employees' tax within 21 business days of becoming an employer.<sup>218</sup> Registration is done by completing the prescribed application form EMP 101e.<sup>219</sup> A recreational club already registered for another tax type on eFiling may as part of the single registration initiative register for PAYE on eFiling.<sup>220</sup> A registered employer will receive a monthly return, the EMP 201 form, which must be completed and submitted together with the payment of employees' tax within seven days after the end of the month during which the deduction was made.

An employer must issue an employee with an employees' tax certificate (IRP 5 certificate) if employees' tax was deducted from the employees' remuneration. This certificate discloses, among other things, the total remuneration earned during a year of assessment and the employees' tax and UIF contributions deducted by the employer.

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<sup>214</sup> For further commentary, see the *Guide for Employers in respect of Employees' Tax - External Guide*.

<sup>215</sup> Paragraph 28 of the Fourth Schedule.

<sup>216</sup> Paragraph (b) of the definition of "representative taxpayer" in section 153(1) of the TA Act.

<sup>217</sup> The term "remuneration" is defined in paragraph 1 of the Fourth Schedule.

<sup>218</sup> Paragraph 15(1) of the Fourth Schedule read with Chapter 3 of the TA Act.

<sup>219</sup> For commentary, see the *External Guide – Guide for Completion of Employer Registration Application*.

<sup>220</sup> For further commentary, see the *External Guide – How to Complete the Registration, Amendments and Verification Form (RAV01)*.

## 10.6 Unemployment insurance contributions

The unemployment insurance system in South Africa is governed by the Unemployment Insurance Act and the Unemployment Insurance Contributions Act 4 of 2002. These statutes, among other things, provide for the benefits, to which contributors are entitled, and the imposition and collection of contributions to UIF, respectively.

The UIF<sup>221</sup> gives short-term relief to workers when they become unemployed or unable to work because of maternity, adoption leave, or illness. It also provides relief to the dependents of a deceased contributor.<sup>222</sup>

The employer must pay a total contribution of 2% (1% contributed by the employee and 1% contributed by the employer) of the remuneration paid or payable by an employer to employees. UIF contributions are payable by employers on a monthly basis, subject to specified exclusions. These contributions must be paid to the UIF office of the Department of Labour<sup>223</sup> or to SARS within seven days after the end of the month during which the amount was deducted. Payment can be made via eFiling, electronic funds transfer (EFT) or at a branch of an approved banking institution.

A recreational club paying remuneration to its employees will also be liable for UIF contributions unless it qualifies for certain exemptions.

## 10.7 Skills development levy

The SDL is a compulsory levy to fund education and training under the SDL Act.<sup>224</sup> SARS administers the collection of the SDL payable by employers.<sup>225</sup>

The SDL Act<sup>226</sup> imposes on every employer an SDL on the total amount of remuneration paid or payable or deemed to be paid or payable by an employer<sup>227</sup> to its employees<sup>228</sup> during any month. The amount of such remuneration is the same as the amount of remuneration<sup>229</sup> determined under the Fourth Schedule from which an employer is obligated to withhold employees' tax taking into consideration certain exclusions.<sup>230</sup>

Section 4 of the SDL Act contains a number of exemptions from the SDL. There, however, is no specific exemption from SDL for a recreational club. A recreational club that is an employer whose annual payroll will not exceed R500 000 in the following 12 months will be exempt from paying SDL.<sup>231</sup>

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<sup>221</sup> For further commentary, see the *Guide for Employers in respect of the Unemployment Insurance Fund*.

<sup>222</sup> Section 2 of the Unemployment Insurance Act.

<sup>223</sup> Information is available on the Department of Labour's website at [www.labour.gov.za](http://www.labour.gov.za).

<sup>224</sup> For further commentary, see the *Quick Reference Guide for Skills Development Levy*.

<sup>225</sup> For commentary, see the *Guide for Tax Rates / Duties / Levies and Taxation in South Africa*.

<sup>226</sup> Section 3(1) of that Act.

<sup>227</sup> The term "employer" is defined in section 1(1) of the SDL Act and includes an "employer" as defined in the Fourth Schedule.

<sup>228</sup> The term "employee" is defined in section 1(1) of the SDL Act and includes an "employee" as defined in the Fourth Schedule.

<sup>229</sup> The term "remuneration" is defined in paragraph 1 of the Fourth Schedule.

<sup>230</sup> See section 3(4) of the SDL Act for the exclusions.

<sup>231</sup> Section 4(b) of the SDL Act.

An employer liable to pay SDL must apply to the Commissioner in such manner as the Commissioner may determine to be registered as an employer for the purposes of SDL.<sup>232</sup>

## 10.8 Value-added tax

The term “recreational club” used for income tax purposes is not used in the VAT Act. Instead, reference is made to an “association not for gain”.<sup>233</sup> An association not for gain such as a recreational club meeting the requirements for compulsory or voluntary registration is treated like any other business making taxable supplies and will be liable to register and account for VAT according to the normal VAT rules applying to all vendors. There are, however, a few special provisions applying to associations not for gain.<sup>234</sup>

A recreational club required to register for VAT, or which has registered voluntarily, must charge VAT (output tax) on any taxable supplies of goods or services made in the course of conducting the club’s enterprise. The term “taxable supplies” includes supplies that are subject to VAT at the standard rate (currently 15%), or at the zero rate.

Typical examples of income earned from taxable supplies on which output tax is payable by recreational clubs are as follows:

- Club membership fees
- Entrance fees charged for entrance to fundraising and sports events
- Fees charged for the use of sports facilities such as bowling greens, squash and tennis courts
- Charges for restaurant meals, bar facilities and any other hospitality or entertainment
- Tuck shop sales such as tea, coffee and other beverages and snacks
- Fees for hiring out facilities for weddings and other functions
- Charges for the provision of commercial accommodation or office space
- Income from the sale of raffle tickets or fees for entry to competitions
- Takings from coin-operated amusements such as pool tables or other vending machines
- Entrance fees for theatre performances and film shows
- Charges for hospitality boxes

A recreational club registered for VAT will, subject to a few exceptions, be able to claim credit for any VAT paid (input tax) on goods or services acquired to make taxable supplies, subject to the documentary requirements being met.

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<sup>232</sup> Section 5(1) of the SDL Act. For commentary, see the *External Guide – Guide for Employers in Respect of Skills Development Levy* SDL-GEN-01-G01.

<sup>233</sup> See paragraph (b) of the definition of “association not for gain” in section 1(1) of the VAT Act.

<sup>234</sup> For further commentary on VAT and “associations not for gain”, see the *VAT 414 – Guide for Associations not for Gain and Welfare Organisations*.

Since recreational clubs often make supplies of “entertainment”, the special VAT rules in this regard should be noted.<sup>235</sup> The term “entertainment” means the provision of any food, beverages, accommodation, entertainment, amusement, recreation or hospitality of any kind by a vendor whether directly or indirectly to anyone in connection with the enterprise carried on by that vendor.<sup>236</sup> The main rule regarding the deduction of input tax concerning supplies of entertainment is that the supplies must be made for a charge covering all the direct and indirect costs, or for a charge that is at least equal to the open market value of the supplies. A club that supplies entertainment may therefore deduct input tax on any goods or services acquired to make taxable supplies of entertainment, provided it meets these requirements.

Should a ruling request be required on a specific VAT issue, a ruling application may be submitted by e-mail to [VATRulings@sars.gov.za](mailto:VATRulings@sars.gov.za).<sup>237</sup>

## 10.9 Micro businesses

The Sixth Schedule sets out the conditions and requirements for an entity to qualify as a micro business<sup>238</sup> for turnover tax<sup>239</sup> purposes. A micro business may be constituted as a sole proprietor, partnership, close corporation, co-operative or a company.<sup>240</sup> Another requirement is that the qualifying person’s qualifying turnover may not exceed R1 million for a year of assessment.

An NPC approved by the Commissioner as a recreational club will not qualify as a micro business.<sup>241</sup>

## 11. Administrative provisions – Tax Administration Act

The TA Act<sup>242</sup> deals with tax administration and seeks, among other things, to simplify administrative provisions by incorporating into one piece of legislation administrative provisions that are generic to all tax Acts, remove duplicated or redundant administrative provisions in the different tax Acts and as far as possible harmonise administrative provisions.<sup>243</sup>

Some administrative provisions that apply only to, and are unique to, the administration of a specific tax type remain in the Act imposing that tax. If the TA Act is silent on the administration of a tax Act and it is specifically provided for in any other tax Act, the provisions of that Act

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<sup>235</sup> For further commentary on supplies of entertainment and the deductibility of input tax, see the *VAT 404 – Guide for Vendors* and the *VAT 411 – Guide for Entertainment, Accommodation and Catering*.

<sup>236</sup> Section 1(1) of the VAT Act.

<sup>237</sup> For commentary on the VAT ruling process, see the *VAT Ruling Process Quick Reference Guide*.

<sup>238</sup> The term “micro business” is defined in paragraph 1 of the Sixth Schedule.

<sup>239</sup> Turnover tax is a separate and independent tax from the income tax system that is payable under section 48A by a person who is registered as a micro business under paragraph 8 of the Sixth Schedule.

<sup>240</sup> For commentary on the turnover tax system for micro businesses, see the *Tax Guide for Micro Businesses*.

<sup>241</sup> Paragraph 3(f)(v) of the Sixth Schedule.

<sup>242</sup> The TA Act came into effect on 1 October 2012.

<sup>243</sup> For commentary relating to taxpayer’s obligations and entitlements under the TA Act, see the *SARS Short Guide to the Tax Administration Act, 2011 (Act No. 28 of 2011)*.

apply.<sup>244</sup> If there is any inconsistency between the TA Act and any other tax Act, the other Act prevails.<sup>245</sup>

General administrative provisions contained in the TA Act relating to, for example, record-keeping (see **14**), returns (see **15**), assessments, dispute resolution (see **16**), interest, refunds and anti-avoidance will therefore apply to recreational clubs.

## 12. Furnishing of information

In order to assist in enforcing the Act, the Commissioner may submit a written request to any person to furnish information about any recreational club and may require that person to –<sup>246</sup>

- answer any questions relating to the recreational club;
- make books of account, records or other documents relating to the recreational club available for inspection; or
- meet with the Commissioner’s representative and produce for examination any documents relating to the recreational club.

A person who wilfully and without just cause refuses or neglects to furnish, produce or make available any document or thing, or reply to or answer truly and fully any questions posed by SARS is guilty of an offence and on conviction is subject to a fine or imprisonment for a period not exceeding two years.<sup>247</sup>

## 13. Changes in registered particulars

A recreational club must inform SARS of changes in its registered particulars to ensure that SARS has the most accurate and current information. A recreational club must communicate to SARS any change of postal, physical or electronic addresses, representative taxpayer and banking particulars.<sup>248</sup>

A person who wilfully and without just cause refuses or neglects to notify SARS of a change in registered particulars is guilty of an offence and on conviction is subject to a fine or imprisonment for a period not exceeding two years.<sup>249</sup>

## 14. Record-keeping

All recreational clubs are required to keep records for five years from the date of the submission of a return.<sup>250</sup>

A return<sup>251</sup> includes any form, declaration, document or other manner of submitting information to SARS that incorporates a self-assessment or is the basis on which an assessment is to be made by SARS.

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<sup>244</sup> Section 4(2) of the TA Act.

<sup>245</sup> Section 4(3) of the TA Act.

<sup>246</sup> Section 46(1) of the TA Act.

<sup>247</sup> Sections 234(1)(c)(i), (2)(f) and (2)(h) of the TA Act.

<sup>248</sup> Section 23 of the TA Act.

<sup>249</sup> Section 234(2)(a) of the TA Act.

<sup>250</sup> Section 29(3) of the TA Act.

<sup>251</sup> The term “return” is defined in section 1 of the TA Act.

Although records are generally required to be kept and retained for five years, there are circumstances in which they are required to be retained for longer periods.<sup>252</sup>

The required retention periods for records, books of account or documents are as follows:

- Five years from the date of the submission of a return.<sup>253</sup>
- If no return is submitted for a tax period but is required to be submitted, records, books of account or documents must be kept and retained indefinitely until the obligation to submit a return has been complied with, and then for five years from the date of submission of the return.<sup>254</sup>
- If an objection or appeal against an assessment or decision is lodged, the records, books of account or documents relevant to the objection or appeal must be kept and retained until the disputed assessment or decision becomes final or the applicable five-year period has elapsed, whichever is the later.<sup>255</sup>
- A person that has been notified of or is aware of an audit or investigation by SARS must retain the records, books of account or documents relevant to that audit or investigation until it is concluded or the applicable five-year period has elapsed, whichever is the later.<sup>256</sup>
- Indefinitely if a document is relevant for future years of assessment such as the prescribed application form for approval of exemption from income tax EI 1 and the required supplementary information and documentation on which the Commissioner based the decision to approve or not to approve an exemption from income tax.

The records, books of account, or documents that must be kept and retained may include anything that contains a written, sound or pictorial record or other record of information whether in physical or electronic form.

The following are non-exhaustive examples of records, books of account or documents that must be kept and retained:

- Cash books
- Debtors, creditors and sales ledgers
- Journals
- Fixed-asset register
- Bank statements and deposit slips
- Invoices

In order to ensure the safe retention of records as well as easy and efficient access to records by SARS, especially for inspection or audit purposes during the prescribed retention period, a recreational club is required to keep and retain its records in their original form, in an orderly fashion and in a safe place.<sup>257</sup>

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<sup>252</sup> Section 32 of the TA Act.

<sup>253</sup> Section 29(2)(a) read with section 29(3)(a) of the TA Act.

<sup>254</sup> Section 29(2)(b) of the TA Act.

<sup>255</sup> Section 32(b) of the TA Act.

<sup>256</sup> Section 32(a) of the TA Act.

<sup>257</sup> Section 30 of the TA Act.

The electronic form of record-keeping is regulated by the Electronic Record-Keeping Rules.<sup>258</sup> The rules require that electronic records must be kept in their original form,<sup>259</sup> and should within a reasonable time, be accessible to and readable by SARS. Other requirements deal with the location of the records, the maintenance of system documentation and measures for storage, back-ups and conversions.<sup>260</sup>

A person who wilfully and without just cause fails or neglects to retain records is guilty of an offence and on conviction is subject to a fine or imprisonment for a period not exceeding two years.<sup>261</sup>

## 15. Income tax returns

The Commissioner annually gives public notice in the *Government Gazette* of the persons that must furnish an income tax return.

A recreational club must submit income tax returns, even if its approval or exemption results in no tax liability. The income tax return enables the Commissioner to annually assess whether the recreational club is operating within the prescribed limits of its approval and to determine whether the partial taxation principles have been applied to receipts and accruals that do not qualify for exemption.

The prescribed Income Tax Return for Exempt Organisations (IT12EI) applicable to recreational clubs must be submitted on an annual basis. It may be obtained from –

- the eFiling website;
- any SARS branch office; or
- the SARS National Contact Centre.

A return must be a full and true return<sup>262</sup> and be signed by the recreational club or by the recreational clubs duly authorised representative. The person signing the return will be regarded as being cognisant of the statements made in the return.<sup>263</sup>

Non-receipt of an income tax return does not affect the obligation to submit an income tax return.<sup>264</sup>

A person who wilfully and without cause refuses or neglects to submit a return or document to SARS is guilty of an offence and on conviction is subject to a fine or imprisonment for a period not exceeding two years.<sup>265</sup>

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<sup>258</sup> See Government Notice 787 in *Government Gazette* 35733 of 1 October 2012.

<sup>259</sup> See section 14 of the Electronic Communications and Transactions Act 25 of 2002. Under that section a document is regarded as being in original form if the integrity of the data is maintained, for example, when it is complete and unaltered.

<sup>260</sup> For commentary, see the *Electronic Communications Guide*.

<sup>261</sup> Section 234(2)(e) of the TA Act.

<sup>262</sup> Section 25(2) of the TA Act.

<sup>263</sup> Section 25(3) of the TA Act.

<sup>264</sup> Section 25(4) of the TA Act.

<sup>265</sup> Section 234(2)(d) of the TA Act.

## 15.1 Taxpayer reference number

A taxpayer reference number is allocated on completion of registration for income tax purposes.<sup>266</sup> The taxpayer reference number must be included when filing a return or any document with SARS.

## 15.2 Filing an income tax return

The public notice issued annually by the Commissioner also prescribes the period within which returns must be submitted for the years of assessment specified in that notice. An appropriate penalty<sup>267</sup> will be imposed by SARS if satisfied that the company failed to comply with the obligation to submit an income tax return under the Act and public notice issued by the Commissioner.<sup>268</sup> The appropriate penalty for non-compliance will be imposed according to a fixed amount penalty table.<sup>269</sup>

Income tax returns must in the case of a –<sup>270</sup>

- company be submitted electronically by using eFiling; or
- trust be submitted electronically –
  - by using eFiling, provided the person is registered for eFiling; or
  - through the assistance of a SARS official at an office of SARS.

SARS, however, may agree that a person, who is required to submit a return, may submit the return in an alternative manner.

## 15.3 Year of assessment

A recreational club that is an NPC, an association, or a society will have a year of assessment ending on the date that coincides with its financial year-end. For purposes of income tax, an association and a society are regarded as a “company”.<sup>271</sup> If the financial year-end is 30 June, its year of assessment will run from 1 July to 30 June of the following year. The Commissioner has discretion to accept financial accounts of a company for a period ending on a day differing from the last day of the company’s financial year.<sup>272</sup>

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<sup>266</sup> The term “taxpayer reference number” is defined in section 1 of the TA Act and means the number referred to in section 24 of the same Act.

<sup>267</sup> The terms “administrative non-compliance penalty” and “penalty” are defined in section 208 of the TA Act and means a penalty imposed by SARS in accordance with Chapter 15 of the TA Act or a tax Act other than this Act, and excludes an understatement penalty referred to in Chapter 16 of the TA Act.

<sup>268</sup> Section 210 of the TA Act. For commentary, see the *Guide to Understatement Penalties*.

<sup>269</sup> Section 211 of the TA Act.

<sup>270</sup> See Government Notice 2130 in *Government Gazette* 46471 of 3 June 2022. The public notice was issued in accordance with section 25 of the TA Act read with section 66(1) and relates to the submission of income tax returns for the 2022 tax year.

<sup>271</sup> See paragraph (d) of the definition of “company” in section 1(1), which includes any association formed in South Africa to serve a specified purpose, beneficial to the public or a section of the public.

<sup>272</sup> For further commentary, see the Interpretation Note 90 “Year of Assessment of a Company: Accounts Accepted to a Date Other Than the Last Day of a Company’s Financial Year”.

## 15.4 Supporting documentation

It is not a requirement for supporting documents to be submitted together with the income tax return. The recreational club will be notified if supporting documentation is required to substantiate any aspect of the income tax return.

A recreational club whose income tax return is supported by any balance sheet, statement of assets and liabilities or account prepared by any other person may be requested to submit a certificate or statement recording –<sup>273</sup>

the extent of the examination by the preparer of the books of account and of the documents from which the books of account were prepared; and

in so far as may be ascertained by the examination, whether the entries in those books and documents disclose the true nature of any transaction, receipt, accrual or payment or debit.

The accounts must be signed by a person responsible for the recreational club in a fiduciary capacity and by the person who prepared them on behalf of the recreational club.

## 15.5 Financial statements

A recreational club that is an NPC may be required to be audited or independently reviewed under the Companies Act<sup>274</sup> taking into account, for example, the category of the company and its public interest score.

It, however, is not a requirement of SARS that a qualified accountant must complete the financial statements of a recreational club that is an association or society.

## 16. Objection and appeal

Any decision of SARS in the exercise of its discretion under section 30A is subject to objection and appeal.<sup>275</sup>

The Commissioner's discretion under section 30A will be exercised to determine whether –

- a club may be approved as a recreational club for purposes of section 30A(2);
- a recreational club is or was knowingly a party to, or knowingly allowed itself to be used as part of a tax-avoidance scheme;
- a recreational club has in any material respect, or on a continuous or repetitive basis failed to comply with section 30A; and
- approval as a recreational club can be granted with retrospective effect.

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<sup>273</sup> Section 28 of the TA Act.

<sup>274</sup> Section 30(2) of the Companies Act read with regulations 27, 28 and 29 of the Companies Regulations, 2011.

<sup>275</sup> Section 3(4)(b).

A recreational club may object to any of the above decisions or an assessment within 30 business days<sup>276</sup> from the date of the decision or assessment<sup>277</sup> in accordance with Chapter 9 of the TA Act read with the “rules” as published in the *Government Gazette*.<sup>278</sup>

The objection must be made on the prescribed form and specify in detail the grounds on which it is made. SARS will consider the objection and may disallow the objection or allow the objection in whole or in part.

If on disallowance of the objection the recreational club is dissatisfied with SARS’s decision, it may appeal against the disallowance. Such appeal must be in writing and lodged with SARS within the prescribed period.<sup>279</sup>

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<sup>276</sup> The term “business day” is defined in section 1 of the TA Act.

<sup>277</sup> For further commentary, see the Interpretation Note 15 “Exercise of Discretion in case of Late Objection or Appeal”.

<sup>278</sup> The rules for objections and appeals are formulated under section 103 of the TA Act and published in Government Notice 550 in *Government Gazette* 37819 of 11 July 2014. Rule 7 deals with objections. For further commentary, see the *Dispute Resolution Guide: Guide on the Rules Promulgated in terms of Section 103 of the Tax Administration Act, 2011* and the *Alternative Dispute Resolution: Quick Guide*.

<sup>279</sup> Rule 10.

## Annexure A – The law

### Section 10(1)(cO)

- 10. Exemptions.**—(1) There shall be exempt from normal tax—
- (cO) the receipts and accruals of any recreational club approved by the Commissioner in terms of section 30A, to the extent that the receipts and accruals are derived—
    - (i) in the form of membership fees or subscriptions paid by its members;
    - (ii) from any business undertaking or trading activity that—
      - (aa) is integral and directly related to the provision of social and recreational amenities or facilities for the members of that club;
      - (bb) is carried out on a basis substantially the whole of which is directed towards the recovery of cost; and
      - (cc) does not result in unfair competition in relation to taxable entities;
    - (iii) from any fundraising activities of that club, which are of an occasional nature and undertaken substantially with assistance on a voluntary basis without compensation; and
    - (iv) from any other source and do not in total exceed the greater of
      - (aa) five per cent of the total membership fees and subscriptions due and payable by its members during the relevant year of assessment; or
      - (bb) R120 000;

### Section 30A

- 30A. Recreational clubs.**—(1) For purposes of this Act, “**recreational club**” means any non-profit company as defined in section 1 of the Companies Act, society or other association of which the sole or principal object is to provide social and recreational amenities or facilities for the members of that company, society or other association.
- (2) The Commissioner must approve a recreational club for the purposes of section 10(1)(cO), if—
- (a) that club has submitted to the Commissioner a copy of the constitution or other written instrument in terms of which it is established and which provides that—
    - (i) it is required to have at least three persons, who are not connected persons in relation to each other, to accept the fiduciary responsibility of that club and no single person directly or indirectly controls the decision making powers relating to that club;
    - (iA) its activities must be carried on in a non-profit manner;
    - (ii) it is prohibited from directly or indirectly distributing any surplus funds to any person, other than in terms of subparagraph (iii);
    - (iii) it is required on dissolution to transfer its assets and funds to—
      - (aa) any other recreational club which is approved by the Commissioner in terms of this section;
      - (bb) a public benefit organisation contemplated in paragraph (a)(i) of the definition of a “public benefit organisation” in section 30(1) which has been approved in terms of section 30(3);
      - (cc) any institution, board or body which is exempt from tax under the provisions of section 10(1)(cA)(i), which has as its sole or principal object the carrying on of any public benefit activity; or

(dd) the government of the Republic in the national, provincial or local sphere, contemplated in section 10(1)(a);

(iv) it may not pay any remuneration to any person which is excessive, having regard to what is generally considered reasonable in the sector and in relation to the service rendered, nor may any remuneration be determined as a percentage of any amounts received or accrued to that club;

(v) all members must be entitled to annual or seasonal membership; and

(vi) members are not allowed to sell their membership rights or any entitlement in terms thereof;

(b) the club undertakes to submit to the Commissioner a copy of any amendment to the constitution or other written instrument under which it is established; and

(c) the Commissioner is satisfied that the club is or was not knowingly a party to, or does not knowingly permit, or has not knowingly permitted, itself to be used as part of any transaction, operation or scheme of which the sole or main purpose is or was the reduction, postponement or avoidance of liability for any tax, duty or levy which, but for such transaction, operation or scheme, would have been or would have become payable by any person under this Act or any other Act administered by the Commissioner.

(3) Where the constitution or other written instrument under which the club is established does not comply with the provisions of paragraph (a) of subsection (2), it shall be deemed to so comply if a person responsible in a fiduciary position for the funds and assets of such club furnishes the Commissioner with a written undertaking by such club that such club will be administered in compliance with the provisions of this section.

(4) (a) Subject to paragraph (b), where a club applies for approval, the Commissioner may approve that club for purposes of this section with retrospective effect, if the Commissioner is satisfied that that club during the period prior to its application complied with the requirements of a “recreational club” as defined in subsection (1).

(b) For the purposes of paragraph (a), where the club—

(i) has complied with all its obligations under chapters 4, 10 and 11 of the Tax Administration Act, the Commissioner may not extend approval to the years of assessment in respect of which an assessment may in terms of section 99(1) of that Act not be made; or

(ii) has not complied with all its obligations under chapters 4, 10 and 11 of the Tax Administration Act, the Commissioner may not extend approval to the years of assessment in respect of which an assessment could in terms of section 99(1) of that Act, not have been made had the income tax returns relating to those years of assessment been submitted in accordance with section 25(1) of that Act.

(5) Where the Commissioner is—

(a) satisfied that any recreational club approved under subsection (2) has during any year of assessment in any material respect; or

(b) during any year of assessment satisfied that any such recreational club has on a continuous or repetitive basis,

failed to comply with the provisions of this section, or the constitution or other written instrument under which it was established to the extent that it relates to the provisions of this section, the Commissioner shall notify the recreational club that he or she intends to withdraw the approval of that recreational club if no corrective steps are taken by that club within a period stated in that notice.

(6) If no corrective steps are taken by a recreational club as contemplated in subsection (5), the Commissioner must withdraw approval of that club with effect from the commencement of the year of assessment contemplated in subsection (5).

(7) If the Commissioner has withdrawn the approval of a recreational club, that club must within six months after the date of that withdrawal (or such longer period as the Commissioner may allow) transfer or take reasonable steps to transfer its remaining assets to any recreational club, public benefit organisation, institution, board or body or the government, as contemplated in subsection (2)(a)(iii).

(7A) As part of its dissolution the club must transfer its assets to a recreational club, public benefit organisation, institution, board or body or the government, as contemplated in subsection (2)(a)(iii).

(8) If the recreational club fails to transfer, or to take reasonable steps to transfer, its assets as contemplated in subsection (7) or (7A), an amount equal to the market value of those assets which have not been transferred less an amount equal to the bona fide liabilities of that recreational club must for purposes of this Act be deemed to be an amount of taxable income which accrued to that recreational club during the year of assessment in which approval was withdrawn or the dissolution took place.

(9) Any person who is in a fiduciary capacity responsible for the management or control of the income and assets of any approved recreational club and who intentionally fails to comply with any provision of this section or of the constitution, or other written instrument under which such recreational club is established to the extent that it relates to the provisions of this section, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 24 months.

## Annexure B – Step-by-step guide to calculating the taxable income of a recreational club by applying the basic exemption rule

### Facts:

The HW Club is a recreational club with a year of assessment ending on 30 June. Its financial statements for the year ended 30 June 2021 reflect the following income and expenditure:

<b>Income</b>	R
Membership fees and subscriptions	1 890 000
Entrance fees from members	240 000
Bar and catering revenue – net trading income	800 000
Green fees from members and non-members	434 000
Annual fundraising event	250 000
Rental income from billboards and cell phone mast	270 000
Interest on investments	<u>16 000</u>
Total receipts and accruals	<u>3 900 000</u>
<b>Expenditure</b>	
Operating expenditure relating directly to the provision of recreational facilities	1 850 000
Maintenance: Billboards & cell phone mast rental	5 000
General overheads: Office salaries, stationery, security, telephone & bank charges	22 000
Accounting fees	<u>13 000</u>
Total expenses	<u>1 890 000</u>

### Note:

#### Income from trading activities or business undertaking

- *Bar and catering facilities – net trading income*

The bar and catering facilities are provided to members and non-members who make use of the recreational facilities provided by the club. The mark-up on the food and beverages provided is determined by taking into account expenditure such as salaries and wages, cost of provisions and perishables, repairs and maintenance, estimated cost of replacing breakables, an amount set aside for future renovations, opening and closing stock and replacement of capital items (such as furniture and fittings, curtains, fridges, microwave ovens and dishwashers). The club does not make a profit after taking these costs into account. Taking these factors into account SARS is satisfied that the trading activities will qualify for exemption under section 10(1)(cO)(ii).

- *Green fees from members and non-members*

Green fees are integral and directly related to the provision of golf-playing facilities to members and non-members and are provided substantially on a cost-recovery basis and are not provided in competition with other taxable entities. Taking these factors into account SARS is satisfied that the trading activities will qualify for exemption under section 10(1)(cO)(ii).

#### Fundraising activities

An annual spring day is held to raise funds for the club (upgrade of ladies' change rooms). Prizes and all other goods sold, such as second-hand books, fresh vegetables, needlework and other produce are donated. Volunteers run all the stalls.

Result:

The taxable income of the club is determined as follows:

**Step 1**

**Total receipts and accruals exempt from income tax**

	R
Membership fees and subscriptions	1 890 000
Entrance fees from members	240 000
Bar and catering revenue (net) – integral and directly related	800 000
Green fees from members and non-members – integral and directly related	434 000
Annual fundraising	<u>250 000</u>
Total receipts and accruals not subject to income tax	<u>3 614 000</u>

**Step 2**

**Total receipts and accruals subject to income tax**

Rental income from billboards and cell phone mast	270 000
Interest on investments	<u>16 000</u>
Total receipts and accruals subject to income tax	<u>286 000</u>

**Step 3**

**Calculate basic exemption**

Greater of –

- (a) 5% of membership fees and subscriptions  
(R1 890 000 + R240 000) × 5% = R106 500;

or

- (b) R120 000

Basic exemption = Exempt portion of taxable receipts and accruals = R120 000 [The portion subject to tax is therefore R166 000 (R286 000 – R120 000.)]

**Step 4**

**Allocation of basic exemption to taxable receipts and accruals**

The basic exemption is allocated between the various sources of taxable receipts and accruals on a *pro rata* basis, that is, (taxable receipts and accruals from a particular source / total taxable receipts and accruals) × basic exemption. This step is necessary because the basic exemption in section 10(1)(cO) applies to taxable receipts and accruals, not to such receipts and accruals less related expenses. Consequently, a portion of the expenditure incurred in relation to the various taxable income sources will be disallowed under section 23(f), since it will be in the production of exempt income.

	<b>Rental income from billboards and cell phone mast</b>	<b>Interest</b>	<b>Total</b>
	R	R	R
Total receipts and accruals	270 000	16 000	286 000
Exempt ( <i>pro rata</i> )	<u>(113 287)</u>	<u>(6 713)</u>	<u>(120 000)</u>
Total taxable receipts and accruals	<u>156 713</u>	<u>9 287</u>	<u>166 000</u>

### **Step 5**

#### **Direct expenditure relating to a specific taxable source must be apportioned between “exempt” and “taxable” total receipts and accruals**

Expenditure directly incurred in the production of total taxable receipts and accruals from a specific source must be apportioned between the “exempt” and “taxable” portion using the formula below.

#### **Formula:**

$$\frac{\text{Total taxable receipts and accruals from specific trade}}{\text{Total receipts and accruals from the taxable trade}} \times \frac{\text{Expenditure}}{1}$$

#### **Application: Rental income from billboards and cell phone mast (R270 000)**

1. Expenditure directly attributable to taxable (rental) income, namely, maintenance of R5 000 must be allocated between the “taxable” and “exempt” portions of the rental income from billboards and cell phone mast:

$$\begin{array}{r} \frac{\text{Total taxable receipts and accruals from rental}}{\text{Total receipts and accruals from rental}} \times \frac{\text{Expenditure}}{1} \\ \\ \frac{\text{R156 713}}{\text{R270 000}} \times \frac{\text{R5 000}}{1} \\ \\ = \text{R2 902} \end{array}$$

2. Expenditure applicable to “taxable portion” of rental income = R2 902
3. Expenditure applicable to “exempt portion” of rental income = R2 098 (R5 000 – R2 902)

### **Step 6**

#### **Calculate taxable receipts and accruals from rentals**

$$\begin{aligned} \text{Taxable receipts} &= (\text{Total receipts and accruals} - \text{exempt portion}) - \text{allowable expenditure} \\ &= (\text{R270 000} - \text{R113 287}) - \text{R2 902} \\ &= \text{R156 713} - \text{R2 902} \\ &= \text{R153 811} \end{aligned}$$

### **Step 7**

#### **General (indirect) expenditure**

Expenditure incurred that does not specifically relate to a particular source of income but that can be attributed to various sources of gross receipts and accruals, must be apportioned on a *pro rata* basis. Examples include accounting fees, audit fees, bank charges or overhead expenses.

#### **Basis on which general expenditure may be apportioned**

The expenditure will be apportioned based on the gross receipts and accruals.

#### **Formula:**

$$\frac{\text{Specific receipt and accrual}}{\text{Total gross receipts and accruals from taxable activities}} \times \frac{\text{General expenditure}}{1}$$

**Source of receipts and accruals to which general expenditure is to be apportioned**

Source	Gross receipts and accruals R
Membership fees and subscriptions	1 890 000
Entrance fees from members	240 000
Bar and catering revenue	800 000
Green fees from members and non-members	434 000
Annual fundraising	250 000
Rental income from billboards and cell phone mast	<u>270 000</u>
Total	<u>3 884 000</u>

**Note:** No portion of the general expenditure has been incurred in the production of interest on investments.

**Proportionate accounting and general overhead expenditure to be deducted based on the above formula (R22 000 + R13 000 = R35 000)**

Source	Gross receipts and accruals R	Allocation R
Membership fees and subscriptions	1 890 000	17 031
Entrance fees from members	240 000	2 163
Bar and catering revenue	800 000	7 209
Green fees from members and non-members	434 000	3 911
Annual fundraising	250 000	2 253
Rental from billboards and cell phone mast	<u>270 000</u>	<u>2 433</u>
Total	<u>3 884 000</u>	<u>35 000</u>

**Step 8**

**Allocation of general (indirect) expenditure between taxable and exempt portion of rental income from billboards and cell phone mast**

The allowable portion of the general (indirect) expenditure determined in Step 7 must now be allocated between the “taxable” and “exempt” income as determined in Step 4.

**Formula:**

Taxable rental income from billboards/cell phone mast × Expenditure allocated

Total rental income from billboards/cell phone mast 1

$$\begin{array}{r}
 \frac{R156\,713}{R270\,000} \times \frac{R2\,433}{1} \\
 = R1\,412
 \end{array}$$

**Step 9**

**Determine taxable income from rental (billboards and cell phone mast)**

Total taxable receipts and accruals from rental ( <u>Step 4</u> )	R 156 713
Less: Direct expenditure determined in <u>Step 5</u>	( 2 902)
	153 811
Less: Indirect expenditure determined in <u>Step 8</u>	( 1 412)
Taxable income from rental	<u>152 399</u>

**Step 10**

Add all the amounts representing taxable income from the various sources together to calculate the taxable income for the year of assessment

<b>Source</b>	<b>Amount R</b>
Taxable income from rental ( <u>Step 9</u> )	152 399
Taxable income from investment (interest) ( <u>Step 4</u> )	<u>9 287</u>
Taxable income for the year of assessment ended 30 June 2021	<u>161 686</u>

**Step 11****Calculation of income tax payable**

The club will pay income tax at the rate of tax applicable to recreational clubs for the 12-month period ending on 30 June 2021, namely, 28%. Income tax on the taxable income of R161 686 will, therefore, be R45 272,08 ( $R161\ 686 \times 28\%$ ).