

**A CRITICAL ANALYSIS OF THE LAW THAT GOVERNS THE
TAXATION OF PUBLIC BENEFIT ORGANISATIONS (PBOs):
A CASE STUDY OF SOUTH AFRICA AND ZIMBABWE.**

BY

JOHANNES RICE

212536335

This Research Project is submitted in partial fulfilment of the regulations for the LLM
Degree at the University of KwaZulu-Natal



COLLEGE OF LAW and MANAGEMENT STUDIES

(SCHOOL OF LAW)

SUPERVISOR: MR C. SCHEMBRI

CO-SUPERVISOR: Prof S. BOSCH

SEPTEMBER 2018

DECLARATION

I declare that this dissertation is entirely my own work and that all the sources that I have used have been expressly indicated and acknowledged within the text, that all direct quotations are enclosed within quotation marks and that this dissertation has not been submitted to any other university or educational institution. This project is made available for photocopying and for inter-library loan.



SIGNED: J. RICE

212536335

DEDICATION

To my late mother, Mrs. Sittie Grace Nyamupfukudza, and my father, Mr. Adam Nyamupfukudza, for bringing me to this world and believing in me; my brothers and sisters for you were always my source of motivation and encouragement. You guys have been my pillar of strength.

To my beloved son, Johan, my “doctor-in-the-making”, you have been a blessing to my life and I love you so much!

ACKNOWLEDGEMENTS

This piece of work has been made a success by a lot of people who have offered me support, at both professional and personal level. I would like to acknowledge them for the successful completion of this dissertation.

My supervisor, Mr. C Schembri, your encouragement and guidance throughout this research kept me focused and confident. You went over and above the call of duty to ensure that I met the deadline by providing a helping hand from day one. Thank you for your guidance and patience Sir!

To Prof. Shannon Bosch, thank you for being the co-supervisor for this dissertation. Your invaluable contribution to this project is highly appreciated.

To Johan, my son in whom I am so pleased, you have been my source of inspiration and unknown to you, you have been my source of strength. To Mitchelle, thank you for being a great mum to Johan. Much appreciation for allowing me to spend long hours on this project away from you. My amazing daughters, Ruvarashe, Makanaka and the new addition: Ropafadzo, you are daddy's joy and pride. Words can never express how proud I am to call you family.

To my friends and colleagues, too many to mention, a big thank you! Special mention goes to Tendai Mutamba, Mfundo B. Dubula, Peter Gwindima, Clever Masisimani, Virginia Mutsago, Melissa Laganparsad and Simone A. Esbend; your unwavering support and encouragement to achieve greatness is greatly appreciated. I wish you all the best in your endeavours!

To my mentor, Mr B. Nomlala, thank you for always pushing me to achieve my goals!

To my classmates, the class of 2016/2017, a big thank you to each and every one of you! Special mention goes to Mantwa Madiba for the encouragement and support especially when the thought of giving-up seemed to be the easiest way out.

My lovely siblings, Lizzie, Alice, Nkazana, Edward, Rutendo and the late Zorodzai and Clement, words alone cannot express how you have completed my life. Your contributions are invaluable. To your families, spouses, my nieces and nephews, thank you and God bless you!

To my God the Almighty, thank you for blessing my paths and sending me angels throughout my journey. I am a living testimony of your goodness and divine favour. May your holy name be hallowed!

ACRONYMS

PBO	Public Benefit Organisation
PBA	Public Benefit Activity
SARS	South African Revenue Service
ZIMRA	Zimbabwe Revenue Authority
Republic	Republic of South Africa
TPE	Tax-paying Entities
NPO	Non-profit Organisations
NPC	Non-profit Companies
SBE	Small Business Enterprise
CGT	Capital Gains Tax
VAT	Value Added Tax
PAYE	Pay as you earn
WHT	Withholding tax
IN	Interpretation note
BGR	Binding General Ruling
TEU	Tax Exemption Unit
Minister	Minister of Finance
Commissioner	Commissioner of SARS
USA	United States of America
UK	United Kingdom
KC	Katz Commission
KCR	Katz Commission Report

Contents

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGEMENTS	iv
ACRONYMS	v
CHAPTER 1:	1
1.1 BACKGROUND	1
1.2 STATEMENT OF PURPOSE	5
1.3 RATIONALE	5
1.4 CONCEPTUAL OR THEORETICAL FRAMEWORK	6
1.5 RESEARCH QUESTIONS	6
1.6 RESEARCH METHODOLOGY	7
1.7 LITERATURE REVIEW	7
1.8 STRUCTURE OF THE DISSERTATION	10
CHAPTER 2:	11
RATIONALE FOR TAXATION OF PBO'S AND TRADING PROVISIONS	11
2.1 INTRODUCTION	11
2.2 SOUTH AFRICAN DEVELOPMENTS	11
2.2.1 THE PRE 2006 ERA	12
2.2.1.1 TRADING PROVISIONS CONSIDERATIONS	14
2.2.1.2 TRADING PROVISIONS- CGT CONSEQUENCES	17
2.2.1.3 TRADING CONSEQUENCES (TAX LIABILITY)	19
2.2.2 THE POST 2006 ERA	19
2.3 ZIMBABWEAN DEVELOPMENTS	20
2.3.1 THE PRE 2016 ERA	20
2.3.2 THE POST 2016 ERA	23
2.4 CONCLUSION	23
CHAPTER 3:	24
CURRENT TRADING PROVISIONS FOR SOUTH AFRICA AND ZIMBABWE	24
3.1 INTRODUCTION	24
3.2 SOUTH AFRICAN PROVISIONS	24
3.2.1 THE LEGISLATION	24
3.2.2 TRADING PROVISIONS	32
3.2.2.1 INTEGRAL AND DIRECTLY RELATED TRADE	33
3.2.2.2 OCCASIONAL TRADING	35
3.2.2.3 MINISTERIAL APPROVAL	36

3.2.2.4 BASIC EXEMPTION.....	36
3.2.3 THE TAX CONSEQUENCES	38
3.2.3.1 REVENUE RECEIPTS	38
3.2.3.2 CAPITAL RECEIPTS	40
3.2.3.3 OVERALL TAX LIABILITY	41
3.3 ZIMBABWEAN PROVISIONS	41
3.3.1 THE LEGISLATION	41
3.3.2 TRADING PROVISIONS.....	43
3.3.2.1 TRADING INCOME EXEMPTION	44
3.3.2.1.1 SOLE OR PRINCIPAL OWNERSHIP.....	44
3.3.2.1.2 GRANTING OF A LICENCE	45
3.3.2.2 TRADING INCOME TAXATION	46
3.3.3 THE TAX CONSEQUENCES	46
3.3.3.1 REVENUE RECEIPTS	46
3.3.3.2 CAPITAL RECEIPTS	47
3.3.3.3 TAX LIABILITY	47
3.4 CONCLUSION.....	48
CHAPTER 4:	49
SIMILARITIES AND PARALELLS IN THE TRADING PROVISIONS	49
4.1 INTRODUCTION.....	49
4.2 SIMILARITIES	49
4.2.1 NON-TRADE INCOME EXEMPTION.....	49
4.2.2 TRADING ACTIVITIES	49
4.2.3 CHARITABLE ACTIVITIES	50
4.2.4 STATUTORY DEFINITION DEFICIT	50
4.3 PARALLELS.....	50
4.3.1 DEFINITION OF CHARITABLE ORGANISATIONS.....	50
4.3.2 DEFINITION OF CHARITABLE ACTIVITIES.....	51
4.3.3 LEVELS OF EXEMPTION	51
4.3.4 MECHANICS REGARDING TAXING TRADING INCOME	52
4.3.5 CGT TREATMENT.....	53
4.4 CONCLUSIONS.....	53
CHAPTER 5:	54
RECOMMENDATIONS AND CONCLUSIONS.....	54
5.1 INTRODUCTION.....	54
5.2 INTERNATIONAL PRACTICE	54
5.2.1 NEW ZEALAND MODEL	54
5.2.2 UNITED KINGDOM MODEL	55

5.2.3 CANADIAN MODEL.....	56
5.2.4 UNITED STATES OF AMERICA MODEL.....	56
5.2.5 THE REPUBLIC OF IRELAND MODEL	57
5.3 RECOMMEDATIONS	58
5.3.1 SOUTH AFRICAN PROVISIONS, SHORTFALLS AND THE RECOMMENDATIONS	58
5.3.2 ZIMBABWEAN PROVISIONS, SHORTFALLS AND THE RECOMMENDATIONS.....	61
5.4 RECOURSE ON NON-APPROVAL OF PBO STATUS	62
5.5 CONCLUSION.....	64
REFERENCES	67
Appendix 1: Approval letter	73

CHAPTER 1:

Key words

PBOs, Non-profit organisations (NPOs), Non-profit Company (NPC), ecclesiastical, charitable and educational institutions of a public character, Public Benefit Activity (PBA), Income Tax Act No. 58 of 1962 as amended, South African Revenue Service (SARS), Income Tax Act (Chapter 23:06) as amended by the Finance Act No. 8 of 2015, Zimbabwe Revenue Authority (ZIMRA), normal tax, trade, investment, business.

GENERAL INTRODUCTION AND BACKGROUND

1.1 BACKGROUND

Taxation, an old concept which goes back as far as recorded history, is a mandatory financial charge or levy which is imposed upon a taxpayer by a governmental organisation in order to fund public expenditure.¹ An income tax system brings into account the aggregate incomings of a taxpayer and then permits the deduction of various amounts, with the net being subjected to tax.² In order to stimulate growth or achieve set objectives, the legislature may encourage certain activities by incentivising taxpayers in the form of, *inter alia*, reduced tax rates, exemptions, accelerated allowances and deductions. One such specific incentive is the preferential tax treatment of Public Benefit Organisations (PBOs). Such tax benefits are designed to, “assist NPOs by augmenting their financial resources and providing them with an enabling environment in which to achieve their objectives.”³ This is because charitable organisations or PBOs as alluded by Pretorius, “have a valuable contribution to make to society and they fill an important lacuna in the ability of the government to address all the social and development needs of the country.”⁴

¹ S Maria et al ‘Taxation’, available at <https://www.britannica.com/topic/taxation>, accessed on 16 September 2018.

² Income Tax Act No. 58 of 1962 (South Africa) and Income Tax Act (Chapter 23:06) (Zimbabwe).

³ SARS Tax Exemption Guide for Public Benefit Organisations in South Africa, issue 5, 2017, 3.

⁴ H Pretorius ‘The tax treatment of Public benefit organisations’ 2012, available at <http://www.thesait.org.za/news/97021/The-Tax-Treatment-Of-Public-Benefit-Organisations.htm>, accessed on 8 March 2017.

Organisations that are exempt from income tax are generally also eligible for exemption from transfer duty and donations tax. This dissertation will, however, focus on the “normal tax” consequences arising from PBOs’ trading activities.⁵

PBO and Public Benefit Activity (PBA) are key terms and they are defined in section 30 of the Income Tax Act No. 58 of 1962 as amended (hereunder referred to as the South African Act). In summary, a PBO conducts a PBA for the benefit of the general public at large, or a sector thereof, in a non-profit manner with no intention to directly or indirectly promote the self-interest of its representative(s). PBAs are listed in Part I of the Ninth Schedule to the South African Act under several categories namely “welfare and humanitarian; health care; land and housing; education and development, religion, belief or philosophy; cultural; conservation, environment and animal welfare; sport and providing of funds, assets or other resources.”⁶

In South Africa, an organisation is approved and conferred with the PBO status by the Commissioner for the South African Revenue Service (hereafter referred to as the Commissioner) after satisfying the specified criteria as per the South African Act.⁷ Such an organisation can be a Non-profit Company (NPC), a trust or an association of persons or any branch thereof operating within the Republic of South Africa. An NPC is defined as a company incorporated for a public benefit; its income and property are not distributable to its members or incorporators other than, inter alia, by way of reasonable remuneration, payment of expenses or in terms of a *bona fide* agreement.⁸ A non-profit organisation (NPO) is defined as a “trust, company or association of persons, established for a public purpose and the income and property of which are not distributable to its members or office bearers except as reasonable compensation for services rendered.”⁹ In the event that the Commissioner disapproves an organisation’s application for recognition as a PBO, the aggrieved party, as a recourse, can approach the courts.¹⁰

⁵ Income Tax Acts (note 2 above).

⁶ ML Stein, Tax for Public benefit organisations, M Stiglingh et al., *SILKE: South African Income Tax*, Lexis Nexis (2017) Vol 1, 129.

⁷ Section 30(3) of the Income Tax Act No. 58 of 1962

⁸ Section 1 of the Companies Act No. 71 of 2008.

⁹ Section 1 (x) of the Non-Profit Organisations Act No. 71 of 1997.

¹⁰ *ITC 1872* (2014) 76 SATC 225

There has been confusion amongst the lay public regarding the distinction between NPCs, NPOs and PBOs.¹¹ Although different in terms of purpose and registration requirements, they possess similar characteristics as they are all public benefit vehicles. According to Lovells, it should be noted that the “operation of one does not preclude the operation of the other.”¹² An organisation may register as it deems necessary provided all the requirements and criteria “are satisfied in terms of the relevant legislation.”¹³ The term “charitable organisation” is not defined in the Zimbabwean legislation but it is suggestive of an organisation that is created for an altruistic cause. In terms of the ancient Anglo-Saxon formulations,

“a purpose is considered charitable only if falls within the spirit and intendment of: the relief of the aged, impotent and poor people, maintenance of sick and maimed soldiers and mariners, schools of learning, pre-schools, and scholars in universities, repair of bridges, ports, havens, churches, seabanks and highways, education and preferment of orphans, relief, stock or maintenance for house of correction, marriages of poor maids, aid or ease of any poor inhabitants . . . setting out of soldiers and other taxes . . .”¹⁴

Based on the above definition, an activity was classified as charitable if it possessed an element of benevolence. As circumstances changed with time, the nature of such activities also changed. It is submitted that any activity which is discharged with the intention to benefit the next person whilst not settling an obligation and without a corresponding benefit accruing to the provider would be charitable in nature.

The terms “PBOs” and “PBAs” are not defined in the Income Tax Act (Chapter 23:06) as amended, (hereunder referred to as the Zimbabwean Act) but they are defined in the South African Act. In the Zimbabwean context, organisations and activities that benefit the general public are listed in the Third Schedule of the said Act. Similarly to South Africa, an organisation wishing to gain a tax-exemption status in Zimbabwe has to apply to the Zimbabwe Revenue Authority (ZIMRA) for the bestowal.

¹¹ H Lovells, ‘PBOs, NPOs and NPCs – Lexology’ available at <https://www.lexology.com/library/detail.aspx?g=0fc85774-b458-4da1-813e-a181de4b082a>, accessed on 7 March 2017.

¹² *ibid* 2.

¹³ *ibid* 2.

¹⁴ Preamble to the Charitable Uses Act of 1601.

The terms PBOs, NPCs, NPOs and charitable organisations as well as PBAs and “charitable activities” possess similarities and, as such for the purposes of this dissertation and its focus, it is prudent to treat them all as synonymous, save where the context requires the use of a specific term.

The favourable tax treatment of PBOs is due to the fact that such organisations “play an important role in society as they relieve the financial burden on the state to undertake public benefit activities.”¹⁵ This treatment includes the exemption of receipts and accruals that are meant to further a PBA. The authority for such treatment is in terms of section 10(1) (cN) read with section 30(3) of the South African Act, and section 14 read with the Third Schedule of the Zimbabwean Act.

In order to enjoy the tax benefits, organisations need to satisfy stringent requirements as per the Act.¹⁶ In addition, after being afforded the exemption status, compliance with the legislation on an annual basis is required.¹⁷ Founders and fiduciaries of charitable organisations need to ensure that the exemption status is maintained by operating within the confines of the law or they risk losing their preferential tax treatment.

As is the case with any law governing taxation, taxpayers often engage in schemes to exploit “loopholes” within the legislation. PBOs have not been an exception, hence the need to critically analyse the said laws. In critically analysing the taxation laws governing PBOs, cognisance should be placed upon the correct interpretation of words used in the legislation or similar documents. Wallis JJA, in delivering his judgment, noted that from the outset one should “read the words used in the context of the document as a whole and in light of all relevant circumstances.”¹⁸

¹⁵ G Nyanin (DLA Cliffe Dekker Hofmeyr) ‘Public benefit organisations: the tax treatment of income derived from trading activities’ available at <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2015/tax/downloads/Tax-Alert-29-May-2015.pdf>, accessed on 7 March 2017.

¹⁶ Section 10(1) (cN) read with section 30(3) of the South African Act, and section 14 read with the Third Schedule of the Zimbabwean Act.

¹⁷ Section 37 of the Zimbabwean Act, section 65 of the South African Act.

¹⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA), 24.

1.2 STATEMENT OF PURPOSE

The purpose of this dissertation is to critically analyse the law that governs the taxation of PBOs or similar organisations in South Africa and Zimbabwe. In this respect, the aims and objectives of the dissertation are as follows:

1. To trace the major developments and amendments regarding the taxation of PBOs;
2. To interpret the taxation law governing the two jurisdictions, with the main focus being on “normal tax”, particularly relating to the taxation of trading activities;
3. To highlight the parallels and similarities as per the current legislation; and
4. To recommend possible amendments or clarifications on interpretation thereto based on the limitations and strengths identified above.

1.3 RATIONALE

As highlighted earlier, PBOs are “vehicles” meant to assist the State by carrying out public beneficial activities. In so doing, such organisations improve the lives of the general populace, hence the need for the legislature to incentivise their creation and the maintenance thereof. The Income Tax Acts have provisions regarding the exemptions of receipts and accruals of PBOs.¹⁹ Both pieces of legislation exempt receipts and accruals of PBOs or similar organisations to the extent that they are not derived from trade or business or investment.²⁰ Recognising the need for PBOs to be self-sufficient, both the abovementioned Acts provide for some level of exemption should PBOs embark on trading, business or investment undertakings.²¹ However, the Zimbabwean Act’s scope for PBOs or similar organisations which are susceptible to taxation should they engage in trade is narrower than the South African Act. In addition, clarity is not explicitly provided regarding the mechanics of taxing “impermissible” trading activities nor the description of “permissible” ones.

¹⁹ South African Act and Zimbabwean Act (note 16 above).

²⁰ *ibid* (note 16 above).

²¹ S Gastrow, A Vayanos, *Advancing philanthropy in South Africa* 2 ed (2009), 39.

Based on the above, it would seem that the reasoning behind the differences in the Acts need to be examined, thus a critical analysis is warranted. This research seeks to depict parallels and similarities and highlight areas that might need improvements.

Furthermore, the meaning of some key terms such as, “substantially the whole” and “unfair competition,” have not been provided for in the current legislation nor have the courts been called upon to decide their meaning. Such terms are thus to a greater extent open to interpretation which may lead to misunderstanding and place an undue administrative or interpretative burden on the tax authority. This research seeks to provide clarity on the legislation in light of the guidance provided by the landmark case on interpretation of documents.²²

Acknowledging the fact that PBOs or similar organisations assist the government in discharging its humanitarian obligations, its maintenance thereof is of paramount importance. However, in some cases, PBOs have often been abused as part of tax avoidance schemes thus eroding the tax base, hence there is a need to critically analyse the adequacy and effectiveness of the current laws. Furthermore, this research seeks to highlight the possible limitations of the current legislation and provide amendments to ensure that PBOs are safeguarded whilst not being exploited as a tax avoidance or evasion mechanism.

1.4 CONCEPTUAL OR THEORETICAL FRAMEWORK

This dissertation will adopt a legal theoretical framework. The purpose of this approach is to conduct the research in a legal context namely under the realm of Taxation Laws. This critical analysis of the taxation law governing PBOs will be undertaken using legal lenses.

1.5 RESEARCH QUESTIONS

The main focus of this dissertation is to critically analyse the law governing the taxation of PBOs or similar organisations in South Africa and Zimbabwe. The following are the research questions:

²² *Natal Joint Municipal Pension Fund v Endumeni Municipality* (note 18 above).

- What necessitated the change from the “general” exemption rules for PBOs to partial taxation on trading activities?
- What is the current taxation law governing PBOs and what impact does it have on both South Africa and Zimbabwe? To what extent have the amendments been effective?
- How can the South African and Zimbabwean taxation law governing PBOs be amended, where necessary, to ensure effectiveness thereby maximising revenue collection by minimising tax avoidance whilst sustaining the institution of PBOs?

1.6 RESEARCH METHODOLOGY

This dissertation will make extensive use of qualitative methods of research in pursuit of the aforesaid research objectives. It will be purely desktop research. This is so because taxation issues are found in statutes hence this dissertation will refer to the already existing primary literature such as the relevant Income Tax Acts; interpretation notes, binding rules, discussion documents, or similar publications issued by the South African Revenue Service (SARS) and ZIMRA. In addition, reference will also be made to journals, working papers, textbooks, online articles and case law.

1.7 LITERATURE REVIEW

It has been established in both jurisdictions that the legislature intends to tax PBOs should they exceed the stated parameters. The general rule is to exempt from normal tax the receipts and accruals of PBOs from non-trading activities provided the sole or principal objective of the PBO is the carrying on of one or more PBAs e.g. education and development, religion, belief or philosophy, cultural and conservation. In instances where PBOs undertake trading or business activities, the legislature has provided what I can term “permissible” and “taxable” activities. Permissible activities would encompass those business activities that bear no income tax consequences and the opposite is true for taxable activities.

The legislature has given preferential treatment to PBOs in order to conduct one or more PBAs. Such treatment ranges from partial to full exemption. However, in certain cases, unscrupulous parties may utilise this tax benefit to their own advantage whilst

departing from the fulfilment of the PBO's sole and principal objectives. It is therefore of paramount importance to critically analyse the law governing the taxation of PBOs.

The current position regarding taxation of PBOs is the use of hybrid rules to determine when revenue will be taxed. The issue of partial taxation has generated debate across the world. Chaurura is of the view that, "requiring churches to pay taxes would place government above churches and therefore endanger free expression and violate the provisions of section 60 of the Constitution of Zimbabwe which recognises freedom of conscience and religion. By taxing churches, government would be empowered to penalise and / or shut them down if they default on payments."²³ Chaurura further noted that the argument that the aforesaid section would be violated was not entirely correct as the freedom of expression/ religion has to be balanced with the State's need to collect revenue. I share the same sentiments with the latter argument and I am of the view that churches and all other PBOs should be taxed when they embark on trading activities whilst taking special precautions by balancing the need to collect revenue and preserving the institution of PBOs.

Regarding the list of PBAs as housed in the Part I of Ninth Schedule to the South African Act, Moore acknowledged the listing, particularly the inclusion of the "catch-up" category meant to include other activities not specifically mentioned.²⁴ The inclusion of the catch-up category "ensures that the list is not interpreted in an overly restrictive manner but for the concept of public benefit to remain flexible, keeping pace with changing social circumstances."²⁵ To this end, the South African Act includes a provision that allows the Minister of Finance to approve certain activities as PBAs as deemed necessary within set parameters to ensure that PBOs can be taxed accordingly. Brewis also added her weight behind the catch-up category putting forward the same arguments.²⁶ I concur with the legislature and the abovementioned

²³ O Chaurura 'Taxing churches: Pros and Cons' available at www.newsday.co.zw/2015/08/01/taxing-churches-pros-and-cons/, accessed on 7 Mar 2017.

²⁴ D Moore, K Hadzi-Miceva, and N Bullain, 'A Comparative Overview of Public Benefit Status in Europe: The international journal of not-for-profit law' (2008) 11(1), Section 30(3)(b).

²⁵ Moore (note 24 above), *ITC 1872* case (similar view was expressed on interpretation of statutory criteria for PBO approval when it was suggested that the net should be cast wide)

²⁶ T Brewis, 'A view of the Income Tax benefits for non-profit organisations in South Africa' (2006), 7.

scholars in this regard based on the premise that “lacking such a “catch-all” category may impede the inclusion of emerging activities that serve the public benefit.”²⁷

The legislature defined terms such as PBO and PBA but failed to analyse other key terms that have been left to interpretation. One of these terms is, “unfair competition” as alluded to by Brewis.²⁸ In terms of section 10(1) (cN) (ii) (aa) (C) of the South African Act, reference is made to the fact that PBOs’ receipts and accruals will be subject to tax if they arise from activities which will result in unfair competition in relation to taxable entities. The said Act does not elaborate on what is meant by the term “unfair competition.” Brewis further noted that this concept “has sparked substantial controversy in the international arena.”²⁹ It is paramount to have a “clear understanding of what is meant by “unfair competition” between tax exempt and taxable entities.”³⁰ Brewis contends, stating that the mere fact that a PBO is undertaking an activity similar to that of a taxable entity does not result in unfair competition because PBOs provide socially desirable services and goods and have a non-distribution constraint regarding profits other than in the undertaking of its PBAs, among other things.³¹ It should be noted that the said socially desirable services and goods are not ordinarily provided by taxable entities and profits distribution of these taxable entities is not limited. It is submitted that any undertaking by a PBO of an activity of a similar nature with a taxable entity does not necessarily translate to unfair competition. This dissertation will seek to clarify what is meant by the said terminology.

Other terms not defined in the legislation and which the courts have not been called upon to deliberate on are, “integral and directly related” and “substantially the whole.” Interpretation note 24 (IN 24) and the General Binding Ruling No. 20 (BGR 20) issued by SARS have given explanations and examples as a way of providing interpretation to the abovementioned undefined terminology.³² It is submitted that whilst SARS’ contribution is commendable, such is not law as defined and as such the Act needs to

²⁷ Moore (note 24 above)

²⁸ Brewis (note 26 above; 12).

²⁹ Ibid 12.

³⁰ GM Gomes, JM Owens, ‘Commercial Nonprofits, Untaxed Entrepreneurialism, and “Unfair Competition” Journal of Small Business Management’, April 1988.

³¹ Brewis (note 26 above; 13).

³² SARS, Interpretation note 24 ‘Income tax: public benefit organisations: trading rules – partial taxation of trading receipts’, 12 February 2018(4) and SARS, Binding General Ruling (Income Tax): No. 20 ‘Interpretation of the term “substantially the whole”’, 20 January 2016 (2).

be clearer and this research will try to provide this clarity by examining these terms in detail. Of note is the fact that SARS is bound by the legislation in the same way as the taxpayer and any interpretation notes or submissions by it cannot override the law. However, as was held by the Supreme Court of Appeal, interpretation notes, “though not binding on the courts or a taxpayer, constitute persuasive explanations in relation to the interpretation and application of the statutory provision in question....”³³

The Zimbabwean Act has also fallen short in respect of the abovementioned issues as there are some “grey” areas regarding the mechanics of taxing PBOs should they engage in “taxable” trading activities. In addition, the Zimbabwean Act is narrower in terms of organisations that can be taxed should they engage in trade or investment as compared to its South African counterpart. The mentioned organisations are ecclesiastical, charitable and educational institutions. Nyamandi proposed amendments to the Zimbabwean legislation should PBOs engage in trade. Though not detailed, these are to an extent similar to those as per the South African Act and IN 24.³⁴ In this respect, this dissertation aims to critically analyse the current legislation and propose amendments to both the South African and Zimbabwean Acts to ensure the maximisation of revenue collection from PBOs within the confines of the legislation, where necessary.

1.8 STRUCTURE OF THE DISSERTATION

Chapter 1	Research proposal
Chapter 2	Rationale for taxation of PBOs and trading provisions
Chapter 3	Trading provisions for South Africa and Zimbabwe
Chapter 4	Differences & similarities
Chapter 5	Recommendations & Conclusions

³³ *CSARS v Marshall NO and Others* (816/2015) [2016] ZASCA 158 (3 October 2016)

³⁴ N Nyamadi, ‘Taxing the chalice: Is it fair to tax churches in Zim?’ available at <http://www.financialgazette.co.zw/taxing-the-chalice-is-it-fair-to-tax-churches-in-zim/>, accessed on 7 Mar 2017.

CHAPTER 2:

RATIONALE FOR TAXATION OF PBO'S AND TRADING PROVISIONS

2.1 INTRODUCTION

The provisions governing the taxation of PBOs and similar organisations have changed over the past decades all over the world in order to keep abreast with changing times and needs of such organisations and the communities within which they operate. South Africa and Zimbabwe are no exception. Some of the reasons in favour of the developments thus far have been the need to encourage continued philanthropy whilst ensuring the self-sufficiency of such institutions in light of increasing demands on scarce or depleting resources. In respect of South Africa, the major developments can be analysed in two parts; first, the pre 2006 era and secondly, the post 2006 era. Regarding Zimbabwe, such can be divided into pre and post 2016. The developments will be tracked as per the abovementioned phases.

2.2 SOUTH AFRICAN DEVELOPMENTS

The South African developments can be categorised into two major developmental stages, pre and post 2006, with the earlier having addressed most of the big issues and the latter addressing some anomalies created by the earlier.³⁵ The Katz Commission (KC) explored the two.³⁶

The Katz Commission Report (KCR) “recognised the limited tax benefits as a shortcoming and gave the following justification for extending greater tax benefits to the non-profit sector:”³⁷

- “1. NPOs are seen to be a relatively cost-effective means of delivering social and developmental services in a manner which relieves the financial burden which otherwise falls upon the State;
2. as civil society initiatives, NPOs are seen to promote important values in society, including voluntarism, self-responsibility, and participative democracy; and

³⁵ Explanatory Memorandum on the Revenue Laws Amendment Bill, 2006, 28.

³⁶ M Katz. et al, *Ninth Interim Report for the Commission of Inquiry into certain aspects of the Tax Structure of South Africa, Fiscal Issues Affecting Non-Profit Organisations* (1999).

³⁷ Brewis (note 26 above; 4).

3. in societies such as South Africa where there exist gross disparities of income and wealth, NPOs represent an important mechanism for encouraging philanthropy and promoting greater equity and redistributive policies.”³⁸

2.2.1 THE PRE 2006 ERA

As outlined earlier, the pre 2006 era had addressed the major issues ranging from the deficit in the definition of terms as well as subjectivity regarding key issues. The tax exemption benefits prior to the 2000 reform exempted fully the receipts and accruals of, “religious, charitable and educational institutions of a public nature; and any fund the sole object of which is to provide funds for any religious, charitable or educational institution contemplated above.”³⁹ The terminology used lacked statutory definitions and the absence thereof imposed a substantial interpretative burden on the Commissioner. With regards to the period prior to 2000, one could argue that, “the South African tax regime applicable to religious and charitable organisations was skeletal, naive, and open to abuse.”⁴⁰ As the courts had not been called on to decide on such matters, the dilemma persisted. The KCR outlined a few examples to show the interpretative burden that the Commissioner had to face. Such examples depicted the strictness of the legislation which was counter-productive as otherwise deserving organisations would not be encouraged through qualifying for tax benefits.⁴¹ Case law also indicated the stringency as the word “charitable” was afforded an otherwise narrower meaning.⁴²

In a bid to provide clarity regarding “charitable organisations”, the Taxation Laws Amendment Act, No. 30 of 2000 introduced the new concept of a “public benefit organisation” carrying on a “public benefit activity.” This was a great improvement to the legislation, as just like the rest of the world, the key issues were defining the eligibility criteria and identifying such activities that would qualify for the preferential tax treatment. This milestone saw the birth of defining terms such as PBO and PBA so as to provide some uniformity regarding the eligibility of organisations and thus

³⁸ Katz Commission (note 36 above; 2).

³⁹ Section 10(1) (f) of the Income Tax Act No. 58 of 1962.

⁴⁰PWC, Synopsis, Public benefit organisations, July 2006, 3 available at <https://www.pwc.co.za/en/assets/pdf/pwc-synopsis-july06.pdf>, accessed on 7 March 2017.

⁴¹ Katz Commission (note 26 above; 4-6).

⁴² *ITC 1565*, 56 SATC 18, at 31-32.

providing more certainty to both taxpayers and the Commissioner.⁴³ This also saw the emergence of a listing of public beneficial activities as housed in the Ninth Schedule to the South African Act. Of significance was the inclusion of the catch-up provision allowing the Minister to include any other deserving activities that would not be otherwise specifically mentioned. The catch-up category ensured that the concept of public benefit remained flexible, keeping pace with changing social circumstances.⁴⁴

In drafting its proposals, the KC acknowledged the necessity to develop formulations which were not only clear but flexible and which made reference to objective criteria rather than the arbitrary exercise of discretion. Defining the key terms answered the eligibility criteria issue to a greater extent. By so doing, the legislature provided uniformity across the board and to some extent prevented tax leakage and abuse. However, as mentioned earlier, a few anomalies still had to be dealt with. Regarding the eligibility criteria, the legislation still did not allow, for example, a foreign organisation to qualify as a PBO under the definition.⁴⁵ This was due to technical issues which acted as a barrier to foreign established charities from being afforded the exemption status in the Republic.⁴⁶ One such technicality related to the requirement for a PBO, on dissolution, to transfer all its assets to another PBO in the Republic. Foreign registered PBOs were not willing to transfer all its assets to the Republic and as such this technicality hindered the foreign helping hand. This position, however, changed after 2006.

There were a few other administrative issues which still caused an undue compliance burden on PBOs. One was the dual registration requirement. PBOs were required to register with the Director of NPOs as a precondition for exempt status.⁴⁷ PBOs could only be exempted from this requirement in the event of both the Director of NPOs and the Commissioner's approval.⁴⁸ This requirement was considered to be an unnecessary administrative burden as the only reason one could register under the

⁴³ SARS Guide (note 3 above).

⁴⁴ Moore (note 24 above).

⁴⁵ Edward Nathan Sonnenbergs Inc., Exempt income 1457, The current rules governing public benefit organisations, November 2006, issue 87, page 2. available at https://www.saica.co.za/integritax/2006/1457_The_current_rules_governing_public_benefit_organisations.htm, accessed on 8 March 2017.

⁴⁶ Explanatory Memorandum (note 35 above, 31).

⁴⁷ *ibid* 33.

⁴⁸ *ibid* 33.

NPO Act would be to benefit from tax benefits which would be a by-product of the PBO status in any case.

2.2.1.1 TRADING PROVISIONS CONSIDERATIONS

The general rule was to exempt all the receipts and accruals of PBOs due to the fact that such organisations bear the burden of the State by providing services to the impoverished, which would otherwise be the responsibility of the State. However, there was a counter argument that granting full exemption to PBOs would give them “an unfair advantage in the market place which would be to the detriment of private businesses.”⁴⁹ A question was then raised as to what constituted “unfair competition” in light of PBOs engaging in trading activities. Another key question was in relation to whether PBOs should be allowed to trade or not in the first place.

One argument to the effect that full exemption would not amount to “unfair competition” in the event that PBOs engage in trading, hinged on the fact that PBOs:

- “1. Provide “socially desirable services and goods” that would not ordinarily be provided by for-profit taxable organizations.
2. Are subject to the non-distribution constraint and those involved with the organization are not allowed to share in any profits of the organization, but to use it in furtherance of the organization’s objectives.
3. Access to funding has become more limited and non-profits have to carry on trading activities or face extinction. Income in the form of donations is not a very reliable source and the need accordingly exists to supplement the organisation’s income.”⁵⁰

Expanding on point 3 above, it should be noted that due to shrinking donor funding, it was imperative for charitable organisations to become more self-sufficient. This, however, raised two keys issues:

- a) an issue of “equity” in situations where tax exempt organisations operate in the same market place with tax paying ones, and

⁴⁹ Brewis (note 26 above, 12).

⁵⁰ *ibid* 13.

- b) the possible erosion of the tax base where some organisations seek to operate as hybrid organisations by combining taxable and philanthropic activities.⁵¹

In Interpretation Note 24, Issue 1, SARS expressed its concerns as follows:

“Trading or the carrying on of a business undertaking by tax exempt organisations is a major cause for concern, as exempt entities should not be seen to be in competition with other tax paying entities, by either conducting the same or similar business activities in a tax-free environment, thereby undermining fair competition and potentially eroding the tax base. The main rule is therefore that PBOs are prohibited from carrying on business or trading activities.”

Consequently, the legislature had to consider two key issues:

- 1 Is trading by PBOs permissible?
- 2 If so, what are the resultant tax consequences?

One major issue characterising the pre-2006 era was the trading aspect of qualifying organisations. Initially, trading was not allowed without risking the preferential tax status. This was later improved by the 2000 amendments and trading was permissible within the set thresholds in order for an organisation to continue enjoying the preferential tax status.⁵² Should an organisation exceed these thresholds, all of its trading receipts and accruals became fully taxable. This was the “all or nothing” approach. The major drawback was the severity of the punishment, should an organisation exceed such limitations, which was a loss of the PBO status.⁵³

The KC recommended that the legislature consider permitting trading by tax exempt organisations as a way of giving them self-sufficiency but within a carefully controlled tax regime whilst limiting the opportunity for abuse, without jeopardising the tax exemption status. Various mechanisms to control “unfair competition” included a possible limit on the quantum of the trading activities, or a ratio of trading receipts to the total receipts and accruals of such tax exempt organisations, were proposed.⁵⁴ In addition, consideration was to be given to whether the trading activity was in the course

⁵¹ Katz Commission (note 36 above; 8).

⁵² The South African Act, section 30(3)b(iv)(aa) (prior to amendment in 2006).

⁵³ Brewis, (note 26 above, 11).

⁵⁴ *ibid* 11.

of the furtherance of the tax-exempt organisation's primary purpose or otherwise. One of the trickiest problems of policy regarding the exempting of PBOs from tax was "to determine the extent to which such organisations should be permitted to trade without forfeiting their tax-exempt status."⁵⁵

PBOs engage in trading activities ranging from a "modest Saturday morning cake sale to an extensive and profitable farming enterprise carried on by a rural church under the expert guidance of its congregants. In other words, the kinds of trading activities engaged in by PBOs range from the negligible and harmless to full-blown trading that competes head-on with taxpaying businesses."⁵⁶ Consequently these activities have to be closely monitored to ensure equity whilst protecting the tax base.

From the position of allowing PBOs to trade within set parameters, and in the event of exceeding such limits, being subject to full taxation, a few anomalies still existed. One such anomaly was the issue of equity as PBOs' trading activities were subjected to tax based on its legal form. If a PBO was registered as a company, the resultant trading activities would be subjected to tax at a rate of 29 per cent and if registered as a trust, the applicable tax rate of 40 per cent would apply.⁵⁷ This caused an undue tax burden to PBOs registered as trusts as the same general tax principles applied to all. As per the Draft Revenue Laws Amendment Bill (RLAB) 2006, the proposal was to have a 34 per cent tax rate for all PBOs on the trading activities. The South African Council of Churches, in its commentary on the draft RLAB, made the following two points:

"First, it represents an attempt to prevent a potential loss to the fiscus as a result of lowering the rate of tax on trusts. Secondly, it is yet another manifestation of revenue officials' overzealous attempts to ensure that PBOs do not enjoy any "unfair" advantage in trading over profit-making enterprises. We continue to believe that this is a straw man. First, we believe that the majority of PBO trading activities do not directly compete with those of profit-making enterprises. Even where they do, there is little evidence that they undersell or otherwise crowd out for-profit trade. More importantly, the whole point of developing a separate tax regime for PBOs is to encourage them and their activities by giving them a privileged position relative to for-profit enterprises. Efforts to "level the playing field" with

⁵⁵ PWC, Synopsis (note 40 above, 3).

⁵⁶ *ibid* 3.

⁵⁷ Explanatory Memorandum (note 35 above, 28).

for-profits therefore undermine the public policy objectives that gave rise to the PBO tax system in the first place.”⁵⁸

The proposal by the KC was to have a 29 per cent across the board normal tax rate on trading activities, irrespective of the legal form of the PBO. PBOs were also limited to a strict set of passive investments and sometimes required approval by the Financial Services Board and the Director of NPOs. Contravention of the investment rules resulted in their tax exempt status being withdrawn. Although this was meant to reduce risky investments and prevent PBOs from conducting passive investment on a scale that would constitute trading activities, such a proviso was considered too restrictive and already covered by other aspects of the tax system.⁵⁹ Post 2006, this position was refined.

Prior to the “amendments introduced by the Revenue Laws Amendment Act No. 31 of 2005,” a “PBO would qualify for exemption from income tax where its trading income” fell within set parameters.⁶⁰ In the event of it exceeding such thresholds, the PBO would be liable for income tax on all the income derived by it. In this era of possible tax consequences, however, some administrative woes or uncertainties emerged. One of these was the question of whether provisional tax payments would be required in the case of a trading PBO. Another related to whether the receipts and accruals subject to possible income tax would be the accumulated undistributed amounts or otherwise.⁶¹ The concern here was the fact that other PBOs might not have the historic records should the earlier amount be the taxable amount. The post 2006 era provided answers to such concerns.

2.2.1.2 TRADING PROVISIONS- CGT CONSEQUENCES

Receipts and accruals are generally categorised into either revenue or capital amounts, based on principles established by case law since such terms are not defined in the South African Act.⁶² Any given receipt or accrual can only be revenue or

⁵⁸ Submission to the Portfolio committee on Finance on the Revenue Laws Amendment Bill 2006 by the South African Council of Churches, 16 October 2006, 2.

⁵⁹ Explanatory Memorandum (note 35 above, 32).

⁶⁰ Edward Nathan Sonnenbergs (note 45 above, 6).

⁶¹ Explanatory Memorandum (note 35 above, 34).

⁶² *CSARS v Capstone 556 (Pty) Ltd* (20844/2014) [2016] ZASCA 2.

capital in nature.⁶³ A revenue amount will be subject to normal tax, while a capital amount may be subject to capital gains tax (CGT).⁶⁴ CGT is a tax that is triggered on disposal of capital assets. However, CGT is not a separate tax per se but merely a “portion of normal tax attributable to the inclusion in taxable income of any taxable capital gain.”⁶⁵

Initially, pre 2000, when PBOs enjoyed full exemption from income tax, they also enjoyed complete exemption from CGT in terms of paragraph 63 of the Eighth Schedule to the South African Act based on the fact that their gross income, regardless of its nature, was exempt from income tax in terms of section 10 of the said Act.⁶⁶ As noted earlier, the Taxation Laws Amendment Act, No. 30 of 2000 allowed the concept of trading by PBOs but within set parameters. In the event of exceeding such thresholds, the PBO would be subject to full taxation on all its receipts and accruals from the trading activities. This loss of the full exemption extended to CGT, as the PBO would “no longer claim that all their receipts and accruals of whatever nature are exempt from tax.”⁶⁷ This position was then revised by paragraph 64 of the abovementioned schedule to disregard any resultant capital gain or loss of a capital asset if the said asset was “used solely to produce amounts exempt from normal tax in terms of section 10” of the South African Act or “substantially the whole of the use” of the asset from the valuation date was in the carrying of a public benefit activity.⁶⁸ The revised amendment provided more questions than answers.

The revised paragraph 64 did not provide guidance when assets were used for dual purposes or for assets undergoing a change in use.⁶⁹ The submission by the Council of Churches went on to include examples to show the difficulty created by the revised paragraph 64 in light of the interpretation of the phrase “substantially the whole of the use” based on the draft IN 24.⁷⁰ To further clarify the problem, paragraph 64,

⁶³ *ibid* 22.

⁶⁴ Eighth Schedule to the Income Tax Act No.58 of 1962.

⁶⁵ Preamble to Interpretation note No. 44 (Issue 2), 4 February 2014, 2.

⁶⁶ L Daya, Dealing with the disposal by Public Benefit Organisations of capital assets, 1, available at <http://www.withoutprejudice.co.za/search?query=daya&page=2>, accessed on 7 March 2017.

⁶⁷ Daya (note 66 above, 1)

⁶⁸ *ibid*, 1

⁶⁹ Submission to the Portfolio committee (note 58 above, 21).

⁷⁰ IN 24 (note 32 above).

“also had the effect of denying PBOs the ability to disregard capital gains and losses on the disposal of shares and participatory interests in collective investment schemes. This is so since only capital gains and losses arising from assets used to produce specific exempt income (excluding certain receipts and accruals from a foreign source, dividends on shares and income from collective investment schemes), were excluded.”⁷¹

To deal with the shortcomings outlined above, paragraph 63A of the same schedule was introduced to deal specifically with PBOs. This forms part of the post 2006 era which will be explored in detail in the following chapter.

2.2.1.3 TRADING CONSEQUENCES (TAX LIABILITY)

Having established that the taxation of trading activities was imminent, determination of the tax liability became a key issue. Receipts and accruals of a taxpayer are summed up and exempt income, deductions and allowances are deducted to arrive at taxable income. Normal tax is then levied on this amount. Receipts or accruals can take the form of donations, gifts and revenue from trading. Examples of deductions and allowances are rental paid, running costs such as water and lights, salaries of employees employed in the trading operations, to mention but a few. In the event of a trading PBO, it is then critical to note which deductions and allowances will be permissible. Given the fact that there are general expenses such as lighting and water which are incurred in the running of a PBO as a whole, such will need to be split in order to determine the portion relating to the trading activity. The other issue is the possible capital allowances claimable from the assets utilised for trading. A possible split of the allowance is inevitable in the event that such assets are applied for both trade and non-trade purposes. Thus, although a big step had been achieved in terms of taxing the trading activities of PBOs, technical issues still had to be addressed. The post 2006 era addressed such issues.

2.2.2 THE POST 2006 ERA

After taking into account the legislative recommendations by the KC and comments from various stakeholders, the legislature made amendments to the taxing provisions of tax exempt organisations. The “provisions governing the exemption from tax

⁷¹ Daya (note 66 above, 1).

applicable to PBOs were changed by the Revenue Laws Amendment Act No. 31 of 2005.”⁷² This is what I have termed the post 2006 era. The major development was the fact that should a tax exempt organisation decide to trade in order to supplement its funding, instead of facing possible loss of its tax-exempt status, it could only attract income tax consequences at the extreme. This meant that PBOs were now subject to partial taxation on trading receipts and accruals.

In addition, SARS issued IN 24 (issue 4) and BGR 20 (issue 2) which are intended to provide guidelines on the interpretation and application of the provisions of the South African Act.⁷³ In relation to capital assets and any tax consequences on its disposal, paragraph 63A of the Eighth Schedule was introduced as well as Interpretation Note 44 (IN 44).⁷⁴

As the above is the current law governing taxation of trading activities for PBOs, it will be critically analysed in detail in the following chapter.

2.3 ZIMBABWEAN DEVELOPMENTS

2.3.1 THE PRE 2016 ERA

Prior to 2016, receipts and accruals of “ecclesiastical, charitable and educational institutions of a public character” were exempt from income tax in full.⁷⁵ This was due to the fact that such organisations were seen to be of public benefit and as such warranted full exemption. As in South Africa, questions were being raised on the appropriateness of the exemption status in the light of such organisations allegedly venturing into commercial activities which were in direct competition with tax paying entities (TPEs). This caused a lot of debate, particularly with respect to religious organisations, with some viewing it in the extreme as a measure to tax “God” and thus a taboo subject.⁷⁶ The fairness of the full exemption was thus interrogated in light of

⁷² Edward Nathan Sonnenbergs (note 45 above, 1).

⁷³ IN 24 and BGR 20 (note 32 above).

⁷⁴ SARS, Interpretation note 44 ‘Public benefit organisations: capital gains tax’, 4 February 2014(2).

⁷⁵ Section 14 of the Income Tax Act (23:06) , read with Third Schedule Paragraph 2(e)

⁷⁶H Kadirire, B Mananavire, Churches say ‘no’ to taxes, available at, <http://www.dailynews.co.za/articles/2013/11/15/churches-say-no-to-taxes> , accessed on 7 Mar 2017.

the need to balance the tax objectivities of raising revenue and encouraging philanthropy.⁷⁷

In 2012, the Zimbabwean newspaper, The Herald, reported that as of late there had been “a new trend of entrepreneurs” called gospreneurs which are defined as men or women of the cloth “who use the word of God in order to make money.”⁷⁸ The paper stated that “these were latter day businessmen, entrepreneurs or gospreneurs, using the bible to line their pockets, while milking the sick and the suffering of their hard-earned cash.”⁷⁹ It is evident that religion provides “the much-needed smokescreen behind which these men hide their gospreneurship.”⁸⁰ Currently, it is one of the “biggest and fastest growing industry in Zimbabwe and beyond.”⁸¹ The problem “faced by the sick and suffering in all instances is that they are characterized by desperation and in a bid to change their status quo they do anything in order to get to” a perceived safety zone.⁸² The basis for taxing religious organisations was based on the fact that they were operating as commercial entities and thus were supposed to contribute to the country’s economy.

According to a research article, “modern church organisations now have other activities that are not recorded in proper accounting systems such as sales of head gear, dukes, bandanas, stickers (car and other), CD’s, T-Shirts, wrist bands, bibles, ornaments, musical instruments, ball points, holy water and other valuables.”⁸³ In support of his assertion that churches are running businesses, Bronstein elucidated that “churches are indeed selling services that is, salvation, prayers, hope, heaven, forgiveness of sins, rituals and trinkets.”⁸⁴ In his thoughts, “churches offer intangible services, such as a psychiatrist who can make someone feel better, for a fee.”⁸⁵ As

⁷⁷ Nyamadi (note 34 above, 1).

⁷⁸ I Guvamombe, ‘Gospreneurship, the new art of making money’ Herald 13 July 2012 available at <https://www.herald.co.zw/gospreneurship-the-new-art-of-making-money/>, accessed on 7 March 2017, O. Sifile, R. Mukwapuna, J.M. Tendai, and M. Kudzanai, A strategic analysis of revenue generated by churches, in relation to possible tax loss in Zimbabwe: Africa Development and Resources Research Institute Journal, Ghana: 2014, Vol. 7, No. 7(2), Pp. 37-51, 3.

⁷⁹ Guvamombe (note 78 above).

⁸⁰ *ibid* (note 78 above).

⁸¹ *ibid* (note 78 above).

⁸² Sifile... et al (note 78 above, 3).

⁸³ *ibid* 3.

⁸⁴ K Bronstein, ‘The God business gets away with being tax free’ USA: BRM , 2009

⁸⁵ Bronstein (note 84 above).

churches fall under ecclesiastical organisations, it was therefore paramount to act on the research findings through questioning the exemption status.

White suggested that “a church that owns its building and uses the facility for both worship services and charitable deeds should be taxed according to a formula, the same way a person can deduct home office expenses from his income taxes.”⁸⁶ It is on this premise that there was a wide hullabaloo regarding the need to revise the exemption rules relating to charitable organisations. Considerations had to be made on what could be regarded as “permissible” trading activities and taxable ones.

Nyamadi proposed amendments to the legislation to possibly introduce thresholds of acceptable levels of trading and thus only taxing the excess.⁸⁷ Chaurura concurred with this assertion but acknowledged the need to implement special measures.⁸⁸ The reason for this is that the legislature would not want to “tax income from tuck shops, cafeterias and small kiosks or gift shops in museums which are there for the convenience of the users but to discourage nonprofits from entering into commercial activities under cover of being tax exempt.”⁸⁹ It was further proposed that there would be a need for separate bookkeeping to ensure that the warranted deductions and allowances will be allowed in the determination of the PBO’s tax liability.

PBOs were also exempt from CGT in respect of any sale of specified assets.⁹⁰

In his 2015 mid-year fiscal policy review statement, the Minister of Finance and Economic Development Mr. PA Chinamasa, highlighted his intention to revise the taxing provisions of charitable organisations.⁹¹

⁸⁶ White (2010)

⁸⁷ Nyamadi (note 34 above, 2).

⁸⁸ Chaurura (note 23 above).

⁸⁹ Nyamadi (note 34 above, 2).

⁹⁰ Section 10 of the Capital Gains Tax Act (Chapter 23:01), The Herald (Zimbabwe), ‘Tax obligations for church or religious organisations’, available at <https://www.pressreader.com/zimbabwe/the-herald-zimbabwe/20151224/2819302469452>, accessed on 7 March 2017.

⁹¹ The 2015 mid-year fiscal policy review statement, presented to the parliament of Zimbabwe on 30 July 2015.

2.3.2 THE POST 2016 ERA

The Finance Act amended the Zimbabwean Act to cater for the taxation of receipts and accruals of charitable organisations with effect from 1 January 2016.⁹² However, the amendments appear to be “inadequate”.

This will be explained and fully examined in the following chapter as it is the current legislation.

2.4 CONCLUSION

Both the South African and the Zimbabwean legislature have over the years amended the legislation to cater for some level of taxation of PBOs or charitable organisations. As outlined earlier, this has been attributed to the need to balance the need to ensure the self-sufficiency of such organisations in light of declining government resources whilst protecting the tax base. The current provisions of each jurisdiction will be critically analysed in the following chapter, considering the adequacy and effectiveness of each, bearing in mind that “a good tax system constitutes taxes that conform to dictates of equity, certainty, convenience and economy.”⁹³

⁹² Finance Act No. 8 of 2015 (Zimbabwe).

⁹³ FB Gberegbe, ‘Tax Administration in Nigeria - Concepts and Practice. Lagos’ Fredsbary Printers and Publishers (2007).

CHAPTER 3:

CURRENT TRADING PROVISIONS FOR SOUTH AFRICA AND ZIMBABWE

3.1 INTRODUCTION

As outlined earlier, both the South African and the Zimbabwean Acts have been amended to cater for partial taxation of PBOs. This means that in the event that a PBO engages in trading activities, its resultant receipts and accruals may be subject to income tax consequences.

I will now critically analyse the trading provisions in each jurisdiction.

3.2 SOUTH AFRICAN PROVISIONS

3.2.1 THE LEGISLATION

Listed below are the key provisions and extracts thereof, governing the taxation of trading activities of PBOs in South Africa.

Section 10(1) (cN), there shall be exempt from normal tax—

“the receipts and accruals of any public benefit organisation approved by the Commissioner in terms of section 30(3), to the extent that the receipts and accruals are derived—

(i) otherwise than from any business undertaking or trading activity; or

(ii) from any business undertaking or trading activity—

(aa) if the undertaking or activity—

(A) is integral and directly related to the sole or principal object of that public benefit organisation as contemplated in paragraph (b) of the definition of “public benefit organisation” in section 30;

(B) is carried out or conducted on a basis substantially the whole of which is directed towards the recovery of cost; and

(C) does not result in unfair competition in relation to taxable entities;

(bb) if the undertaking or activity is of an occasional nature and undertaken substantially with assistance on a voluntary basis without compensation;

(cc) if the undertaking or activity is approved by the Minister by notice in the Gazette, having regard to—

(A) the scope and benevolent nature of the undertaking or activity;

(B) the direct connection and interrelationship of the undertaking or activity with the sole or principal object of the public benefit organisation;

(C) the profitability of the undertaking or activity; and

(D) the level of economic distortion that may be caused by the tax exempt status of the public benefit organisation carrying out the undertaking or activity; or

(dd) other than an undertaking or activity in respect of which item (aa), (bb) or (cc) applies and do not exceed the greater of—

(i) 5 per cent of the total receipts and accruals of that public benefit organisation during the relevant year of assessment; or

(ii) R200 000”

Section 30 Public benefit organisations - (1) For the purposes of this Act-

'public benefit activity' means-

(a) any activity listed in Part I of the Ninth Schedule; and

(b) any other activity determined by the Minister from time to time by notice in the Gazette to be of a benevolent nature, having regard to the needs, interests and well-being of the general public;

'public benefit organisation' means any organisation-

(a) which is -

(i) a non-profit company as defined in section 1 of the Companies Act or a trust or an association of persons that has been incorporated, formed or established in the Republic; or

(ii) any branch within the Republic of any company, association or trust incorporated, formed or established in any country other than the Republic that is exempt from tax on income in that other country;

(b) of which the sole object is carrying on one or more public benefit activities, where-

(i) all such activities are carried on in a non-profit manner and with an altruistic or philanthropic intent;

(ii) no such activity is intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee; and

(c) where-

(i) each such activity carried on by that organisation is for the benefit of, or is widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups);

(2) Any activity determined by the Minister in terms of paragraph (b) of the definition of “public benefit activity” in subsection (1) or any conditions prescribed by the Minister in terms of subsection (3) (a) must be tabled in Parliament within a period of 12 months after the date of publication by the Minister of that activity or those conditions in the *Gazette*, for incorporation into this Act.

(3) The Commissioner shall, for the purposes of this Act, approve a public benefit organisation which-

(a) complies with such conditions as the Minister may prescribe by way of regulation to ensure that the activities and resources of such organisation are directed in the furtherance of its object;

(b) has submitted to the Commissioner a copy of the constitution, will or other written instrument under which it has been established and in terms of which it is -

(i) required to have at least three persons, who are not connected persons in relation to each other, to accept the fiduciary responsibility of such organisation and no single person directly or indirectly controls the decision making powers relating to that organisation: Provided that the provisions of this subparagraph shall not apply in respect of any trust established in terms of a will of any person;

(ii) prohibited from directly or indirectly distributing any of its funds to any person (otherwise than in the course of undertaking any public benefit activity) and is required to utilise its funds solely for the object for which it has been established;

(iii) in the case of a public benefit organisation contemplated in paragraph (a) (i) of the definition of “public benefit organisation” in subsection (1), required on dissolution to transfer its assets to –

(aa) any similar public benefit organisation which has been approved in terms of this section;

(bb) 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

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

(dd) the National Finance Housing Corporation contemplated in section 10 (1) (t) (xvii),

which is required to use those assets solely for purposes of carrying on one or more public benefit activities;

(iiiA) in the case of a branch of a public benefit organisation contemplated in paragraph (a) (ii) of the definition of “public benefit organisation” in subsection (1), is required on termination of its activities in the Republic to transfer the assets of such branch to any public benefit organisation, institution, board, body, department or administration

contemplated in subparagraph (iii), if more than 15 per cent of the receipts and accruals attributable to that branch during the period of three years preceding that termination are derived from a source within the Republic;

(v) prohibited from accepting any donation which is revocable at the instance of the donor for reasons other than a material failure to conform to the designated purposes and conditions of such donation, including any misrepresentation with regard to the tax deductibility thereof in terms of section 18A: Provided that a donor (other than a donor which is an approved public benefit organisation or an institution board or body which is exempt from tax in terms of section 10 (1) (cA) (i), which has as its sole or principal object the carrying on of any public benefit activity) may not impose conditions which could enable such donor or any connected person in relation to such donor to derive some direct or indirect benefit from the application of such donation;

(vi) required to submit to the Commissioner a copy of any amendment to the constitution, will or other written instrument under which it was established;

(c) the Commissioner is satisfied 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;

(d) has not and will not pay any remuneration, as defined in the Fourth Schedule, to any employee, office bearer, member or other person which is excessive, having regard to what is generally considered reasonable in the sector and in relation to the service rendered and has not and will not economically benefit any person in a manner which is not consistent with its objects;

(e) complies with such reporting requirements as may be determined by the Commissioner;

(f) the Commissioner is satisfied that, in the case of any public benefit organisation which provides funds to any association of persons contemplated in paragraph 10 (iii) of Part 1 of the Ninth Schedule, has taken reasonable steps to ensure that the funds are utilised for the purpose for which it has been provided; and

(h) has not and will not use its resources directly or indirectly to support, advance or oppose any political party:

(6A) As part of—

(a) the dissolution of an organisation contemplated in paragraph (a) (i) of the definition of “public benefit organization” in subsection (1); or

(b) the termination of the activities of a branch contemplated in paragraph (a) (ii) of that definition, if more than 15 per cent of the receipts and accruals attributable to that branch during the period of three years preceding that termination are derived from a source within the Republic,

the organisation or branch must transfer its assets to any public benefit organisation, institution, board or body or the government contemplated in subsection (3) (b) (iii).

(7) If the organisation fails to transfer, or to take reasonable steps to transfer, its assets, as contemplated in subsection (6) or (6A), 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 the organisation, must for purposes of this Act be deemed to be an amount of taxable income which accrued to such organisation during the year of assessment in which approval was withdrawn or the dissolution of the organisation or termination of activities took place.

Paragraph 63A of the Eight Schedule to the South African Act,

“A public benefit organisation approved by the Commissioner in terms of section 30(3) must disregard any capital gain or capital loss determined in respect of the disposal of an asset if—

(a) that public benefit organisation did not use that asset on or after valuation date in carrying on any business undertaking or trading activity; or

(b) substantially the whole of the use of that asset by that public benefit organisation on and after valuation date was directed at—

(i) a purpose other than carrying on a business undertaking or trading activity; or

(ii) carrying on a business undertaking or trading activity contemplated in section 10(1)(cN)(ii)(aa), (bb) or (cc).”

Before we can look at the trading activities of PBOs, it is paramount that an understanding is established of what constitutes a PBO carrying on a PBA(s).

To deal with PBO related matters, SARS established a dedicated office, the Tax Exemption Unit (TEU), to consider applications for PBO status approval and to raise assessments on PBOs, among other things. Most importantly, the TEU, “monitors compliance by PBOs with the legislative requirements in order to prevent malpractice and abuse.”⁹⁴

As can be gathered from the definition, a PBO is an organisation which may take a different legal form, but whose sole or principal object is the carrying on of one more PBAs, upon which the Commissioner will confer PBO status, provided it complies with all the other applicable provisions of the South African Act. The stated sole or principal object may not be to conduct a commercial business with the profits so derived being applied to fund the PBA.⁹⁵ PBAs are listed in the Ninth Schedule to the South African Act and any others as approved from time to time by the Minister, provided such

⁹⁴ SARS Guide (note 3 above, 4).

⁹⁵ *ibid* 4.

activities are of a “benevolent nature taking into account the needs, interests and well-being of the general public.”⁹⁶ This ensures that PBAs are not restricted to a list but can be extended as required in order to satisfy the needs of the populace. As per the definition, a PBO has to meet the requirements of section 30 of the South African Act. Such requirements are meant to bring out the “true meaning” of an organisation regarded as a PBO. These will be examined below.

The PBA(s) carried on by a PBO should be executed in a non-profit manner and with a philanthropic intention. By the same token, “an organisation carrying on a PBA as part of a profit-making venture will not qualify for approval as a PBO.”⁹⁷ However, “an organisation carrying on a business undertaking or trading activity as part of a PBA may qualify as a PBO provided it meets all the business or trading requirements.”⁹⁸ To put the above into context, if an organisation carries on a trading activity in the form of operating a “supermarket and is open seven days a week” whilst utilising some of its stock-in-trade “to provide free meals to homeless people on a regular basis,” such an organisation can’t be approved as a PBO because its sole or principal object is not the carrying on of a PBA but rather the conduct of a commercial activity.⁹⁹ Furthermore, such PBAs must be widely accessible to the general public and should not benefit a small or exclusive group. To exemplify this, providing residential accommodation “to retired employees of a specific company” will not qualify as a PBA as it benefits a selected group alone and not the general public.¹⁰⁰ However, a benefit provided to “a certain sector of the general public, such as a school established for persons of the Hindu, Muslim or Christian faith, will qualify.”¹⁰¹ As depicted by the examples, the basis of recognising an activity as a PBA is to ensure that it is not deterring but rather inviting.

Regarding the running of the PBO, a PBA may not “directly or indirectly promote the economic self-interest” of any employee or fiduciary.¹⁰² Only reasonable remuneration is permitted.¹⁰³ It is my view that such compensation should be commensurate with the

⁹⁶ Paragraph (b) of the definition of “public benefit activity” in section 30(1).

⁹⁷ SARS Guide (note 3 above, 6).

⁹⁸ *ibid* 6.

⁹⁹ IN 24 (note 32 above, 5).

¹⁰⁰ SARS Guide (note 3 above, 7).

¹⁰¹ *ibid* 7.

¹⁰² Paragraph (b) (ii) of the definition of “public benefit organisation” in section 30(1).

¹⁰³ *ibid* (note 102 above).

activities so performed by the employee and should be comparable with market rates in the particular industry. In respect of personnel that hold positions of trust or responsibility, fiduciaries, other than in the case of a testamentary trust, PBOs are “required to have at least three persons, who are not connected persons in relation to” one another.¹⁰⁴ “Connected person” is defined in section 1 of the South African Act and is extremely wide. Therefore, it is critical that organisations intending to apply for PBO status be wary of this definition, because failure to comply will result in non-recognition as a PBO. By way of an example, “where a family creates a charitable foundation, persons other than family members” should be appointed as trustees to ensure compliance with this requirement.¹⁰⁵

This proviso ensures that no single person has the ability or authority to influence the decision-making of the PBO, either directly or indirectly.¹⁰⁶ Such manipulative powers may be used to change the object of the PBO or remunerate certain individuals handsomely or to restrict access to its PBAs thus destroying the very nature of a PBO. In addition, it is also a requirement for PBOs to decline any revocable donations “by the donor for reasons other than the PBO failing to abide by the designated purposes and conditions of the donation.”¹⁰⁷ This requirement is meant to further deter undue control of the PBO by its stakeholders. It is apparent that a PBO may gather receipts from various sources. Such receipts will need to be controlled, lest they will be prone to abuse by its fiduciaries. PBOs must utilise their “funds solely for the sole or principal object for which it was established,” which is the carrying on of “one or more PBAs, as set out in its founding document.”¹⁰⁸ This can be termed the distribution restriction which might not necessarily be present in a for-profit entity. In safeguarding the accumulated receipts and accruals of PBOs, “it is expected that fiduciaries should act with prudence, integrity and reasonable care.”¹⁰⁹

In the unfortunate event of the dissolution of the PBO, its assets can’t be distributed to “individuals or other tax-paying entities” because by so doing, it will “enable the

¹⁰⁴ Paragraph 3 (b) (i) of the definition of “public benefit organisation” in section 30(1).

¹⁰⁵ Edward Nathan Sonnenbergs (note 45 above, 3).

¹⁰⁶ Section 30(3)(b)(i).

¹⁰⁷ SARS Guide (note 3 above, 9).

¹⁰⁸ *ibid* 8, Section 30(3)(b)(ii).

¹⁰⁹ SARS Guide (note 3 above, 7).

recipients to share in the tax concession” that the PBO had enjoyed.¹¹⁰ In my view, this provision further cements the fact that fiduciaries or employees should not benefit from the PBO other than by way of reasonable remuneration only. As outlined in the pre-2006 era, there was a technical issue in respect of foreign PBOs or branches thereof operating in South Africa. This was because to expect a foreign PBO to transfer all its worldwide assets to South Africa by the mere reason that its South African branch decides to close shop was considered irrational.¹¹¹ The legislature had to ensure that foreign registered PBOs or branches are also encouraged to carry out PBAs in South Africa thus benefiting its inhabitants. Thus the “dissolution requirement will apply to a branch of a foreign tax-exempt organisation if during the three years preceding the termination of its activities in South Africa more than 15% of its receipts and accruals were derived from a source within South Africa.”¹¹² If a,

“PBO or a branch of a foreign tax-exempt organisation fails to transfer, or to take reasonable steps to transfer, its remaining assets as required, an amount equal to the market value of the assets not transferred less the amount of the bona fide liabilities of the PBO or branch, will be deemed to be taxable income which accrued to the PBO or branch during the year of assessment in which dissolution or termination of its activities took place.”¹¹³

The tax liability will be computed by applying the applicable tax rate to the deemed taxable income.

There are other administrative requirements stated in the South African Act such as the need for PBOs to desist from being party to or permitting “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 which would otherwise have been or would have become payable by any person under the Act or under any other Act administered by the Commissioner.”¹¹⁴ A PBO may also “not use its resources directly or indirectly to support, advance or oppose any political party.”¹¹⁵ A PBO must comply

¹¹⁰ *ibid* 8.

¹¹¹ Explanatory memorandum (note 35 above, 31).

¹¹² SARS Guide (note 3 above, 9), Section 30(3)(b)(iiiA).

¹¹³ SARS Guide (note 3 above, 9), Section 30(7).

¹¹⁴ SARS Guide (note 3 above, 10), Section 30(3)(c).

¹¹⁵ Section 30(3)(h).

with the reporting requirements.¹¹⁶ Registration as “an NPO is not a condition for approval as a PBO since the registration as an NPO under the NPO Act is a voluntary registration lodged with the Directorate of NPOs.”¹¹⁷

3.2.2 TRADING PROVISIONS

Having established what a PBO is and the activities that it can embark on (PBAs), we can now explore the trading provisions. Basically the legislature introduced partial taxation in the event of a PBO engaging in trading or business activities.

Trading is a defined term in the South African Act and it “includes 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 a patent”¹¹⁸ To unpack this definition, case law can be relied upon.¹¹⁹ The trade definition is wide and generally catches all activities but simply watching over an investment is not regarded as trade.¹²⁰ Business, on the other hand, is not defined. Based on case law, “it is generally accepted to include anything which occupies the time, attention and labours of a person for profit.”¹²¹ There are “no hard and fast rules in determining what constitutes business.”¹²² However, “in determining whether a business undertaking is being carried on a number of factors may be taken into account such as the intention, motive, frequency and nature of the activity.”¹²³

Section 10 (1) (cN) of the South African Act houses the exemption provisions, which can be analysed into two parts. Firstly, any non-trade activity is fully exempt. This constitutes receipts or accruals arising from donations, gifts and tithes, to mention but a few. Secondly, in the event of a trading PBO, there is “permissible” trading and failure to operate within the given parameters will result in the taxation of the excess proceeds from that trading. This has been regarded as partial taxation by means of hybrid

¹¹⁶ Section 30(3)(e).

¹¹⁷ SARS Guide (note 3 above, 13).

¹¹⁸ Section 1(1).

¹¹⁹ *CIR v Burgess* 1993 (4) SA 161 (AD); 55 SATC, *ITC 368* (1936) 9 SATC 211.

¹²⁰ *Stephan v CIR* 1919 WLD 1; 32 SATC 54, *ITC 1476* (1989) 52 SATC 141.

¹²¹ IN 24 (note 32 above, 4), *CIR v Burgess* 1993 (4) SA 161 (AD); 55 SATC, *ITC 368* (1936) 9 SATC 211, *Smith v Anderson* (1880) 15 Ch D 247.

¹²² IN 24 (note 32 above, 4).

¹²³ IN 24 (note 32 above, 4), *Platt v CIR* 1922 AD 42, *Stephan v CIR* 1919 WLD 1, *Estate G v COT* 1964 (2) SA 701 (SR), 26 SATC 168.

measures. To provide guidance on the interpretation and practical application of section 10 (1) (cN), SARS issued IN 24.¹²⁴

Permissible trading can be analysed in four exemption categories, three specific provisions and a general one. Each of the categories “has its own conditions and requirements and is applied separately.”¹²⁵ The following paragraphs will explore these categories.

3.2.2.1 INTEGRAL AND DIRECTLY RELATED TRADE

The trading activity must be “integral and directly related to the sole or principal object of the PBO,” whilst being carried out in a manner “substantially the whole of which is directed towards the recovery of cost” and not resulting in unfair competition with TPEs.¹²⁶ It should be noted that this category is an “and” requirement, meaning that all the three conditions have to be satisfied for it to apply. Key phrases used warrant some scrutiny. These are “integral and directly related”, “substantially the whole” and “unfair competition.”

To explain the meaning of the “integral and directly related”, IN 24 gave the following example. “A PBO conducts a PBA of providing healthcare services at no charge to poor and needy persons. In addition to providing medical consultation services, the PBO also provides medication at cost.”¹²⁷ In this case, the principal object of the PBO is the provision of health services which is a listed PBA in the Ninth Schedule to South African Act. In the furtherance of this principal object, the PBO provides medication at cost. The provision of medication at cost, which is a secondary object, is in support of the primary object thus making it integral and directly related. In my view, the secondary purpose needs to be fundamental and “closely connected” to the main object for this proviso to apply.¹²⁸

“Substantially the whole” is “regarded by SARS to mean 90% or more,” which “percentage must be determined using a method appropriate to the circumstances

¹²⁴ IN 24 (note 32 above).

¹²⁵ *ibid* 8.

¹²⁶ Section 10 (1) (cN) (ii) (aa) (A),(B), (C).

¹²⁷ IN 24 (note 32 above, 4).

¹²⁸ *Port Elizabeth Electric Tramway Company Ltd v CIR* 1936 CPD 241; 8 SATC 13.

and may be motivated by taking into account time or cost”, as per BGR 20.¹²⁹ This ruling was based on the premise that it is not possible for a PBO to conduct separate activities that are completely independent of one another. The ruling applies for an indefinite period, provided it is not withdrawn, amended or the relevant legislation is amended, from the date of the first issue, being 10 December 2013. However, a percentage of not less than 85% will also be acceptable.¹³⁰ The reasons for the acceptance thereof were given in its first issue as the need to overcome certain practical difficulties. Although SARS had not explained what it meant by practical difficulties, it is my opinion that the basis of the calculation of the percentage is subjective and time or cost might not be the only factors to consider. In such situations, one method might result in 83% or 84% and SARS might be “forced” to accept it as a binding general rule by nature is not the law.¹³¹ Building on the health care services example, it follows that the secondary object of provision of medical services at a cost should occupy time and/ or cost of 15% or less, to be regarded as being carried out towards the recovery of cost.

The third proviso requires that the trading activity does not result in “unfair competition” with tax paying organisations. The unfair competitive advantage results from the PBO not being required to pay tax whilst the non-PBO might be in a tax paying position. Drawing the line between what is fair and unfair competition is critical, however, just like determining when one would have “crossed the Rubicon” in determining whether “something more” has been done to a capital amount in order to change its nature to being that of revenue, it is a very controversial issue.¹³² Provision of health care services normally results in the entity providing such services generating taxable income. However, if the trading entity is an approved PBO, no tax liability might accrue. At face value, it would seem that the PBO is getting away with non-payment of tax and thus enjoying an unfair advantage. However, small business enterprises (SBEs) also have preferential tax rates that “give them an artificial competitive advantage, but this

¹²⁹ BGR 20 (note 32 above, 4).

¹³⁰ *ibid* 4.

¹³¹ Lee-Ann Steenkamp, ‘A Note on Recent Income Tax Developments Impacting Charitable Organisations in South Africa’ September 2014, available at

<http://www.mcser.org/journal/index.php/mjss/article/viewFile/3781/3706> , accessed on 14 August 2017.

¹³² *Natal Estates Ltd v SIR* 1975(4) SA 177 (A); 37 SATC 193.

is not regarded as unfair competition.”¹³³ In the same light, PBOs should not be viewed as competing unfairly if they are carrying on similar trading activities as SBEs.¹³⁴

The other argument put forward supporting the notion that allowing PBOs to trade does not result in unfair competition is because they provide socially desirable goods that are not ordinarily provided by TPEs, have a non-distribution constraint that is normally not applicable to TPEs and trading serves as a form of ensuring the self-sufficiency of such organisations which in light of depleting resources in the form of donations, might suffer extinction.¹³⁵ The counter argument suggests that the mere fact that TPEs’ returns might be affected by competition from “excessive entry” into a particular industry by PBOs due to predatory pricing is indicative of unfair competition.¹³⁶

It is my view that since profits derived by trading PBOs are normally applied to augment their financial resources, which are used to provide socially desirable services such as health care services at no charge, whilst prohibiting the distribution of such profits to its fiduciaries or employees, will not result in “unfair competition.” However, it is still subjective and in the absence of statutory definitions and case law, SARS is left with an interpretative burden. The principles of *Endumeni* regarding the interpretation of documents, can assist SARS when it finds itself in an interpretation dilemma.¹³⁷

Regardless of the quantum of trading profits of any PBO under this provision, it is important to note that it will be fully exempt provided the three requirements discussed above are met.¹³⁸

3.2.2.2 OCCASIONAL TRADING

For this proviso to apply, two requirements must be satisfied.¹³⁹ The trading activity must take place occasionally or infrequently and “be undertaken with assistance on a

¹³³ Brewis (note 26 above, 13).

¹³⁴ *ibid* 13.

¹³⁵ *ibid* 13.

¹³⁶ Gomes (note 30 above).

¹³⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (note 18 above).

¹³⁸ IN 24 (note 32 above, 8).

¹³⁹ Section 10 (1) (cN) (ii) (bb).

voluntary basis without compensation, other than bona fide reimbursement of reasonable and necessary out of pocket expenses” incurred by the volunteers.¹⁴⁰ In other words, the volunteers should not be remunerated. Regarding a health care service PBO, when celebrating yearly anniversaries, cake sales can be regarded as a sporadic event, provided the sellers are voluntary health care givers who are not salaried for this additional service provided.

Regardless of the quantum of trading profits derived by the PBO, it is important to note that it will be fully non-taxable provided the two requirements discussed above are met, as per this proviso.¹⁴¹

3.2.2.3 MINISTERIAL APPROVAL

The Minister of Finance has been empowered by the legislation to approve any trading undertaking that is regarded to be of a benevolent nature, which is closely connected to the main object of the PBO, having considered its profitability and any level of economic distortion that might arise.¹⁴² Of note here is the fact that the legislature realised the importance of the Minister being authorised to approve and consequently fully exempt a deserving trading activity being engaged in by a PBO. One could argue that this proviso is meant to capture any other trading activities that might not be fully compliant with the integral and directly related trade provision as the requirements possess some similarities. As at the time of writing, to my knowledge, no trading activity has been exempted under this provision.

Similar to the provisos above, the quantum of the trading profits that are exempt has not been provided suggesting absence of a limit thereof.¹⁴³

3.2.2.4 BASIC EXEMPTION

This represents the general category and is activated in the event that the above discussed specific exemption categories does not apply. “The greater of 5% of the

¹⁴⁰ Section 10 (1) (cN) (ii) (bb) and IN 24 (note 32 above, 9).

¹⁴¹ IN24 (note 32 above, 8).

¹⁴² Section 10 (1) (cN) (ii) (cc) (A), (B), (C), (D).

¹⁴³ IN 24 (note 32 above, 8).

total receipts and accruals of the PBO or R200 000” will be non-taxable.¹⁴⁴ In the event that there will be trading profits realised that are in excess of the greater of the two, tax consequences kick in. This provision is thus quantum based and its application becomes a numbers game. The term “total receipts and accruals” suggests inclusion of both receipts and accruals of a revenue or capital nature.¹⁴⁵ Furthermore, the amount of R200 000 “is not increased by the number of individual organisations within the group, as this amount is applicable to a PBO, which in this case is the regulating or co-ordinating body.”¹⁴⁶

To exemplify this provision, see below:¹⁴⁷

“Facts:

A PBO conducts PBAs from a property which it owns. In order to augment its income, it lets a portion of the property that is not used for carrying on the PBAs.

The PBO’s total receipts and accruals for the year ended 28 February 2013 are as follows:

	R
Donations	450 000
Rental income	90 000
Interest income	50 000
Total receipts and accruals	590 000

Result:

The basic exemption is calculated as an amount equal to the greater of 5% of the total receipts and accruals or R200 000.

5% of the total receipts of R590 000 amounts to R29 500.

The total receipts from letting the property (R90 000) will be exempt as the PBO receives the benefit of the greater of R29 500 or R200 000.”¹⁴⁸

It should be noted that total receipts and accruals for a PBO includes any distributions of income from a trust of which the said PBO is a beneficiary. Where trading income such as rental income flows from the trust to the PBO, such trading income retains its

¹⁴⁴ IN 24 (note 32 above, 10), Section 10 (1) (cN) (ii) (dd) (i), (ii).

¹⁴⁵ SARS Guide (note 3 above, 22).

¹⁴⁶ *ibid* 10.

¹⁴⁷ Section 10 (1) (cN) (ii) (dd) (i), (ii)

¹⁴⁸ IN 24 (note 32 above, 10).

character and as such will be deemed to be a trading receipt derived by the PBO.¹⁴⁹ This is as per the operation of the “conduit principle.”¹⁵⁰ Such trading distributions can, however, only qualify for exemption under the basic exemption provision.¹⁵¹

3.2.3 THE TAX CONSEQUENCES

In the event that the trading receipts and accruals are in excess of the basic exemption, tax consequences are inevitable.¹⁵² As outlined in Chapter Two, when determining the normal tax liability of a trading PBO, guidance has been provided by the legislature. Firstly, it is important to note that receipts and accruals are either revenue or capital in nature.¹⁵³ Generally revenue receipts are included in the gross income of the taxpayer.¹⁵⁴ Revenue expenditure and allowances incurred in the running of the PBO are deductible from the gross receipts and accruals.¹⁵⁵ Capital receipts are subjected to the Eighth Schedule to the South African Act, where capital gains and losses are determined and in the event of a resultant taxable capital gain, a portion thereof might then be pulled into the taxable income of the tax payer, upon which the tax liability will be determined.¹⁵⁶ The taxation mechanics will now be explored.

3.2.3.1 REVENUE RECEIPTS

Revenue receipts and accruals form part of gross income. As per section 1 of the South African Act,

“Gross income in relation to any year or period of assessment, means-

(i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or

(ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic,

during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely.....”

¹⁴⁹ *ibid* 12.

¹⁵⁰ *CIR v Polonsky* (1942) 12 SATC 11.

¹⁵¹ IN 24 (note 32 above, 12).

¹⁵² Section 10 (1) (cN) (ii) (dd) (i), (ii).

¹⁵³ *CSARS v Capstone 556* (note 62 above).

¹⁵⁴ Section 1, gross income definition.

¹⁵⁵ Section 11.

¹⁵⁶ Section 26A.

It is evident from the above definition that capital receipts and accruals are excluded from gross income unless otherwise specifically included by way of special inclusions. As per the opening words of section 10 (1) (cN), reference is made to the term “receipts and accruals” of PBOs. It should be noted that the type of receipt and accrual envisaged as per the aforesaid, is the one which is included in the “gross income” definition.¹⁵⁷ By extension, any other capital receipts or accruals, other than those referred to in the gross income definition, are not exempted under the ambit of section 10 (1) (cN).¹⁵⁸

Revenue receipts in the case of a trading PBO, can be in the form of sales revenue. Using the example of our PBO in the health care services, revenue will be from the sales of medication as well as any distributions from trusts of which the PBO will be a beneficiary. These will make up the gross income of the PBO. Deductions and allowances will be deductible from the gross income of the PBO. These deductions and allowances, being “expenditure and losses actually incurred in the production of income, provided such expenditure and losses are not of a capital nature”, in respect of the trading activity, are housed mainly in section 11 of the South African Act. The basis of deducting expenditure and losses will be that they were incurred in the running of the trading activity. It then follows that in the event of expenditure incurred for both trade and non-trade purposes, only the portion of that expenditure which relates to trade will be deductible against the trading income.¹⁵⁹ In the event that accurate accounting records are kept in relation to the trading activity, it will be unnecessary to allocate the expenditure.¹⁶⁰

Capital allowances that are allowable in terms of the South African Act will be deducted against the trading income. These might be in the form of wear and tear allowances on the capital assets employed in the trading activity. Based on the same premise mentioned above, apportionment becomes necessary in the event of the capital assets being applied for both trade and non-trade activities. A key question that has been asked is in the event of a change in use of an asset, how will the capital allowance be

¹⁵⁷ IN 24 (note 32 above, 6-7).

¹⁵⁸ *ibid* 6-7.

¹⁵⁹ *ibid* 11.

¹⁶⁰ *ibid* 11.

determined? Suppose a capital asset was used initially for exempt purposes and it is now being applied for non-exempt trading, the issue that arises is whether the capital allowance should be determined based on the original cost of the asset or the hypothetical remaining claimable balance. To exemplify this, “if an asset was acquired 2 years before the PBO becomes taxable on its trading income and that asset has a useful life of 5 years, the PBO will be only be entitled to claim wear and tear on the remaining period of 3 years. It will not be able to claim wear and tear on the cost of the asset as if it were acquired in the year during which the PBO becomes taxable in its trading activities.”¹⁶¹ The authority for this treatment is as per section 11(e) (ix) of the South African Act.

The resultant amount after deducting the allowable deductions and allowances from the gross income of the trading PBO will form part of its taxable income.

3.2.3.2 CAPITAL RECEIPTS

On disposal, capital assets that were employed in trading activities may generate capital profits or losses based on the principles outlined in the Eighth Schedule to the South African Act. Taking into account any capital losses carried forward from previous tax years, a taxable capital gain may be arrived at. In the event of capital assets being applied to both trade and non-trade activities, apportionment is warranted. However, as per paragraph 63A of the Eighth Schedule, the exemption provision of capital receipts which are excluded from the gross income definition, it is important to note that any capital gains or losses from non-trading assets or assets were “substantially the whole” of which is not used for trading is fully disregarded.¹⁶² In addition, if the capital assets were used in such trading activities whose revenue receipts are exempted from normal tax, by virtue of them being specifically exempted as per the three categories discussed above, the resultant taxable capital gain is also exempt from CGT. SARS issued Interpretation Note No.44 (issue 2) to provide guidance on the mechanics of determining the taxable capital gain. The meaning attached to

¹⁶¹ Edward Nathan Sonnenbergs (note 45 above, 9).

¹⁶² Paragraph 63A of the Eight Schedule to South African Act, IN 24 (note 32 above, 6-7).

“substantially the whole” can be determined in terms of BGR 20.¹⁶³ The resultant taxable capital gain then forms part of the taxable income of the PBO.

3.2.3.3 OVERALL TAX LIABILITY

The overall tax liability will be determined by applying the applicable tax rate to the taxable income of the trading PBO. In the event of a PBO having an assessed loss brought forward, such may be set-off against the relevant tax year’s taxable income.¹⁶⁴ However, it should be noted that in the case of a PBO being registered as a company as defined, trading ought to be carried on continuously to ensure that the assessed loss may be eligible for set-off.¹⁶⁵ Should the PBO be registered as a trust, the continued trading requirement is not required.¹⁶⁶ In my view, this creates an anomaly, as there is no equity as different forms of enterprises are treated differently, regardless of the fact that they will both be PBOs.

For the 2017/2018 year of assessment, the tax liability will be at 28 percent.¹⁶⁷ Regarding the settling of the resultant tax liability, it should be noted that trading PBOs are exempted from making provisional payments.¹⁶⁸

3.3 ZIMBABWEAN PROVISIONS

3.3.1 THE LEGISLATION

The Zimbabwean Act regarding ecclesiastical, charitable or educational institutions was amended by the Finance Act No.8 of 2015. The same Finance Act also amended other key Acts. Listed below are the key provisions and extracts thereof.

In terms of Chapter 23:04, as amended, “company” or “trust”,

“is deemed to include a reference to any ecclesiastical, charitable or educational institution to the extent that any part of the income of such institution is derived from trade or investment, not being income from trade or investment that is exempt from tax in terms of paragraph 2(e) of the Third Schedule to the Taxes Act.”

¹⁶³ BGR 20 (note 32 above).

¹⁶⁴ Section 20 (1) (a).

¹⁶⁵ Section 20 (1) (a), Interpretation note 33 “Assessed Losses: Companies: The ‘Trade’ and ‘Income from Trade’ Requirements.” 2017(4).

¹⁶⁶ IN 24 (note 32 above, 12).

¹⁶⁷ Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2017: section 3(1), Schedule 1 (4(a))

¹⁶⁸ Fourth Schedule to the South African Act, Part 1 definitions: provisional taxpayer

Section 14 read with the Third Schedule to the Zimbabwe Act, paragraph 2(e), exempts receipts and accruals of:

- "ecclesiastical institutions, and charitable and educational institutions of a public character-
- (i) consisting of donations, tithes, offerings or other contributions by the members or benefactors of the institutions concerned, and any other receipts or accruals that are not receipts and accruals of income from trade or investment carried on by or on behalf of the institutions concerned; or
 - (ii) that are receipts and accruals of income from trade or investment by any company of which that institution is the sole or principal member and in respect of which the Minister responsible for the Companies Act (Chapter 24:03) has issued a licence in terms of section 26 of that Act."

Section 26 of the Companies Act reads:

"Power to dispense with "Limited" in certain cases

(1) Where the Minister is satisfied that an association exists for any lawful purpose, the pursuit of which is calculated to be in the interests of the public, or any section of the public, and intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members, and that it is desirable that such association should be incorporated, the Minister may, if the association submits to him a memorandum complying with section *eight*, by licence under his hand direct that the association be registered as a company without the addition of the word "Limited" to its name, and the association may thereupon be registered accordingly.

(2) The association, upon such registration, shall enjoy all the privileges of a company and be subject to all the obligations thereof, except those of using the word "Limited" as any part of its name and of complying with sections *sixty-five, sixty-six, seventy-one, one hundred and fourteen, one hundred and twenty-three, one hundred and twenty-four, one hundred and forty-nine* and *one hundred and seventy-one*.

(3) A licence under this section may at any time be revoked by the Minister and upon revocation the Registrar shall enter the word "Limited" at the end of the name of the association upon the register, and the association shall thereupon cease to enjoy the exemptions and privileges granted by this section.

Before a licence is so revoked the Minister shall give to the association notice in writing of his intention, and shall afford it an opportunity of submitting in writing arguments in opposition to revocation.

An association whose licence has been revoked may appeal to the court within such period and in accordance with such rules as may be prescribed under section three hundred and fifty-nine and on any such appeal the court may make such order as it deems fit.

(4) Whenever it is proved to the satisfaction of the Minister that the objects of a company are those defined in subsection (1) and objects incidental or conducive thereto, and that by its constitution the company is required to apply its profits, if any, or other income in promoting its objects and is prohibited from paying any dividend to its members, the Minister may by licence authorize the company to change its name by special resolution by the omission therefrom of the word "Limited", and as from the date of the receipt of the certificate of the Registrar recording the registration of such special resolution passed

pursuant to such licence the company shall be deemed to be a company licensed under this section.

(5) Section *twenty-five* shall apply to a change of name under this section.

(6) A licence by the Minister under this section may be granted on such conditions and subject to such regulations as he may think fit, and those conditions and regulations shall be binding upon the association or company and shall, if the Minister so directs, be inserted in the memorandum and articles, or in one of those documents.

(7) No alteration of the memorandum or articles of association in respect of which a licence under this section is in force shall take effect until such alteration is approved by the Minister, and if the Minister approves the alteration he may vary the licence by making it subject to such conditions and regulations as he thinks fit, in lieu of or in addition to the conditions and regulations, if any, to which the licence was formerly subject.

In terms of the Zimbabwean Act, ecclesiastical, charitable and educational institutions of a public character may be subjected to some level of taxation. The phrase “ecclesiastical, charitable and educational institutions of a public character” has not been defined in the Zimbabwean Act. In the absence of statutory definitions, reliance can be placed on case law. However, in the Zimbabwean context, due to the absence of both, an undue interpretative burden is placed on both the taxpayer and ZIMRA.

3.3.2 TRADING PROVISIONS

Considering that there are neither statutory definitions nor case law rulings regarding the meaning of the phrase “ecclesiastical, charitable and educational institutions of a public character”, we can now explore the exemption and trading provisions of such institutions.

The exemption provisions as housed in section 14 read with the Third Schedule to the Zimbabwean Act can be analysed in two parts:

- 1 Non-trade or investment receipts and accruals are fully exempt from normal tax. Such receipts or accruals consists of donations, tithes, offerings or other contributions by the members or benefactors of the institutions.
- 2 Trading or investment receipts and accruals are also exempt from normal tax provided the “trading company” is principally or solely owned by the charitable institution and a licence has been issued by the Minister responsible for Companies Act (hereunder referred to as the Minister).

The above suggests that trading or investment receipts and accruals can either be fully exempt or taxable. What separates the two is the possible licence issued by the Minister warranting the exemption and the ownership structure of the trading company.

Trade is a defined term in the Zimbabwean Act and, “includes any profession, trade, business, activity, calling, occupation or venture, including the letting of any property, carried on, engaged in or followed for the purposes of producing income as defined in subsection (1) of section eight and anything done for the purpose of producing such income.” Investment on the other hand is not a defined term in the Zimbabwean Act.

As outlined above, charitable organisations in Zimbabwe that engage in trading activities can either be fully exempt from normal tax or fully taxable as a company or trust would. We will now explore the taxing provisos.

3.3.2.1 TRADING INCOME EXEMPTION

As per the Zimbabwean Act, in the event of a charitable institution wholly or principally owning the trading company with which the institution carries the trading or investment activity and a licence has been issued, the trading income so derived attracts no normal tax consequences.¹⁶⁹ Two key issues arising from the terminology used by the legislature require analysis. One is what constitutes sole or principal ownership of a company and the other being the basis of granting a licence in terms of section 26 of the Companies Act. Both these requirements should be met for the exemption to apply.

3.3.2.1.1 SOLE OR PRINCIPAL OWNERSHIP

The term “sole or principal” is not defined in the legislation. The dictionary meaning is “only or majority” ownership. An example from the Companies Act is the scenario of a holding company and a subsidiary company. In such a scenario, the charitable institution will be the “holding company”, with the trading company being a “wholly-owned or majority-owned subsidiary.” Basically the charitable institution should either hold one hundred percent of the trading company’s equity share capital or control the composition of its board of directors, for the institution to be regarded as a sole

¹⁶⁹ Section 14 read with the Third Schedule to the Zimbabwe Act, paragraph 2(e).

member. This suggests that no other person will hold any shares or be in a position to direct the object of the trading company other than the charitable institution. Alternatively, it can hold more than half of the trading company's equity share capital or have a majority control over the board of directors to be a principal member. The issue here is for the charitable institution to be able to influence the decision-making process of the trading company and as such will determine the application of the trading profits so realised.

However, it should be noted that in the absence of statutory definitions, the matter is still up for debate and can cause an interpretative burden on both the taxpayers and ZIMRA.

3.3.2.1.2 GRANTING OF A LICENCE

The Minister is empowered to grant a licence in terms of section 26 of the Companies Act to any institution so that it can operate as a "company" as defined without the obligation to include the word "limited" to its name but privy to rights and subjected to all other obligations of a "company" so registered.¹⁷⁰ However, certain requirements have to be met for the issue of such a licence. Essentially, the institution has to be operating lawfully, in the interest of the public and utilising the profits derived from its activities to support its charitable object, with a non-distribution clause. Such a licence can also be revoked and in the event that the Minister does so, the trading receipts and accruals become fully taxable.

The above proviso is meant to ensure that for a charitable institution to continue enjoying full normal tax exemption, even if it engages in trading activities, the profits so derived should be utilised in promoting its charitable cause. In the case of a religious organisation, a church can trade and derive profits but for its income not to be subjected to normal tax, its trading profits should be applied in the furtherance of religious activities.

¹⁷⁰ Section 26 (1) and (2) of the Companies Act (Zimbabwe).

3.3.2.2 TRADING INCOME TAXATION

As discussed above, in the absence of a licence being issued by the Minister to a trading company which is wholly or mainly owned by the charitable organisation, the taxable income derived from trading becomes fully taxable. To this end, the Zimbabwean Act has amended the meaning of the word “company” or “trust” to include any trading activity carried on by such charitable organisation, to the extent that it is not exempt. This means that the taxable income from trading will be subjected to tax as if it were a “company” or “trust.” The provisions governing taxable entities in the form of companies or trusts thus apply to charitable organisations that derive revenue from trading.

3.3.3 THE TAX CONSEQUENCES

Receipts or accruals of charitable institutions can be in form of inter alia, donations, tithes, contributions and trading income. Such receipts can either be revenue or capital in nature. As is the case in South Africa, these terms have not been defined in the legislation, but case law can be relied upon. A discussion of these principles is beyond the scope of this dissertation.

3.3.3.1 REVENUE RECEIPTS

Revenue receipts are ordinarily in the form of gross income which means;

“the total amount received by or accrued to or in favour of a person or deemed to have been received by or to have accrued to or in favour of a person in any year of assessment from a source within or deemed to be within Zimbabwe excluding any amount (not being an amount included in “gross income” by virtue of any of the following paragraphs of this definition) so received or accrued which is proved by the taxpayer to be of a capital nature and, without derogation from the generality of the foregoing, includes.....”

Only the non-exempt trading revenue of a trading charitable institution will filter into taxable income from its gross income. This can be in the form of rental income or sales of its produce. The provisions permitting the trading expenditure and losses so incurred which may be set off against the trading income are housed in section 15 of the Zimbabwean Act. Generally, “expenditure and losses to the extent to which they are incurred for the purposes of trade or in the production of the income except to the

extent to which they are expenditure or losses of a capital nature” are deductible.¹⁷¹ Capital allowances are granted on the capital assets utilised in the production of the trading income. The legislature did not provide explicit guidance on the calculation of the allowances. It is thus uncertain as to whether the historical cost of the capital asset would be used or the theoretical remaining claimable balance in the event of a change in use.¹⁷² This might have been implied, but in the absence of such plainness, the trading provisions may be misinterpreted.

3.3.3.2 CAPITAL RECEIPTS

Capital receipts arise mainly from the disposal of capital assets employed in the trading business. Such capital receipts include receipts from the disposals of immovable property, shares and other securities. It should be noted that the exemption of revenue receipts for charitable organisations is extended to capital receipts on disposal of capital assets determined in terms of the Act.¹⁷³ However, in the event of a trading charitable institution, the exemption of capital receipts stated in the foregoing does not apply.¹⁷⁴ This means that any taxable capital gain derived in any given year of assessment from a trading charitable institution will be subject to CGT. For the 2017/2018 year of assessment, the CGT rate is 20 percent of the capital gain in respect of disposal of specified assets that were acquired after the 1st of February 2009.¹⁷⁵ For disposals of specified capital assets acquired before the 1st of February 2009, the applicable CGT rate is 5% of the gross capital amount realised from the sale.¹⁷⁶

3.3.3.3 TAX LIABILITY

The tax liability of “ecclesiastical, charitable or educational institutions of a public character” will be determined by applying the applicable tax rate, as would apply to a “company” or “trust” as defined, to the trading taxable income thereof.¹⁷⁷ It is clear that the legislature intended to tax such organisations based on its legal form. In the

¹⁷¹ Section 15 (2) (a) of the Zimbabwean Act (Chapter 23:06).

¹⁷² Edward Nathan Sonnenbergs (note 45 above).

¹⁷³ Capital Gains Tax Act (Chapter 23:01).

¹⁷⁴ ZIMRA investigations presentation to the religious sector (unpublished).

¹⁷⁵ Section 38 of Finance Act (Chapter 23:04).

¹⁷⁶ *ibid* s38.

¹⁷⁷ Definition of “company” or “trust” as per Chapter 23:04 as amended by the Finance Act No. 8 of 2015.

Zimbabwean context, however, the same rate of tax applies. For the 2017/2018 year of assessment, the normal tax liability will be at 25 percent.¹⁷⁸

3.4 CONCLUSION

Both the South African and Zimbabwean Acts have provided for the taxation of receipts and accruals of trading charitable organisations. However, statutory definitions have not been provided in some instances and consequently an interpretative burden is placed on the tax authority as well as the taxpayer. Similarities and parallels as well as weaknesses and strengths can be drawn from both pieces of legislation and these will be analysed in the succeeding chapter with the intention of providing recommendations where necessary.

¹⁷⁸ Section 14(2c) of Finance Act (Chapter 23:04), accessible at http://www.zimra.co.zw/index.php?option=com_content&view=article&id=1611&Itemid=70,

CHAPTER 4:

SIMILARITIES AND PARALELLS IN THE TRADING PROVISIONS

4.1 INTRODUCTION

Having critically analysed the law governing the taxation of PBOs in both South and Zimbabwe, it is imperative that we draw out the similarities and differences, which will in turn be a basis of future amendments in the spirit of learning from one another.

4.2 SIMILARITIES

4.2.1 NON-TRADE INCOME EXEMPTION

It is crucial to highlight that both the South African and Zimbabwean Acts have adopted a hybrid system of taxation regarding the taxation of PBOs or similar organisations. As a first point of call, they fully exempt from normal tax, all of PBOs' receipts and accruals to the extent that they are not derived from trading, business or investment activities. Secondly in the spirit of recognising the need for charitable organisations to be self-sufficient, the legislature further exempts trading receipts and accruals to the extent that they are regarded to be generated with the intention to benefit the general populace by advancing charitable causes. In so doing, the legislature empowered the Minister to approve certain trading activities as exempt having considered the public interest. By extension, any other trading income may be subject to normal tax.

Regarding capital receipts, both pieces of legislation disregard any taxable capital gains arising in the hands of charitable organisations to the extent that they are not generated from trading, business or investment activities.

4.2.2 TRADING ACTIVITIES

As outlined above, both pieces of legislation tax trading income to the extent that it has not been specifically exempted. It was therefore critical for the legislature to indicate what constituted trading. Based on statutory definitions as well as case law, both jurisdictions recognises that anything that is undertaken which utilises resources such as time, attention and labour for profit constitutes a trading or business activity.

Case law has further recognised that each case will be decided based on its own merits and surrounding circumstances as there are no hard and fast rules for determining business activities. However, there are other activities that have been specifically mentioned in the Act, such as the letting of property. It is common practice for any organisation to let out any excess capacity and as such the legislature saw it fit to regard this as a trading activity and thus avoid ambiguity when applying the law.

4.2.3 CHARITABLE ACTIVITIES

One of the questions that the legislature had to answer was what can be regarded as charitable activities. Although not quite the same across the two jurisdictions, these activities have been widely recognised as activities that are philanthropic in nature and meant to benefit the general public. Such activities includes the provision of health, education, food, environmental and wildlife conservation and other humanitarian services for free.

4.2.4 STATUTORY DEFINITION DEFICIT

Both the South African and Zimbabwean Acts have fallen short in providing statutory definitions to key terms used in the exemption provisions. In terms of the Zimbabwean Act, terms such as “ecclesiastical, charitable or educational institutions of a public character” as well “sole or principal ownership” have not been defined. “Substantially the whole” and “unfair competition” are some of the key terms that have been left open to interpretation in the South African context. It should be noted that this lack of statutory definitions is bound to cause an unwarranted administrative and interpretative burden.

4.3 PARALLELS

4.3.1 DEFINITION OF CHARITABLE ORGANISATIONS

Before embarking on the possible tax consequences of trading, it is important to define the “terms of reference.” What constitutes a charitable organisation then becomes a relevant debate. Defining the parameters provides guidance that goes a long way to provide uniformity and avoid misconceptions.

The South African legislature defined the term PBO and this milestone provided some uniformity regarding the eligibility of organisations, which in turn provided more certainty to both taxpayers and the tax authority.¹⁷⁹ It is interesting to note that the exemption provision prior to the 2000 amendments used to refer to such organisations as “religious, charitable and educational institutions of a public nature.” Fast forward to the year 2017, in the Zimbabwean context, they are still referred to as “ecclesiastical, charitable or educational institutions of a public character.” It appears that the Zimbabwean legislature has fallen behind in terms of defining the eligibility criteria. Of particular concern is the term “charitable” which can be widely or narrowly interpreted, with the former – the broader interpretation - resulting in a possible erosion of the tax base.

4.3.2 DEFINITION OF CHARITABLE ACTIVITIES

The 2000 amendments also saw the birth of the definition of the term PBA, in South Africa. It can be argued that Zimbabwe refers to similar activities as charitable activities. The importance of statutory definitions cannot be overemphasized as it provides some level of guidance. The South African Act has gone further than merely providing definitions and has listed in the Ninth Schedule such activities that are considered to be of public benefit. Whilst the principle of listing can be viewed as over restrictive by Zimbabwe, the legislature included a “catch-up category” that allows the Minister to approve any other activity that is not specifically mentioned so as to ensure that the principle of PBAs can remain current.¹⁸⁰

4.3.3 LEVELS OF EXEMPTION

As outlined earlier, regarding trading receipts, both South Africa and Zimbabwe provide for some level of exemption. In South Africa, there are four levels of exemption, three specific and one general.¹⁸¹ If a PBO meets the requirements of any of the three specific provisions, its trading income becomes fully exempted from normal tax.¹⁸² The fourth category which is referred to as the general provision captures all that is not

¹⁷⁹ SARS Guide (note 3 above, 3).

¹⁸⁰ Moore (note 24 above).

¹⁸¹ Section 10(1) (cN) (ii) (aa), (bb), (cc), (dd) of the South African Act.

¹⁸² Section 10(1) (cN) (ii) (aa), (bb), (cc) of the South African Act.

specifically exempted.¹⁸³ In a nutshell, it exempts trading income to a certain level and is thus quantum based. Consequently, in the event of one's trading income exceeding the permissible level, the excess becomes fully taxable.

In terms of the Zimbabwean Act, there is only one level of exemption. Income from trading is either fully exempt or fully taxable.¹⁸⁴ The exemption provision is not quantum based and exempts amounts in full if the requirements are met. However, due to the fact that any other trading income is fully taxable in the event of not meeting the stringent criteria, one can argue that the Act does not recognise and provide for "small scale trading" and does not intend to only tax the "commercial traders." As argued in the South African context, having a general quantum exemption ensures that sporadic trading is not taxed as doing so might cause an unnecessary administration burden in terms of keeping the books of accounts and submission of the tax returns. The benefits are argued to be minimal. The presence of a quantum general exemption ensures that the focus is only on the large-scale traders.

4.3.4 MECHANICS REGARDING TAXING TRADING INCOME

Having established that some form of normal tax consequences may be inevitable for trading PBOs, it became apparent that the legislature had to devise the taxing mechanics. This revolved around the determination of the deductions and allowances incurred in the production of the trading income and the applicable tax rate. The Zimbabwean legislation simply amended the definition of a company or trust to include any charitable organisation to the extent that its trading receipts and accruals are not exempted. This implied that if a trading PBO were to be subject to taxation, it would be taxed in the same way as a company or trust. This seems inadequate or vague in light of the fact that PBOs, for example, in some cases have capital assets that are dual purpose assets and change in use assets. The determination of the allowable capital allowance ought to have been accounted for as per the South African Act.

¹⁸³ Section 10(1) (cN) (ii) (dd) of the South African Act.

¹⁸⁴ Section 14 read with the Third Schedule to the Zimbabwe Act, paragraph 2(e).

4.3.5 CGT TREATMENT

Whilst both South Africa and Zimbabwe intend to tax taxable capital gains arising from the disposal of capital assets employed in trading activities, South Africa also provides for a certain level of “exemption.”¹⁸⁵ Firstly, any resultant taxable capital gain arising from capital assets used in the trading activities whose revenue receipts are specifically exempted, are disregarded. Secondly, if the capital asset is employed substantially the whole of which is for non-trading, it will be disregarded. Thirdly, it can be argued that the quantum based general exemption also extends to the determination of taxable capital gains. Thus, in the event that the total taxable income, inclusive of the non-exempt taxable capital gain, falls within the thresholds, it will be fully exempt from normal tax consequences. In terms of the Zimbabwean legislation, in the event of a trading charitable organisation, any resultant capital gain is fully taxable.¹⁸⁶ It is submitted that the Zimbabwean legislation is too strict and fails to acknowledge that some level of exemption is warranted.

4.4 CONCLUSIONS

The exercise of identifying the similarities and parallels enables us to perform a comparative analysis. It also brings out the strengths and weaknesses of the legislation in each jurisdiction. The next step would be to exploit the weaknesses to ensure that the institution of PBOs is maintained while ensuring that they are not being abused leading to the erosion of the tax base.

¹⁸⁵ Paragraph 63A of the Eight Schedule to the South African Act.

¹⁸⁶ ZIMRA: Tax Obligations for Church or Religious Organisations, accessible on http://www.zimra.co.zw/index.php?option=com_content&view=article&id=2105:tax-obligations-for-church-or-religious-organisations&catid=21:taxmans-corner&Itemid=91 , accessed on 10 August 2017.

CHAPTER 5:

RECOMMENDATIONS AND CONCLUSIONS

5.1 INTRODUCTION

Highlighting the strengths and weaknesses is not enough without comparison to international best practise. Doing so will provide possible recommendations for amendments to ensure that tax objectives are met. Only the key issues will be discussed regarding the international best practice.

5.2 INTERNATIONAL PRACTICE

5.2.1 NEW ZEALAND MODEL

In New Zealand, the Charities Act of 2005 regulates the taxation of charitable organisations. Generally there is an “exemption from income tax on non-business income.¹⁸⁷ It includes interest and dividends and rental income not earned from carrying on a business.”¹⁸⁸ Income generated from business activities is exempt to the extent that it is used for charitable purposes in New Zealand.¹⁸⁹ It follows that if the trading income is applied outside New Zealand, normal tax consequences will arise. However, if anyone connected to a charitable organisation receives a benefit from the income other than by way of reasonable remuneration, or can influence any benefit that might be derived from the institution or is involved in a commercial transaction with the institution but on rates greater than market rates, the business income exemption does not apply even if the income generated is used in New Zealand for charitable purposes.¹⁹⁰ It stands to reason that the legislature intended that no other person should directly or indirectly benefit from the charitable organisation other than by way of reasonable remuneration. This avoids possible exploitation of such organisations and in turn prevents the possible erosion of the tax base.

¹⁸⁷ Similar to the South African Act provision (section 10(1) (cN) (i)) and the Zimbabwean Act provision (section 14 read with the third schedule, para 2(e)(i) relating to the exemption in respect of non-trading income.

¹⁸⁸ Inland Revenue, Tax information for charities registered under the Charities Act 2005, Sep 2014, 3.

¹⁸⁹ Inland Revenue (note 188 above, 3).

¹⁹⁰ *ibid* 4.

5.2.2 UNITED KINGDOM MODEL

Charitable organisations must be established for charitable purposes only.¹⁹¹ Such charitable purposes, which must be for public benefit are listed in the Act and includes education advancement, poverty prevention or relief and environmental protection or improvement.¹⁹² Receipts and accruals are exempted if they are applied for charitable purposes only. More importantly after registration as a charity, application for recognition as one should be made to the tax authority so as to enjoy the exemption fruits.

The basic rule is that “profits a charity makes from trading activities are taxable, but this is subject to some exemptions.”¹⁹³ Thus, “charities are allowed to undertake commercial activities provided these activities are either primary purpose trading, undertaken mainly by its beneficiaries or low-risk/small-scale non-primary purpose trading”, for it to enjoy the exemption.¹⁹⁴ Firstly, primary purpose trading contributes directly to the objects of the charity.¹⁹⁵ It also includes complementary trading that “contributes indirectly to the successful furtherance” of the charity’s purposes, for example, operating a bar in a theatre charity.¹⁹⁶ In the event of a trade being dual purpose, partly for the primary purpose and partly otherwise, only the earlier will be exempt.¹⁹⁷ Secondly if the trading, being non-primary purpose trading, is carried out mainly by the beneficiaries of the charitable institution, it is exempt.¹⁹⁸ By extension, if both beneficiaries and other parties partly but not mainly engage in the trading, only the beneficiaries’ proportionate share is exempt.¹⁹⁹ Thirdly, small scale trading is a

¹⁹¹ Section 1(a) Charities Act 2006 (UK).

¹⁹² Section 2 Charities Act 2006 (UK).

¹⁹³ Better targeting of not-for-profit tax concessions, Consultation paper, May 2011, 19 available at https://www.google.co.za/search?source=hp&ei=jU6IWvDBoubOgSqpZXAAg&q=221_Consultation_Paper_Better_Targeting_of_Tax_Concessions&oq=221_Consultation_Paper_Better_Targeting_of_Tax_Concessions&gs_l=psy-ab.3...1482.1482.0.2257.2.1.0.0.0.477.477.4-1.1.0....0...1c.1.64.psy-ab..1.0.0.0...0.QNtxZzhKECw, accessed on 7 March 2017.

¹⁹⁴ Better targeting of not-for-profit tax concessions (note 193 above, 20) (similar to South African Act exemption provisions: section 10(1) (cN) (ii) (aa), (bb), (cc), (dd)).

¹⁹⁵ Similar to the South African Act provision (section 10(1) (cN) (ii) (aa)) relating to integral and directly related trading income exemption.

¹⁹⁶ Better targeting of not-for-profit tax concessions (note 193 above, 20).

¹⁹⁷ Section 478 of the Corporations Tax Act 2010 (UK) and subsection 524 of the Income Tax Act 2007 (UK).

¹⁹⁸ Similar to the South African Act provision (section 10(1) (cN) (ii) (bb)) relating to the exemption in respect of occasional trading income generated with voluntary assistance.

¹⁹⁹ Subsection 479(3) of the Corporations Tax Act 2010 (UK) and subsection 525(3) of the Income Tax Act 2007 (UK).

quantum based exemption which is like a general provision meant to capture all other trading that is not specifically exempted as outlined above.²⁰⁰ This exemption applies where the profits so derived are applied for charitable purposes.²⁰¹ Such small scale trading should not pose a significant risk to the assets of the institution in the event of trading income being insufficient to cover the related costs and if otherwise, trading should be carried out by a trading subsidiary. The trading income will, however, not be exempt but a donations deduction might be available to the subsidiary.

5.2.3 CANADIAN MODEL

Canadian income tax law recognises two categories of charity, charitable organisations and charitable foundations.²⁰² The former is an organisation where all the resources are devoted to the charitable activities that the organisation will engage in by itself.²⁰³ The latter are “corporations or trusts constituted and operated exclusively for charitable purposes that are not charitable organisations.”²⁰⁴ Trading is not permissible for charitable foundations.²⁰⁵ In the event of a registered charity engaging in a business that is not a “related business”, it will be liable for income tax. Related business is one that is substantially carried on by volunteers.²⁰⁶ Such related business activities are of a supplementary nature to charitable programs or sales of by-products or use of excess capacity or sales of promotional items of the charity and its objects. Related business is tax exempt.

5.2.4 UNITED STATES OF AMERICA MODEL

In the USA, “unrelated trade or business” may attract income tax. A business activity is unrelated trade or business if it is “not substantially related to the exercise or performance by such organisation of its charitable, educational, or other purpose or function constituting the basis for its exemption....”²⁰⁷ This interpretation is considered

²⁰⁰ Similar to the South African Act provision (section 10(1) (cN) (ii) (dd)) relating to the basic exemption in respect of small scale trading.

²⁰¹ Better targeting of not-for-profit tax concessions (note 193 above, 21).

²⁰² Subsection 149.1(1) of the Income Tax Act (Canada)

²⁰³ Subsection 149.1(1) (note 202 above).

²⁰⁴ Better targeting of not-for-profit tax concessions (note 193 above, 22).

²⁰⁵ Subsection 149.1(1) (note 202 above).

²⁰⁶ *ibid* (note 202 above), Similar to the South African Act provision (section 10(1) (cN) (ii) (bb)) relating to the exemption in respect of occasional trading income generated with voluntary assistance.

²⁰⁷ Section 513 of the Internal Revenue Code (USA).

strict as unlike the Canadian model, use of excess capacity is considered to be unrelated trade which warrants tax.²⁰⁸

On the other hand, the USA federal “tax law exempts profits derived from a business” which is “substantially related” to the PBO.²⁰⁹ The dominant purpose of the PBO should not be profit making, lest it loses the exemption status. To this effect Salamon states that:

“Substantially related in this context means that the conduct of the business activity must have a significant causal relationship to the achievement of a tax-exempt purpose. Thus, for the conduct of a trade or business from which a particular amount of gross income is derived to be exempt from taxation, the production or distribution of the goods or the performance of the services from which the gross income is derived must contribute importantly to the accomplishment of the organisations' exempt purposes.”²¹⁰

5.2.5 THE REPUBLIC OF IRELAND MODEL

In Ireland, charitable organisations undertake charitable purposes such as the relief of poverty, education advancement and social welfare. To be awarded the income tax exemption, such charitable organisations should apply to the tax authority.²¹¹ However, the tax exemption “will not be granted to entities with a mix of charitable and non-charitable purposes.”²¹² Trading by a charitable organisation is exempt if it is either “exercised in the course of the actual carrying out of a primary purpose of the charity” or where the trading is “mainly carried on by the beneficiaries of the charity.”²¹³ In both circumstances, the profits must be applied solely for the furtherance of the charity’s primary purpose. Ancillary trading activities engaged in while carrying out its primary purpose may also be exempt. In all other cases, income tax consequences are inevitable.

²⁰⁸ Better targeting of not-for-profit tax concessions (note 193 above, 21).

²⁰⁹ Publication 598, Tax on Unrelated Business Income of Exempt Organizations (USA), Similar to the South African Act provision (section 10(1) (cN) (ii) (aa)) relating to integral and directly related trading income exemption.

²¹⁰ LM Salamon ‘The International Guide to Non Profit Law’, 1997, par. 25.7.

²¹¹ Charities Act 2005 (Ireland).

²¹² Better targeting of not-for-profit tax concessions (note 193 above, 26).

²¹³ *ibid* 26, Similar to the South African Act provision (section 10(1) (cN) (ii) (bb)) relating to the exemption in respect of occasional trading income generated with voluntary assistance.

5.3 RECOMMEDATIONS

Having looked at some of the international best practises regarding the trading tax concessions, it will be necessary to consider the possible recommendations given the identified shortfalls.

5.3.1 SOUTH AFRICAN PROVISIONS, SHORTFALLS AND THE RECOMMENDATIONS

As outlined in earlier chapters, the South African Act has provided for partial taxation of PBOs carrying on PBAs. This critical analysis showed that non-trade income is fully exempt. In addition, there are four categories of trading income exemption, three specific and one general. In a nutshell, the specific exemptions include exemption of integral and directly related trading, occasional trading and a provision that allows the Minister to approve any activity that satisfies the stated strict requirements. The general one is quantum based and is meant to capture any other trading income that is not specifically exempted. The UK has also provided for different levels of possible exemption, including the primary purpose trading exemption and the quantum based one but does not include the Ministerial approval proviso. It then appears that the South African model is a refined one with minor drawbacks.

The legislature failed to provide statutory definitions to some of the terms used in the exemption provisions. As highlighted above, these include “substantially the whole”, “unfair competition”. Providing statutory definitions will reduce the possible undue interpretative burden.²¹⁴ In the absence of such statutory definitions, reliance can be placed on case law.²¹⁵ In *Endumeni*, the interpretation of documents was one of the primary questions before the court.²¹⁶ The interpretation of the proviso relating to a claim on adjusted contribution was central in this case, considering its validity and meaning in light of the given circumstances.²¹⁷ By definition, a proviso serves to qualify

²¹⁴ Discussed in detail in Chapter 3.

²¹⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (note 18 above)

²¹⁶ *ibid* (note 18 above)

²¹⁷ *ibid*, para 9, As per the summary of the case, the main issues related to the recoverability of the contribution paid by the Municipality in terms of the proviso to regulation 1(xxi)(h) of the regulations governing the Natal Joint Municipal Pension fund and whether the proviso was valid in terms of s 12(1) of the Pension Funds Act No. 24 of 1956.

and limit the scope of the definition to which it is appended.²¹⁸ However, in this case, it was submitted that the proviso was in fact “an independent provision dealing with the power of the committee of the Superannuation Fund to direct a local authority to pay an adjusted contribution...” Be that as it may, the court ruled that the location of a proviso does not affect its construction.²¹⁹

In reaching its conclusion, the court reiterated the present state of the law as follows:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”²²⁰

To unbundle the above, it is submitted that one should consider the context and the language together, with neither predominating over the other.²²¹ The court dismissed the view of placing reliance on the “intention of the legislature or the draftsman” or the “intention of the contracting parties,” as these expressions are misnomers.²²² To this end, the judge held that, “if interpretation is, as all agree it is, an exercise in ascertaining the meaning of the words used in the statute and is objective in form, it is unrelated to whatever intention those responsible for the words may have had at the time they selected them.”²²³ In addition, the general rule of simply attributing the ordinary grammatical meaning unless such leads to absurdity was set aside as in the

²¹⁸ *Mphosi v Central Board for Co-operative Insurance Limited* 1974 (4) SA 633 (A) at 645C-F.

²¹⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (note 18 above, 27)

²²⁰ *ibid* 18, *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) paras 16 – 19.

²²¹ *Jaga v Dönges NO & another, Bhana v Dönges NO & another* 1950 (4) SA 653 (A) at 662G-663A.

²²² *Natal Joint Municipal Pension Fund v Endumeni Municipality* (note 18 above, 20)

²²³ *ibid* 23.

court's view, the term "ordinary grammatical" meaning needed interpretation in its own right as words do not have fixed and definite meanings.²²⁴

The proper approach to be followed when interpreting documents is to, as a starting point, read the words used in the context of the document as a whole and in the light of all relevant circumstances.²²⁵ This approach is deemed to be more transparent and conducive to greater clarity.²²⁶

In its recommendations to the Minister of Finance, the Davis Tax Committee, suggested a review of the Ninth Schedule to the South African Act.²²⁷ It was submitted that, "although the Ninth schedule to the Act represents a "heroic" attempt to devise a comprehensive list of PBAs, the list remains fraught with a number of obscurities and anomalies both by way of inclusion and omission.²²⁸ For example, the views expressed suggested that there are number of valuable deserving PBAs that ought to be recognised such as the advancement of constitutionalism.²²⁹ The review process, as submitted, should "consider problems or interpretation which have been experienced by the TEU" and the PBOs concerned.²³⁰ Regarding annual compliance of PBOs, in the spirit of the *de minimis* rule it was submitted that in the case of small "low-risk" PBOs where there is a negligible tax risk, a simplified declaration should be devised to help such organisations in retaining its PBO status given their administrative capabilities or lack thereof.²³¹ The basis of this argument is that there are a number of entities whose operations are "so small to comply with the requirements pertaining to both the registration and annual compliance requirements of SARS" but whose activities are public beneficial in nature and should thus benefit from the tax concessions available to PBOs.²³² Other recommendations of the committee relate to the alignment of Part I and Part II of the Ninth Schedule. However, Part II and its implications are outside the scope of this dissertation.

²²⁴ *ibid* 17.

²²⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (note 18 above, 24)

²²⁶ *ibid* 24.

²²⁷ The Davis Tax Committee 'Report on the public benefit organisation and the tax system', March 2018

²²⁸ *ibid* 5.

²²⁹ The Davis Tax Committee (note 216 above,122)

²³⁰ *ibid* 22-24.

²³¹ *ibid* 24

²³² *ibid* 24

5.3.2 ZIMBABWEAN PROVISIONS, SHORTFALLS AND THE RECOMMENDATIONS

In a nutshell, the Zimbabwean provisions exempt all non-trade income of charitable organisations. This is the general norm across the world. Trading income is only exempt to the extent that it is carried out by a company solely or principally owned by the charitable institution and a licence is issued by the Minister. By extension, all other trading income becomes subject to normal tax.

It can be argued that the Zimbabwean provisions left more to be desired regarding the trading provisions. For instance, as was considered by its South African counterpart, defining the eligibility of charitable organisations is crucial. To this end, attaching a definition to what constitutes a “charitable” organisation is paramount as it will clearly define eligibility criteria thus ensuring uniform treatment of such organisations. In addition, defining the “charitable activities” is key as it erases the interpretative burden that would otherwise be placed on concerned parties. The South African Act has defined these key terms as well as the UK legislation.

Having considered the eligibility framework, such charitable organisations embarking on charitable activities need to be encouraged to self-sustain within the boundaries of the law. Taxing trading income should be flexible rather than rigid. The Zimbabwean Act, instead of having one exemption provision, should be amended to include more similar to the South African and UK Act. This will ensure that self-funding is encouraged and only “excessive trading” can be taxed. Small scale trading, if not specifically exempted, will cause undue administrative burden on the concerned parties and should thus be exempted as per the foregoing Acts. In addition, the legislature should consider the possible tax effects in the event of the trading profits, regardless of the quantum and not specifically exempted, being applied for charitable purposes. It stands to reason that if the profits so derived are applied for charitable purposes, no tax consequences should be attached thereto as per the Australian Act.²³³ This position realises that since such activities carried out by the charitable organisations in the furtherance of their charitable purposes are the ones that the State

²³³ Section 23(e) of the Income Tax Assessment Act of 1936 (Australia).

would otherwise be required to undertake at its own cost, no real “erosion” of the tax base is necessarily taking place. New Zealand recognises this position and, to strengthen it, only exempts the trading income if applied within its boundaries. In the Zimbabwean context, this might improve the lives of the poor and impoverished. Furthermore, as no individual person will be benefitting from the profits so derived other than by way of reasonable remuneration, no “unfair competition” would arguably exist.

Regarding capital receipts, the Zimbabwean provisions should be revisited to exempt any resultant taxable capital gain that might arise from the disposal of the capital assets whose revenue receipts were exempted based on the same reasons thereof.

In the event of some trading income being considered taxable, it is critical that the legislature provides some guidance regarding the taxing provisions. It is my view that merely stating that charitable organisations’ taxable trading income will be taxed in the same way as a company or trust would is vague. To curb this, the South African provisions and explanatory memoranda (IN 24 and IN 44) can be adapted as they provides some guidance regarding matters such as the determination of the allowable deductions and allowances.²³⁴

5.4 RECOURSE ON NON-APPROVAL OF PBO STATUS

In the event of a non-approval of an application for recognition as a PBO in terms of section 30(3) of the South African Act, the aggrieved party can approach the courts.²³⁵ In ITC1872, an *inter vivos* trust, duly registered, had applied to the Commissioner for such recognition as per the requirements of the South African Act.²³⁶ Based on the Commissioner’s submission, the trust was viewed “to be a genuine public benefit organisation with suspicion.”²³⁷ Consequently, the matter before the court was whether the statutory criteria for recognition as a PBO had been met or otherwise, the fulcrum

²³⁴ IN 24 (note 32 above) and IN 44 (note 74 above).

²³⁵ Chapter 9 of the Tax Administration Act No.28 of 2011 (as amended) provides for the dispute resolution.

²³⁶ ITC 1872 (note 10 above).

²³⁷ PWC, Synopsis tax today, August 2014, 2, available at <https://www.pwc.co.za/en/assets/pdf/synopsis-august-2014.pdf>, accessed on 10 September 2018

being whether the sole or main objective of the trust was the carrying on of a PBA(s) as listed in the Ninth Schedule.

The Commissioner contended that “poverty relief” as stipulated in the Act, was to be narrowly interpreted and suggested “assisting persons who were in dire straits to survive.”²³⁸ The concept of “widely accessible” was also questioned by the Commissioner in light of the trust’s activities. In delivering its’ judgment, the court acknowledged that an application for approval as a PBO should be strictly scrutinised.²³⁹ However, such does not suggest a narrower interpretation. It was submitted that the ambit of section 30 of the South African Act was meant “to encourage activities that will benefit the general public.”²⁴⁰ This translated to having the net being cast “fairly wide to encourage and promote the carrying on of all and any *bona fide*” PBAs provided the organisation seeking approval as a PBO meet the stated criteria in terms of the Act.²⁴¹ The court concluded that “poverty relief” as listed under the heading “welfare and humanitarian” goes beyond assisting people in dire circumstances.²⁴² Regarding the notion of widely accessible, the trust argued that its activities were intended to benefit the general public and that it was purely incidental that established business, viewed as exclusive by the Commissioner, would benefit from its proposed PBAs.²⁴³ The court also found that no other person was to benefit, otherwise than by way of reasonable remuneration and ruled that the trust was to be duly recognised as a PBO as contemplated in section 30 of the South African Act.²⁴⁴

The onus of proof in matters where the decision of the Commissioner is challenged rests with the taxpayer as there is a statutory presumption in favour of the Commissioner’s decision.²⁴⁵ The taxpayer has to prove that upon a preponderance of probabilities, the amount in question is not taxable.²⁴⁶

²³⁸ para 1(f) of Part I of the Ninth Schedule to the South African Act, *ITC 1872 (2014) 76 SATC 225, 227.*

²³⁹ *ITC 1872* (note 10 above, 228(v))

²⁴⁰ *ibid* 228(v)

²⁴¹ *ITC 1872* (note 10 above, 228(v)), Section 30 of the South African Act read with the Ninth Schedule.

²⁴² *ibid* 228(vii).

²⁴³ *ibid* 234.

²⁴⁴ *ibid* 228 (viii)

²⁴⁵ Section 102 of the Tax Administration Act 28 of 2011 under the heading ‘Burden of Proof’, *CIR V Goodrick* 12 SATC 279.

²⁴⁶ *CIR V Goodrick* 12 SATC 279, 296.

It is worth noting that even though by nature the tax court's decisions has no legal force outside the particular case, it can be applied as a basis of interpretation of statutory criteria relating to approval of tax exemption status.²⁴⁷

5.5 CONCLUSION

Following the outcry across the world regarding the taxation law governing PBOs or similar organisations, it became apparent that introspection was warranted. Over the years there were numerous amendments with particular focus on trading activities. Trading was viewed by many scholars as a way of self-sustenance of such institutions in the light of diminishing donor funding. It is considered strategic to sustain such organisations as they carry out public beneficial activities that would otherwise fall on the State. However, the need to safeguard such institutions should be matched with the need to avoid tax leakage. It should be noted that the tax law governing the trading provisions of PBOs should be carefully structured to allow or exempt certain trading activities and tax the remainder so as to avoid unfair competition with TPEs. Although a lot has been done by the legislative authorities in this regard, much is still desired and as such possible amendments would be welcome, especially in the Zimbabwean context.

Globally, religious organisations are being interrogated. This is because religious leaders have become richer by the day with many owning mansions, private jets and numerous businesses. One then questions the appropriateness of the continued exemption of such organisations in the present day based on the premise that they no longer serve the public. In both South Africa and Zimbabwe, the legislature has made it clear that the essence of charitable organisations is hinged on public benefit and not exploitation by the founders, fiduciaries or its employees.²⁴⁸ It is of paramount importance that such "alleged" exploitation is minimised if not eliminated. Presently in Africa, men and women of the cloth have become wealthier by the day, inter alia, through the selling of religious items and renting out of property owned by the churches and fees from schools, hotels and hospitals so owned. It is then critical to clearly define what is considered "permissible" trading. For example, the selling of church wear can

²⁴⁷ PWC ,Synopsis tax today (note 237 above).

²⁴⁸ Section 30 (3) (d) of the South African Act and section 26(1) of the Companies Act (Zimbabwe).

be argued to be religious in nature and incidental to the advancement of religion as a charitable purpose. Owning schools can also be argued to be in the advancement of education. However, it is my view that the founding document of the PBOs should clearly state the object(s) of the institution and any amendments thereof should be closely monitored and approved by the responsible authority. The tax authority should pay attention to such amendments in order to ensure that the tax base is not compromised. To demonstrate the difficulty in combating the “possible mischief” by religious organisations, most churches for example provide items such as anointing oil, spiritual books allegedly for free but congregants are encouraged to then make a donation towards the church. It is critical to note that as long as a minimum amount is stated, such activities can be argued to be trading activities as an equal and opposite return is received by the trading entity.

In the spirit of ensuring that double taxation is avoided, as intended by both the South African and Zimbabwean Acts, due care should be exercised in this matter. I am of the view that should normal tax be “avoided” by trading charitable institutions, the legislature should seriously consider the effectiveness of the other taxes such as pay as you earn (PAYE), value added tax (VAT) and withholding tax (WHT) so as to broaden their scope in a bid to avoid tax-leakage. In respect of PAYE, this will be necessary in circumstances where founders and members are benefiting otherwise than considered reasonable remuneration. For example, should the church own a private jet which will be used exclusively by the church leader, a commensurate fringe benefit should accrue to him or her and some form of tax will be levied thereto (PAYE). Although this is the current position, its effectiveness should be explored given that in most cases such benefits are not taxed and as such the legislature need to consider lifestyle audits or its equivalent as a measure to ensure maximum tax collection. In addition, the tax authorities should investigate as to whom the rightful owner of such assets will be. This would also possibly affect CGT. In addition, where taxable sales or services are made, the appropriate VAT should be levied and paid over to the tax authority. Furthermore, WHT should be withheld and paid over where foreign nationals such as foreign pastors are paid for services rendered in the Republic.

Tax reviews pertaining to charitable organisations are most likely to be met with resistance but the objectives of taxation should be adhered to nonetheless. Expanding

on the church example above, in the absence of formalisation, such as an employment contract, it is difficult to determine the level of benefits accruing to the employees. This is even made difficult by situations where foodstuffs are collected for the pastors on a monthly basis without being recorded. Birthday collections are seldom recorded as well. Although such benefits will be exempt from normal tax in the hands of the PBO as it is non-trade income, PAYE should be accounted for in the hands of the beneficiary. “Touch not the anointed ones” has been one of the biggest deterring factors in pursuit of tax equity but the legislature should not be discouraged given that even Jesus paid to Ceaser what belonged to Ceaser.²⁴⁹

Although there is general concern over the fact that trading activities by charitable organisations might not be recorded, tax has always been based on the honesty of the taxpayer given the available information which can be corroborated by the tax authority. In extreme cases, the legislature should conduct lifestyle audits in a bid to ensure the protection of the tax base whilst balancing it with the need to continue offering support to worthwhile PBOs.

As mentioned above, whilst it is commendable that the legislature has tried to “combat” trading activities of charitable organisations, more still needs to be done. Some form of taxation should be attached thereto, regardless of the form, in order to protect and grow the tax base, taking into account its effectiveness. This will be beneficial for both the South African and the Zimbabwean economies. This exploration can be the subject of future research.

²⁴⁹ Psalm 105:15, 1 Chronicles 16:22.

REFERENCES

TABLE OF CASES

Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School 2008 (5) SA 1 (SCA)
CIR v Burgess 1993 (4) SA 161 (AD); 55 SATC
CIR v Goodrick 12 SATC 279
CIR v Polonsky (1942) 12 SATC 11
CSARS v Capstone 556 (Pty) Ltd (20844/2014) [2016] ZASCA 2 (9 February 2016).
CSARS v Marshall NO and Others (816/2015) [2016] ZASCA 158 (3 October 2016)
Estate G v COT 1964 (2) SA 701 (SR), 26 SATC 168
ITC 368 (1936) 9 SATC 211
ITC 1476 (1989) 52 SATC 141
ITC 1565, 56 SATC 18
ITC 1872 (2014) 76 SATC 225
Jaga v Dönges NO & another, Bhana v Dönges NO & another 1950 (4) SA 653 (A)
Mphosi v Central Board for Co-operative Insurance Limited 1974 (4) SA 633 (A)
Natal Estates Ltd v SIR 1975(4) SA 177 (A); 37 SATC 193
Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA)
Platt v CIR 1922 AD 42
Port Elizabeth Electric Tramway Company Ltd v CIR 1936 CPD 241; 8 SATC 13.
Smith v Anderson (1880) 15 Ch D 247
Stephan v CIR 1919 WLD 1; 32 SATC 54

TABLE OF STATUTES

Companies Act No. 71 of 2008

S1

Income Tax Act No. 58 of 1962 as amended

S1

S10

S11

S20

S26A

S30

S65

Eight Schedule to the South African Act

Fourth Schedule to the South African Act, Part 1 definitions: provisional taxpayer

Paragraph 63A of the Eight Schedule

Non-Profit Organisations Act No. 71 of 1997

S1(x)

Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2017: section 3(1), Schedule 1 (4(a))

Tax Administration Act No. 28 of 2011

S102

Chapter 9

FOREIGN LAW

Companies Act (Chapter 24:03) (Zimbabwe)

S1

S26

Capital Gains Tax Act (Chapter 23:01) (Zimbabwe)

S10

Income Tax Act (Chapter 23:06) as amended by the Finance Act No. 8 of 2015 (Zimbabwe)

S1

S14

S15

S37

Third Schedule, paragraph 2(e)

Finance Act (Chapter 23:04) (Zimbabwe)

S14(2c)

S38

Charities Act of 2005 (Ireland)

Charities Act of 2005 (New Zealand)

Charities Act 2006(UK)

S1

S2

Charitable Uses Act of 1601

Corporations Tax Act 2010 (UK)

S478

Subsection 479(3)

Income Tax Act (Canada)

S149.1

Income Tax Act 2007 (UK).

Subsection 524

Subsection 525(3)

Income Tax Assessment Act of 1936 (Australia).

S23(e)

Publication 598, Tax on Unrelated Business Income of Exempt Organizations (USA)

Section 513 of the Internal Revenue Code (USA).

BOOKS

Stein, ML, Tax for Public benefit organisations: LexisNexis (2015).

Stiglingh, M...et al., *SILKE: South African Income Tax*: LexisNexis (2017). Vol 1.

The Holy Bible, Psalm 105:15, 1 Chronicles 16:22.

JOURNAL ARTICLES AND WEBSITES.

Brewis, T 'A view of the Income Tax benefits for non-profit organisations in South Africa' (2006).

Bronstein, K 'The God business gets away with being tax free' USA: BRM (2009).

Chaurura, O 'Taxing churches: Pros and Cons' available at www.newsday.co.zw/2015/08/01/taxing-churches-pros-and-cons/ ,accessed on 7 Mar 2017.

Daya, L 'Dealing with the disposal by Public Benefit Organisations of capital assets,' available at <http://www.withoutprejudice.co.za/search?query=daya&page=2> , accessed on 7 March 2017.

Edward Nathan Sonnenbergs Inc., 'Exempt income 1457, The current rules governing public benefit organisations' (November 2006), Issue 87 at 2 available at https://www.saica.co.za/integritax/2006/1457_The_current_rules_governing_public_benefit_organisations.htm, accessed on 8 March 2017.

Gastrow, SA...et al., 'Advancing philanthropy in South Africa' 2 ed. (2009) at 39.

Gberegbe, FB, 'Tax Administration in Nigeria - Concepts and Practice. Lagos' Fredsbary Printers and Publishers (2007).

Gomes, GM...et al., 'Commercial Nonprofits, Untaxed Entrepreneurialism, and "Unfair Competition" Journal of Small Business Management', April 1988.

Guvamombe, I 'Gosprenurship, the new art of making money' Herald 13 July 2012, available at <https://www.herald.co.zw/gosprenurship-the-new-art-of-making-money/>, accessed on 7 March 2017.

Kadirire, H...et al., 'Churches say 'no' to taxes', available at <http://www.dailynews.co.za/articles/2013/11/15/churches-say-no-to-taxes> , accessed on 7 Mar 2017.

Lovells, H 'PBOs, NPOs and NPCs – Lexology.' available at <https://www.lexology.com/library/detail.aspx?g=0fc85774-b458-4da1-813e-a181de4b082a> , accessed on 7 March 2017.

Maria S.....et al. 'Taxation', available at <https://www.britannica.com/topic/taxation> , accessed on 16 September 2018

Moore, D...et al., 'A Comparative Overview of Public Benefit Status in Europe: The international journal of not-for-profit law' (2008) 11(1).

Nyamadi, N 'Taxing the chalice: Is it fair to tax churches in Zim?' available at <http://www.financialgazette.co.zw/taxing-the-chalice-is-it-fair-to-tax-churches-in-zim/> , accessed on 7 Mar 2017.

Nyanin, G (DLA Cliffe Dekker Hofmeyr) 'Public benefit organisations: the tax treatment of income derived from trading activities.' available at <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2015/tax/downloads/Tax-Alert-29-May-2015.pdf>, accessed on 7 March 2017.

Opuene, F 'Nigeria Personal Income Tax, Nigeria' Lagos: Ano Publishers (2006)

Pretorius, H 'The tax treatment of Public benefit organisations' 2012, available at <http://www.thesait.org.za/news/97021/The-Tax-Treatment-Of-Public-Benefit-Organisations.htm>, accessed on 8 March 2017

PWC, Synopsis, 'Public benefit organisations' (July 2006), available at <https://www.pwc.co.za/en/assets/pdf/pwc-synopsis-july06.pdf>, accessed on 7 March 2017.

PWC ,Synopsis tax today, August 2014, available at <https://www.pwc.co.za/en/assets/pdf/synopsis-august-2014.pdf>, accessed on 10 September 2018

Salamon, LM 'The International Guide to Non Profit Law' Johns Hopkins. University in association with John Wiley Inc., par. 25.7 (1997).

Steenkamp, L 'A Note on Recent Income Tax Developments Impacting Charitable Organisations in South Africa' Mediterranean Journal of Social Sciences, MCSER Publishing, Rome-Italy Vol 5 No. 20 September 2014, available on <http://www.mcser.org/journal/index.php/mjss/article/viewFile/3781/3706> , accessed on 14 August 2017.

The Herald (Zimbabwe), 'Tax obligations for church or religious organisations', available at <https://www.pressreader.com/zimbabwe/the-herald-zimbabwe/20151224/2819302469452> , accessed on 7 March 2017.

White (2010).

ZIMRA: 'Tax Obligations for Church or Religious Organisations,' available at http://www.zimra.co.zw/index.php?option=com_content&view=article&id=2105:tax-obligations-for-church-or-religious-organisations&catid=21:taxmans-corner&Itemid=91 , accessed on 10 August 2017.

REPORTS/ REVIEWS

Better targeting of not-for-profit tax concessions, Consultation paper, May 2011, 19 available at https://www.google.co.za/search?source=hp&ei=jU6IWvDBoub0gSqpZXAAg&q=221_Consultation_Paper_Better_Targeting_of_Tax_Concessions&oq=221_Consultation_Paper_Better_Targeting_of_Tax_Concessions&gs_l=psy-ab.3...1482.1482.0.2257.2.1.0.0.0.477.477.4-1.1.0....0...1c.1.64.psy-ab..1.0.0.0...0.QNtxZzhKECw , accessed on 7 March 2017.

Binding General Ruling (Income Tax): No. 20 'Interpretation of the term "substantially the whole"' (2016), issue 2, 20 January 2016.

Explanatory Memorandum on the Revenue Laws Amendment Bill (2006).

Katz, M...et al., 'Ninth Interim Report for the Commission of Inquiry into certain aspects of the Tax Structure of South Africa, Fiscal Issues Affecting Non-Profit Organisations' (1999).

SARS, *Interpretation note No. 24 'Income tax: public benefit organisations: trading rules – partial taxation of trading receipts'* (2018), Issue 4, 12 February 2018.

SARS, *Interpretation note No. 33 "Assessed Losses: Companies: The 'Trade' and 'Income from Trade' Requirements."* (2017), issue 4, 5 May 2017.

SARS, *Interpretation note No. 44 'Public benefit organisations: capital gains tax'* (2014), Issue 2, 4 February 2014.

SARS, 'Tax Exemption Guide for Public Benefit Organisations in South Africa' (2017), Issue 5.

Sifile, O...et al., 'A strategic analysis of revenue generated by churches, in relation to possible tax loss in Zimbabwe': Africa Development and Resources Research Institute Journal, Ghana: 2014, Vol. 7, No. 7(2), Pp. 37-51, at 3.

Submission to the Portfolio committee on Finance on the Revenue Laws Amendment Bill 2006 by the South African Council of Churches (16 October 2006).

The Davis Tax Committee 'Report on the public benefit organisation and the tax system', March 2018.

The 2015 mid-year fiscal policy review statement, presented to the parliament of Zimbabwe on 30 July 2015.

ZIMRA investigations presentation to the religious sector (unpublished).



19 September 2017

Mr Johannes Rice (212536335)
School of Law
Howard College Campus

Dear Mr Rice,

Protocol reference number: HSS/1686/017M

Project title: A critical analysis of the law that governs the taxation of the Public Benefit Organisations (PBOs): A case study of South African and Zimbabwe

Approval Notification – No Risk / Exempt Application

In response to your application received on 11 August 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Dr Shenuka Singh (Chair)

/ms

Cc Supervisors: Mr Christopher Schembri and Professor Shannon Bosch
Cc Acting Academic Leader Research: Professor Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

Dr Shenuka Singh (Chair)

Westville Campus, Govan Mbeki Building

Postal Address: Private Bag X54001, Durban 4000

Telephone: +27 (0) 31 260 3587/8350/4557 Facsimile: +27 (0) 31 260 4609 Email: ximbap@ukzn.ac.za / snymanm@ukzn.ac.za / mohunp@ukzn.ac.za

Website: www.ukzn.ac.za