



Nico Botha

# Fiduciary Matters

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## Fiduciary and the 2014 Budget Speech

**S**ign on a petrol station: "We collect taxes - national, provincial and local. We also sell petrol as a sideline."

One has to carefully read the 34 page Budget Speech delivered on 26 February 2014 by the Minister of Finance, Pravin Gordhan, if you are looking for any specific matters of a fiduciary nature.

### Public Benefit

**Organisations - not all non-profit organisations are automatically tax exempt**

Tucked away under the heading **Tax policy, savings and small business support** on page 25 is a paragraph that deserves attention:

*"The Income Tax Act currently requires philanthropic foundations to distribute 75 per cent of the money they generate within a year. This requirement is unduly restrictive and will be relaxed, while ensuring that accumulated capital is distributed to worthy causes within a reasonable period."*

The heading **2 Introduction of the Tax Exemption Guide for Public Benefit Organisations** in South Africa on the SARS web site contains the following paragraph that provides important context:

"Non-profit organisations play a significant role in society as they undertake a shared responsibility for the social and development needs of the country thereby relieving the financial burden, which otherwise falls on the State. Tax benefits are designed to assist non-profit organisations by augmenting their financial resources and providing them with an enabling environment in which to achieve their objectives".

The nature and extent of the involvement of the fiduciary industry in the creation and administration of charitable trusts, as they are commonly referred to, is well-known. It is necessary to point out that not all non-profit organisations are automatically tax exempt. These notes pertain to organisations that have been approved as a public benefit organisation (PBO) in terms of section 30 of the Income Tax Act and been approved for purposes of section 18A(1)(a) of the said Act.

Currently PBOs which provide funds to other PBOs and qualifying organisations are obliged to distribute or incur the obligation

to distribute during the following year of assessment, at least 75% of those funds received by them which represent tax deductible donations (section 18A).

The Commissioner may however, upon good cause shown and subject to such conditions as he or she may determine, either generally or in a particular instance, waive, defer or reduce the obligation to distribute any funds, having regard to the public interest and the purpose for which the relevant organisation wishes to accumulate those funds. It therefore amounts to the 75% rule versus the discretion of the Commissioner to waive, defer or reduce the rule.

By his own admission the Finance Minister stated that the aforementioned restriction is unduly restrictive and we absolutely agree with him.

The announcement does beg the question whether ensuring that accumulated capital is distributed to worthy causes within a reasonable period, will not in itself become unduly restrictive? In my personal view this needs to be taken up with Treasury.

Many new PBOs as well as existing ones face the challenge of building capacity in order to come to the rescue of their target beneficiaries. Consider a PBO that has as its main object providing a shelter for the homeless.

It will need land and improvements before it can take in those without a roof over their heads. This requires capital expenditure that cannot be distributed within a reasonable period, but enables PBOs to carry out their specific public benefit activities on an ongoing and sustainable manner.

**Tax Review Committee - it is expected that the taxation of trusts and conduit principles may still come under the spotlight**

On page 25 of the 2014 Budget Speech is another paragraph that should make us all sit up and take note. Reference is made to the appointment of Judge Dennis Davis in July 2013 to head up a Tax Review Committee with a broad brief to make recommendations for possible reforms.

Recognition is given to the Committee's first recommendations, and it is stated that during 2014 work will be undertaken on, amongst other things, estate duty.

Judge Davis is known for his understanding of estate planning techniques and estate duty. Whilst some have been in favour of the abolishment of estate duty for a long time, it is expected that the taxation of trusts and conduit principles may still come under the spotlight. Trusts are extremely useful for a wide variety of purposes,

but they are sometimes unfortunately also used for the wrong reasons. My advice is that you use the time to ensure that your trust is fully compliant with the requirements of the Trust Property Control Act and the Income Tax Act, that you do not manage your trust as your alter ego, and that joint decision making with your co-trustees is evident from resolutions and minutes in the trust minute book. Make sure that all is in order and if you need assistance, seek help from an accredited fiduciary practitioner of the Fiduciary Institute of Southern Africa.

In the meantime: drive carefully. We need every taxpayer we can get.

*This article was written by Nico Botha, FISA member and sole proprietor of Vaal Tax and Trust Services, director of companies and Fiduciary Practitioner of South Africa (FPSA®).*

*FISA is a non-profit organisation that represents practitioners in the fiduciary industry and sets high minimum standards to protect the public's interests. Activities of FISA members include but are not restricted to the drafting of wills, administration of trusts, beneficiary funds and estates, tax and financial advice and the management of client funds. FISA has over 700 individual members who collectively manage in excess of R250 billion. Membership is open to any professional who meets the membership criteria.*

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