

U.S. INTERNATIONAL GRANTMAKING

Country Information

South Africa

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I. Summary

A. Types of Organizations

The legal framework for not-for-profit, nongovernmental organizations (“NGOs”) in South Africa consists of four primary tiers.

At the first tier, statutory and common law recognize the following NGO legal forms:

- Voluntary associations

- Trusts; and
- Section 21 Companies limited by guarantee (sometimes called “associations incorporated not for gain”)

A second tier of legislation allows any of these organizational forms to apply for the status of “Non-Profit Organization.” Among other requirements, a Non-Profit Organization cannot distribute profits, and it must meet certain governance criteria.

A third legislative tier enables a Non-Profit Organization to apply for the status of “Public Benefit Organization.” Among other requirements, the organization's sole purpose must be to undertake one or more public benefit activities, carried out in a non-profit manner and with an altruistic or philanthropic intent. Public Benefit Organizations are restricted in their ability to engage in political activities but not in lobbying. They are entitled to a broad range of tax benefits, including income tax exemptions and exemptions from the donations tax.

Finally, a fourth legislative tier allows Public Benefit Organizations to apply for the right to receive tax-deductible donations.

Other not-for-profit legal forms, which are outside the scope of this Note due to their limited interaction with U.S. grantmakers, include trade unions, employers' organizations, cooperatives, political parties, and so-called Friendly Societies established for the benefit of their members.

B. Tax Laws

The Income Tax Act provides two major benefits to the not-for-profit sector: tax exemption, for organizations that qualify as Public Benefit Organizations; and donor deductibility, for contributions to those Public Benefit Organizations that carry out certain specified Public Benefit Activities (“Public Benefit Organizations with Donor-Deductible Status”). Public Benefit Organizations are also entitled to benefits with regard to donations tax, estate duty, transfer duty, and the skills development levy. Finally, certain organizations are eligible for VAT preferences.

South Africa and the United States have entered into a double taxation treaty.

II. Applicable Laws

- [Constitution of the Republic of South Africa](#), Act 108 of 1996 (as amended)
- [Companies Act](#) 61 of 1973 (as amended)
- [Non-Profit Organisations Act](#) 71 of 1997 (as amended) (“NPO Act”)
- [Trust Property Control Act](#) 57 of 1988 (“TPCA”)
- [Income Tax Act](#) 36 of 1996 (as amended) (“ITA”)
- [Value Added Tax Act](#) 89 of 1991 (“VATA”)

Other Material Consulted

- Tax Exemption Guide for Public Benefit Organisations in South Africa, [Tax Exemption Guide for Public Benefit Organisations in South Africa.](#)

III. Relevant Legal Forms

Voluntary Associations

The voluntary association is the most common legal form for non-profit organizations in South Africa. No office of registry exists for voluntary associations. Forming a voluntary association requires only that three or more people agree to achieve a common object, primarily other than making profits. The agreement may be oral or written, though it is customary for the agreement to take the form of a written constitution. Voluntary associations are a product of the common law and not regulated by statute. This can be confusing, because the common law is not easily accessible and sometimes conflicting. From the aspect of legal personality, voluntary associations may be classified as follows:

1. Corporate bodies under the common law, known as “*universitas*”; and
2. Bodies that remain unincorporated at common law, known as "non-corporate associations."

When deciding how to classify a voluntary association, a court will consider the organization's constitution as well as its nature, objects, and activities. An organization generally must meet three requirements in order to be a *universitas*:

1. it must be structured to continue as an entity notwithstanding a change in membership;
2. it must be able to hold property distinct from its members; and
3. no member can have any rights, based on membership, to the property of the association. If all of these requirements are met, the organization will be deemed a *universitas* with legal personality.

Because the voluntary association lacks a clearly defined legal structure, a U.S. grantmaker must review the founding document or constitution as a first step in deciding whether a proposed grantee may qualify as a 501(c)(3) equivalent.

Trusts

Trusts in South Africa are governed under the Trust Properties Control Act and common law. A trust can be established for private benefit or for a charitable purpose. In order to determine whether a trust qualifies as a charitable trust under South African law, a grantmaker must look to the trust deed.

A trust is created when property is transferred by a trust deed; the trust then manages the property for the benefit of others or for the achievement of a particular goal. The property

can be transferred by written agreement, testamentary writing, or court order. The person who administers the trust property is called a trustee [[TPCA §1](#)]. A court official, called a Master of the Supreme Court, has jurisdiction over a trust if the majority of the trust property is situated in his or her jurisdiction. [[TPCA § 3](#)] The Master holds the trust instruments, oversees the appointment of trustees, and polices the trustees' performance with respect to the trust property. [[TPCA § 4](#) ; [§§ 6-7](#); [§§ 16-20](#)]

A trust does not have separate legal personality, though it may enter into contracts in its own name if the trust deed so allows. All rights and responsibilities vest collectively in the Trustees.

Section 21 Companies

The South African Companies Act provides for an “association not for gain in terms of Section 21” [[Companies Act §21](#)]. Such an organization, commonly called a “Section 21 Company,” must have at least seven members, each of whom makes a guaranteed commitment in the event of the institution's financial failure (although such commitment may be purely nominal). The primary purpose of a Section 21 Company must be to promote religion, the arts, science, education, charity, recreation, any other cultural or social activity, or communal or group interests [[Companies Act §21\(1\)\(b\)](#)]. A Section 21 Company must register with the Registrar of Companies [[Companies Act §63\(1\)](#)]. The records of the Registrar are open to the public. Section 21 Companies have legal personality and therefore offer limited liability to their member and directors. They can enter into contracts and sue and be sued in their own name.

Branches of foreign non-profits in South Africa can be registered under Section 21A of the Companies Act.

IV. Public Benefit Status

Registered Non-Profit Organization

In 1997, South Africa adopted a Non-Profit Organisations Act. Registration under the NPO Act is voluntary, but only registered NPOs are eligible for tax benefits under the Income Tax Act.

To be eligible, an organization must meet all of the following criteria:

1. It is a trust, company, or other association of persons established for a “public purpose,” a term that is not further defined [[NPO Act §1\(1\)\(x\)\(a\)](#)];
2. It does not distribute income or property to members or officers except for “reasonable compensation for services rendered” [[NPO Act §1\(1\)\(x\)\(b\)](#)];
3. It is not “an organ of state” [[NPO Act §12\(1\)](#)]; and
4. It includes certain internal governance provisions in its constitution [[NPO Act §12\(2\)](#)].

An organization seeking NPO status must apply to the Directorate for Nonprofit Organisations. If the organization qualifies, the Directorate issues a certificate and registration number. To retain this status, the organization must submit narrative and financial reports to the Directorate annually.

Registered Public Benefit Organization

To qualify as a Public Benefit Organization (PBO), an organization must comply with all of the following requirements of Section 30 of the Income Tax Act:

1. It must be a Section 21 Company, a charitable trust, or a voluntary association, and it must have the status of a Nonprofit Organization under the NPO Act.
2. Its objectives must be to carry on one or more public benefit activities; it cannot pursue any other objectives.
3. The activities must be carried on in a not-for-profit manner and with altruistic or philanthropic intent. No activity can promote the economic self-interest of any fiduciary or employee, other than reasonable remuneration to employees or officers.
4. Finally, at least 85 percent of such activities, measured either by cost or by time, must benefit persons in South Africa. Under ITA §30(1)(b)(iii), out-of-country activities can be offset by out-of-country donations. Specifically, an organization can subtract donations received from non-residents (as well as receipts and accruals derived directly or indirectly from those donations) from costs incurred to benefit persons outside the Republic, when determining whether its in-country activities fall below the 85 percent threshold.

In addition, at least one of the following must be true:

1. Each of the organization's activities is for the benefit of, or widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups); or
2. Each such activity is for the benefit of, or readily accessible to, the poor and needy; or
3. The organization is at least 85 percent funded by donations, grants from any organ of state, or foreign grants. [ITA § 30(1)(c)]

The qualifying activities appear in the first part of the Ninth Schedule to the Income Tax Act. The Minister may, however, determine additional activities from time to time. At present, more than 60 activities qualify [[ITA, Schedule Nine, §1-11](#)]. They fall under the following headings:

- Welfare and Humanitarian;
- Health Care;
- Land and Housing;
- Education and Development;
- Religion, Belief or Philosophy;

- Cultural;
- Conservation, Environment and Animal Welfare;
- Research and Consumer Rights;
- Sport;
- Providing of Funds, Assets or Other Resources; and
- General.

Additional PBO requirements are discussed below.

Organizations seeking PBO status must apply to the Tax Exemption Unit of the South African Revenue Services, which also has on-going supervisory powers over PBOs.

V. Specific Questions Regarding Local Law

A. Inurement

Voluntary Associations

A grantmaker must look to a voluntary association’s founding documents for specific prohibitions against private inurement. In general, directors of voluntary associations are bound by the common law fiduciary duty to act in good faith and avoid conflicts of interest in their dealings with the organization.

Trusts

Generally, the terms of a trustee’s remuneration are provided in the instrument establishing the trust. If the instrument is silent in this regard, the trustee will receive reasonable compensation. [\[TPCA §22\]](#) The Master will set the amount in the event of a dispute. An auditor of a trust's accounts must report any apparent material irregularities in the accounts to the trustee. [\[TCPA §15\]](#). The Trust Property Control Act requires trustees to “act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.” [\[TPCA §9\(1\)\]](#) A trustee's improper accounting in administering the trust violates this fiduciary duty and constitutes grounds for removal. [\[TPCA §20\(2\)\(e\)\]](#)

Section 21 Companies

In its articles of association, a Section 21 Company must prohibit the transfer, in any form, of the association’s income or property to its members, a holding company, or any subsidiaries that it may have. A Section 21 Company may, however, pay its members, officers, or employees reasonable remuneration for services rendered. [\[Companies Act §21\(2\)\(a\)\]](#)

Registered Non-Profit Organizations

In order to register under the NPO Act, a non-profit organization must state in its constitution that its income and property are not distributable to its members, officers, or

trustees, except as reasonable compensation for services rendered. [[NPO Act/1997 §12\(2\)\(c\)](#)]

Registered Public Benefit Organizations

In order to obtain approval from the Commissioner under § 30 of the ITA, an organization cannot conduct any activity intended directly or indirectly to promote the economic self-interest of any fiduciary or employee of the organization, other than through reasonable remuneration. In addition, the organization must not distribute any of its funds to any person, other than in the course of undertaking a public benefit activity; and it must use its funds solely for the objective for which it has been established or for certain investments.

B. Proprietary Interest

Voluntary Associations

If a voluntary association prohibits its members, directors, or employees from having a proprietary interest in the organization's assets, the prohibition will appear in the organization's founding documents.

Trusts

The Trust Property Control Act provides that trust property may not form part of the personal estate of a trustee, unless the trustee is also a beneficiary entitled to the property under the trust instrument. [[TPCA §12](#)] A grantmaker should look to the trust documents to identify the beneficiaries of the trust.

Section 21 Companies

The founding documents of a Section 21 Company must provide that the property of the organization, however derived, will be applied solely to the organization's main objectives [[Companies Act §21\(2\)\(a\)](#)]. Upon winding up, deregistration, or dissolution, a Section 21 Company must transfer any assets that remain after satisfying its liabilities to other association(s) and/or institution(s) pursuing similar objectives [[Companies Act §21\(2\)\(b\)](#)].

Registered Non-Profit Organizations

The constitution of an organization registered under the NPO Act must provide that the members, officers, and trustees have no rights in the assets of the organization solely by virtue of being members, trustees, or officers. [[NPO Act/1997 §12\(2\)\(f\)](#)]

Registered Public Benefit Organizations

In order to register as a Public Benefit Organization under Section 30 of the Income Tax Act, an organization cannot accept any donation that is revocable at the donor's request. Moreover, the donor may not impose conditions that could enable the donor or any person related to the donor to benefit, directly or indirectly, from the application of such donation. [\[ITA§30 \(3\)\(b\)\(v\)\]](#) In addition, the organization must apply its funds solely to the objectives for which it was formed. [\[ITA§\(30\)\(3\)\(b\)\(iv\)\]](#).

C. Dissolution

Voluntary Associations

The founding documents would contain any provisions governing the transfer of assets of a voluntarily dissolving voluntary association, whether a *universitas* or an informal voluntary association. A voluntary association can also be involuntarily dissolved by an order of the Supreme Court upon application of an interested party. In that case, the association's net assets will be transferred to an organization with a similar purpose.

Trusts

In limited situations, the trustee, or a person the court finds to have a sufficient interest in the trust property, can petition the court to vary trust provisions or to terminate the trust altogether. These situations include where the terms of the trust hamper the achievement of the founder's objective, prejudice the interests of trust beneficiaries, or are against the public interest. [\[TPCA §13\]](#) No provision in the Trust Property Control Act deals explicitly with the treatment of assets upon termination of a trust.

Section 21 Companies

Upon dissolution of a Section 21 Company and settlement of all outstanding liabilities, any remaining assets must be transferred to association(s) or institution(s) having an objective similar to the main objective of the dissolving company. [\[Companies Act §21\(2\)\(b\)\]](#) The transferee is generally designated by the members of the Section 21 Company at dissolution or before. If the members do not make such a designation, the matter is left to the court overseeing the dissolution.

Registered Non-Profit Organizations

To register under the NPO Act, the organization must require in its constitution that any assets remaining upon dissolution or winding up will be transferred to another non-profit organization with similar objectives [\[NPO Act/1997 12\(2\)\(o\)\]](#). Failure to transfer the assets to such an organization may result in a fine, imprisonment, or both for the person responsible. [\[NPO Act/1997 §30\]](#)

Registered Public Benefit Organizations

In order to obtain approval from the Commissioner under Income Tax Act Section 30, an organization must provide in its constitution that any assets remaining upon dissolution or winding up must be transferred to (1) a similar public benefit organization approved under this section; (2) an institution, board, or body which is exempt from tax under the provisions of section 10(1)(cA)(i) of the ITA, and which has as its principal objective any public benefit acti

D. Activities in General

1. General

Voluntary Associations

Voluntary associations can engage in any lawful activities in pursuit of a legitimate objective, as long as those activities are not for gain.

Trusts

Trustees can engage in any lawful activities as long as they remain within the bounds of their fiduciary duty to the trust beneficiaries.

Section 21 Companies

Section 21 Companies can carry on any activities to promote religion, arts, science, education, charity, recreation, any other cultural or social activity, or communal or group interests. [[Companies Act §21\(1\)\(b\)](#)]

Registered Non-Profit Organizations

The [NPO Act](#) does not address permissible activities. Because a registered non-profit organization will ordinarily be a trust or a Section 21 Company, U.S. grantmakers should consult the laws governing those legal forms and the tax laws for guidance on permissible activities. With respect to a voluntary association, a grantmaker must consult the founding documents.

Registered Public Benefit Organizations

The Tax Act defines public benefit activity by listing some 67 permissible activities (see Section IV, above, for further discussion).

2. Economic Activities

Voluntary Associations

An association can conduct subsidiary activities to make some profits, as long as its main objective is not the acquisition of gain.

Trusts

Trusts are generally flexible structures that can be used for a variety of purposes. The purpose of a discretionary trust must be lawful and sufficiently certain. If a trust has a mainly charitable purpose, the fact that it has a noncharitable subsidiary purpose will not invalidate it.

Section 21 Companies

A Section 21 company can conduct subsidiary activities to make some profits, as long as its main objective remains the promotion of religion, the arts, science, education, charity, recreation, any other cultural or social activity, or communal or group interests.

Registered Public Benefit Organizations

The law explicitly limits the extent to which the economic activities of organizations approved under [Section 30 of the Income Tax Act](#) will be tax exempt. The receipts and accruals from such undertakings or activities shall be exempt from normal tax only if one of the following criteria applies:

A) The undertaking or activity meets all of the following requirements:

1. it is integral and directly related to the sole object of the public benefit organization as contemplated in paragraph (b) of the definition of ‘public benefit organization’ in section 30;
2. substantially the whole of its revenues are directed toward the recovery of its costs; and
3. it does not result in unfair competition in relation to taxable entities.

B) The undertaking or activity is of an occasional nature and substantially performed by uncompensated volunteers.

C) The undertaking or activity is approved by the Minister by notice in the Gazette, taking into account the following factors:

1. the scope and benevolent nature of the undertaking or activity;
2. the direct connection between the undertaking or activity and the sole purpose of the public benefit organization;
3. the profitability of the undertaking or activity; and
4. the economic distortion that may result from allowing a tax-exempt organization to carry out the undertaking or activity.

D) The undertaking or activity does not qualify under any of the above criteria, and the revenues it generates do not exceed the greater of the following:

1. 5 per cent of the public benefit organization's total receipts and accruals during the relevant year of assessment; or
2. R50 000 [[ITA §10\(1\)\(cN\) as amended](#)].

Public Benefit Organizations can invest their funds only in certain registered financial institutions, securities listed on a licensed stock exchange, and other financial instruments approved by the Commissioner of the Revenue Service [[ITA § 30\(3\)\(b\)\(ii\)](#)].

E. Political Activities

The Income Tax Act restricts PBOs from using their resources to directly or indirectly support, advance, or oppose any political party. [[ITA § 30\(3\)\(h\)](#)] South African law does not restrict the political activities of organizations not registered as PBOs. Moreover, the law does not clearly restrict lobbying by any organizations. Therefore, a U.S. grantmaker undertaking an equivalency determination should ensure that the prospective grantee's governing documents meet U.S. requirements.

F. Racial Discrimination

The [Constitution of the Republic of South Africa](#) (1997) stipulates that neither the State nor any person may unfairly discriminate against anyone on the basis of race (among other grounds). [[Constitution §§ 9\(3\) and \(4\)](#)] Section 29 of the Constitution establishes an individual's right to receive a basic education and to further his/her education. [[Constitution §29\(1\)](#)] The right to receive a public education in the language of one's choice, where reasonably practicable, is also guaranteed. [[Constitution §29\(2\)](#)] The Constitution further provides that everyone has the right to establish and maintain independent educational institutions, so long as those institutions do not discriminate on the basis of race. [[Constitution §29\(3\)\(a\)](#)]

G. Control of Organization

South African law does not restrict legal entities or foreign persons from serving as members, promoters, directors, or trustees of not-for-profit organizations. Therefore, it is possible for a South African NGO to be controlled by a for-profit entity (which will lead to additional IRS scrutiny) or by an American grantor charity (which must be disclosed in the affidavit).

VI. Tax Laws

A. Public Benefit Organizations Entitled to Certain Tax Exemptions

In order to be eligible for exemption from income tax and certain other taxes, an organization first must qualify as a Public Benefit Organization under Section 30 of South Africa's Income Tax Act, as summarized in Section IV, above. Eligibility for tax exemption further requires the PBO to satisfy additional conditions on its governance and operations. For example, the organization's constitution must provide that at least three unrelated persons have fiduciary responsibility for the organization, and that no single

person can directly or indirectly control the decisions relating to the organization. [\[ITA § 30\(3\)\(b\)\(i\)\]](#) In addition, the law limits the extent to which the business activities of the organization are tax exempt (see section V(D)(2), above). [\[ITA §10\(1\)\(cN\)\]](#) Upon the organization's termination, its assets must be transferred to similar approved PBOs or the state. [\[ITA § 30\(3\)\(b\)\(iii\)\]](#)

A PBO approved for exemption from income tax is also exempt from capital gains tax, donations tax, estate duty, stamp duty, transfer duty if the property will be devoted to public benefit activities, and, in certain cases, skills development levy. [\[Tax Exemption Guide for Public Benefit Organisations in South Africa at 11\]](#)

Other non-profit organizations are liable for income and other taxes and duties on the same basis as ordinary taxpayers.

B. Deductibility of Donations

An individual or company is entitled to deduct from taxable income a donation (in cash or in kind) to a Public Benefit Organization carrying out specified public benefit activities. These organizations are sometimes referred to as "Public Benefit Organizations with Donor-Deductible Status." The donation must be supported by a receipt issued by the Public Benefit Organization, and it cannot exceed 5 percent of the taxable income of the taxpayer.

The Public Benefit Activities approved by the Minister for purposes of Section 18A are set out in the 2nd part of the 9th Schedule to the [Income Tax Act](#). Currently 44 activities are approved, categorized under the following headings:

- Welfare and Humanitarian
- Health Care
- Education and Development
- Conservation, Environment and Animal Welfare
- Land and Housing [\[ITA Schedule Nine §2 \(1-5\)\]](#)

C. Value Added Tax

The Value Added Tax Act imposes a 14 percent tax on the value of goods or services supplied by a vendor, imported goods, or services provided by a supplier resident or carrying out business outside of South Africa to a resident of South Africa who uses the services in South Africa. [\[VATA §7\(1\)\]](#)

The VAT Act confers certain benefits on organizations that qualify as "associations not for gain," "welfare organizations," or both [\[VATA § 1\]](#). Qualifying organizations can claim the VAT they incur as input tax and, generally speaking, must pay output tax only when they charge for goods or services.

An "association not for gain" is defined as a religious institution or other society, association, or organization (including an educational institution of a public character),

which is not carried on for profit and which is required to use any property or income solely to further its aims and objects. An association not for gain is treated much like any other business if it makes taxable supplies, but the following special provisions apply:

- No output tax is payable on any “unconditional gifts” received, such as a club member's donation of money to cover the costs of new equipment for the club’s soccer team.
- A VAT exemption applies to the sale of any donated goods or services, and to the sale of manufactured goods where donated goods and services constitute at least 80 percent of the value thereof.
- Certain subsidies and grants received from National or Provincial Governments (public authority) are zero-rated.

Some associations not for gain also qualify as "welfare organizations," which entitles them to the benefits listed above plus additional ones. In order to qualify as a "welfare organization," an organization must

1. Be an association not for gain;
2. Be exempt from tax in terms of section 10 (1) (cN) of the Income Tax Act; and
3. Carry on activities in the following categories:
 1. Welfare and humanitarian;
 2. Health care;
 3. Land and housing;
 4. Education and development; or
 5. Conservation, environment, and animal welfare

Along with the benefits listed above for associations not for gain, a welfare organization is eligible for the following additional benefits:

- Even where no charge is made for supplies, the organization can register for VAT and obtain input tax relief on its purchases.
- A subsidy or grant received from the Government (or local authorities) related to welfare activities will be zero-rated.

D. Double Taxation Treaty

South Africa has entered into double taxation treaties with a number of countries, including the United States. [<http://www.irs.gov/pub/irs-trty/safrica.pdf>]

VII. Knowledgeable Contacts

Non-Profit Consortium (Association incorporated under Section 21)

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