TAX EXEMPTIONS TO PUBLIC BENEFIT ORGANISATIONS – REFORM IN RESPECT OF SOUTH AFRICAN CHURCHES

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ABSTRACT

The right to religion and to form religious organisations and associations is enshrined in the Constitution of South Africa, 1996. Religious organisations play an important role in the furtherance of these rights and have been accepted as public benefit organisations in terms of the Income Tax Act 58 of 1962 and can apply for tax benefits that have been afforded to public benefit organisations.

However, South Africa has in the past few years seen an increase in news articles regarding the commercialisation of religion as well as profit driven churches being used as wealth creation tools for church leaders. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (The CRL Commission) undertook an investigation into the issue of commercialisation of religion and found the issue of commercialisation to be true. The CRL Commission found various issues including the intentional disregard of accounting, financial and tax rules. The Commission found that various organisations were never registered, submitted no tax returns, and kept no financial records with some organisations intentionally doing so to evade taxes. The CRL Commission attributed the commercialisation of religion to a lack of enforcement as well as gaps in the legislation such as the lack of mandatory registration of these organisations.

This paper examines how the current tax regime that affords exemptions to public benefit organisations can be developed to address the issue of commercialisation of the church. The paper shows that religious organisations do play a public benefit role in South Africa, they have the ability to provide social services to communities in South Africa that the government struggle to reach such as the provision of housing. However, there is a need to address the use of religious organisations by religious leaders who look to enrich themselves. The paper proposes making registration mandatory but goes further to recommend that religious organisations no longer be governed under the Income Tax Act 58 of 1962 but that a separate legislation adopting the approach taken with the Estate Duty Act 45 of 1955 be legislated as a guiding legislation to regulate the administration and taxation of religious organisations.

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I INTRODUCTION AND OVERVIEW

(a) INTRODUCTION AND CONTEXT

Recently South Africa has seen an increase in news reports surrounding religious leaders and churches within South Africa around issues of commercialisation of religion and church leaders adopting a profit driven approach to enrich themselves. One example of personal wealth being obtained by religious leaders is Prophet Bushiri who owns a private jet worth R17 million, bought from financial contributions to his church.[1] Recently due to the lockdown caused by the Covid-19 pandemic, Prophet Bushiri launched an online worship service platform with an R80 subscription fee for members. His church, Enlightened Christian Gathering, stated that over six million people had subscribed to this application when it launched.[2] In 2016 another church leader, Pastor Mboro, claimed he had visited heaven during the Easter weekend and took photos which would be available for a fee of R5 000.[3]

These are a few of the many money-making ventures that led to the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (hereinafter the CRL Commission) undertaking an investigation into the issue of commercialisation of religion.[4] The CRL Commission inspected the funding and financial accounting practices of these institutions, scrutinised sources of income, budget allocations, assets and liabilities, tax and other processes in determining whether religion had become a commercial institution aimed at enriching religious leaders.[5] The CRL

[1] Venter, Zelda 'Prophet Shepherd Bushiri fights to keep $1.2m luxury jet' (28 November 2019: Independent Online) available at *https://bit.ly/2JxzwHb,* accessed 26 June 2020.
[2] Meyer, Dan 'Prophet Bushiri is now charging followers to watch his services online' (20 April 2020: The South African) available at *https://bit.ly/3mQ6Hnsthesabushiriapp*, accessed 04 July 2020.
[3] eNCA 'Pastor went to heaven and took pics to prove it' (2 April 2016: eNCA) available at *https://bit.ly/36LtIlRencawhatsappmboro,* accessed 26 June 2020.
[4] The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities *Report of the Hearings on the Commercialisation of Religion and Abuse of People's Belief Systems* (2017) at 4.
[5] Ibid at 12.

Commission reported that there was a failure to register as non-profit organisations and maintain financial records from a number of the religious organisations called before the CRL Commission.[6] The CRL Commission also found that there existed issues of financial exploitation of members in the form of tithes and offerings especially poor and vulnerable members and exploiting of gaps in the legislation which were said by the CRL Commission to be furthered by a lack of enforcement.[7] The CRL Commission report quotes a religious leader that appeared before it who disregarded the regulations regarding these institutions and record keeping by stating:

'We have not registered anything in this world…We do not have any of the documents which were required of us…we do not have them [bank statements]'.[8]

The CRL Commission's summary of findings, stated that there existed prima facie evidence that religion has been commercialised due to the lack of a clear separation between religious and business activity.[9] This finding stems from the expectation religious leaders have of members to pay substantial amounts of money before prayer, the sale of anointed waters, oils and other goods at marked-up prices, as well as booking fees to speak to spiritual leaders.[10] In addition and notably for the discussion of this paper, the CRL Commission found that some churches were not registered as Non-Profit Organisations (hereinafter NPO's) or Public Benefit Organisations (hereinafter PBO's) with SARS.[11] Some religious organisations also operated freely without any formal registration with the Commission of Companies and Intellectual Property (hereinafter CIPC) as a NPO or with the Department of Social Development as an NPO or any licensing certificates.[12] The CRL Commission further found that a number of these religious organisations did not disclose to SARS the amount of income they generated annually to evade possible tax liability as most had annual turnover that exceeded the NPO limit.[13] With these prima facie findings in mind, it is important to examine the

[6] Ibid at 19.
[7] Ibid at 20.
[8] Ibid at 21.
[9] Ibid at 31-32.
[10] Ibid at 31.
[11] Ibid.
[12] Ibid.
[13] Ibid at 31-32.

current legal position of churches under section 30 of the Income Tax Act 58 of 1962 (hereinafter the ITA), and where the gaps within the legislation that have led to the abuse and commercialisation of religion are.

(b) OVERVIEW

Section 15(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) provides that 'everyone has the right to freedom of conscience, religion, thought, belief and opinion.' This section can be read with subsection 31(1)*(a)* of the Constitution, which provides that 'persons belonging to a cultural, religious or linguistic community' may not be denied the right to enjoy or practise their religion. Subsection 31(1)*(b)* adds that individuals may not be denied the right to form, join and maintain any religious associations. These sections in the Constitution aim to promote and protect the right to religious freedom. Further promoting the above rights, churches and other religious organisations have also been afforded the ability to obtain tax benefits in terms of section 10(1)*(cN)* and section 30(1) of the ITA.

The promotion and protection of the right to religion and religious practice in The Constitution coupled with the tax exemption benefits afforded by the ITA can be said to have played a part in creating an environment that has seen the increase in the number of churches reported by the CRL Commission throughout South Africa.[14] The increase in the number of new churches throughout the Republic and the increasing number of news articles regarding exploitation of members of religious organisations resulted in the investigation and subsequent finding by the CRL Commission of the issues of commercialisation of the churches, abuse of tax benefits and non-compliance of tax rules within the ITA that governs these organisations.[15]

This research report discusses how the tax regime can be amended to ensure that profit driven churches become tax compliant. The paper begins by discussing the current legal position of religious organisations and their status as PBOs in terms of the ITA and Tax Administration Act 28 of 2011 (Hereinafter the TAA). The paper examines the purpose of the tax exemptions afforded to PBO's and the problems with the current legal

[14] Ibid at 9.
[15] Ibid at 31 – 33.

position. In concluding, the paper suggests changes pertaining to the governance and legislation governing these organisations in order to address the issue of commercialisation and profit driven churches. The paper also briefly discusses why these changes would not amount to an infringement of the constitutional right to freedom of religion and religious practice envisaged in section 15(1) and section 31(1)*(a)-(b)* of the Constitution.

II CURRENT LEGAL POSITION

(a) NON-PROFIT ORGANISATIONS AND CHURCHES

Due to the nature of activities carried out by churches, they may qualify for registration as NPOs and therefore be regulated under the Non-Profit Organisations Act 71 of 1997 (hereinafter the NPO Act). The NPO Act defines an NPO as a trust, company or association of persons created for a public purpose and not the benefit of its members or officials other than for reasonable compensation.[16] This is similar to the definition of a PBO as contemplated in the ITA. The preamble of the NPO Act states that the Act was formulated to create an environment in which NPOs would flourish as well as have a regulatory and administrative framework wherein these organisations can operate.

Aside from registration under the NPO Act, they may also be registered as a non-profit company (hereinafter NPC). The Companies Act 71 of 2008 defines a NPC as an entity formed to achieve a public benefit or an object relating to cultural or social activities or communal or group interests.[17] In terms of this definition, there exists two essential criteria for a NPC both of which must be present simultaneously.[18] First, the company must be incorporated for a public benefit purpose as set out in its founding constitution or a purpose related to one or more cultural or social activities or communal or group interests.[19] Second, the income and property of the organisation must not be distributable to members of the non-profit entity or any other persons except as permitted by the NPOs founding document or as reasonable remuneration for services or goods provided to the

[16] Section 1(1)(x) Nonprofit Organisations Act.
[17] Section 1 Companies Act.
[18] Cassim, Maleka Femida 'The contours of profit-making activities of non-profit companies: An analysis of the new South African Companies Act' (2012) 56(2) *Journal of African Law* 243 at 246.
[19] Ibid.

NPO.[20] Churches have the ability to fall into the category of non-profit organisations due to the nature of their activities being widely considered and accepted as public benefit objects.

It is important to note that registration as a NPC does not automatically mean that the NPO is entitled to tax exemption benefits reserved for PBOs in terms of the ITA.[21] These tax exemptions will only apply once the requirements under section 30 of the ITA have been met.[22] Part of these requirements is that the organisation be registered as a NPO and register as a PBO in terms of section 30(3) of the ITA.[23] The tax status of a PBO is granted when the organisation complies with the requirements that have been laid out in section 30 of the ITA.[24]

(b) SECTION 30 REQUIREMENTS FOR TAX EXEMPTION

Section 10(1)*(cN)* of the ITA provides for tax exemption of receipts and accruals for any approved PBO by the Commissioner in terms of section 30.[25] In turn, section 30 of the ITA stipulates the requirements for an organisation to obtain the classification as a PBO for tax purposes. Before delving into the requirements, it is important to note that the section starts by defining what constitutes a PBO and what structural form these organisations can take. This is important as it extends the scope of the structural form beyond non-profit companies to include structures such as trusts. Section 30(1)*(a)(i)* defines a PBO as including; an NPC as defined by the Companies Act, trust or association of persons that has been established in South Africa. The ITA further includes a branch of a company, association, or trust not resident in the Republic but that is exempt from tax in its country of residence.[26]

As to the requirements for tax exemption benefits, section 30(1)*(b)* of the ITA starts by requiring that the organisations and associations contemplated in section

[20] Item 1(3) of Schedule 1 to the Companies Act.
[21] Cassim op cit note 18 at 250.
[22] Ibid.
[23] Section 10(1)(cN) Income Tax Act.
[24] Lee-Ann, Steenkamp 'The relationship between non-profit companies and public benefit organisations' (2011) 30 *Tax Talk Magazine* pp 14-16 at 15 available at *https://0-journals-co-za.innopac.wits.ac.za/doi/10.10520/EJC110497,* accessed 5 July 2020.
[25] AP de Koker & RC Williams *Silke on South African Income Tax* (LexisNexis, 2021) para 6.50.
[26] Section 30(1)*(a)(ii)* Income Tax Act.

30(1)*(a)* must have the sole or main objective of carrying out one or more public benefit activities in a non-profit manner with a charitable intent.[27] The Ninth Schedule of the ITA provides a list of what activities are recognised as public benefit activities for tax purposes.[28] These public benefit activities include: welfare and humanitarian activities such as rescuing or caring for persons in distress,[29] and providing health care services to poor and needy persons.[30]

Noteworthy for this paper are the activities referred to in Item 5 of the Ninth Schedule which are religious, belief or philosophy activities. These include: the promotion or practice of religion which includes evangelical acts of worship, teaching on a belief in a higher power, the promotion and practice of a belief or philosophical activities.[31] Furthermore, the activities by the organisation may not be intended to directly or indirectly promote self-serving interests of any members of the organisation who may only receive reasonable remuneration, and the activities by the organisation must be for the benefit of general society.[32] In order for an organisation to qualify, the above requirements set out must all be complied with as they do not operate in isolation.[33]

However, meeting the above requirements does not automatically grant tax exemption benefits. In order to be exempt for income tax purposes, the Minister must approve the PBO.[34] The ITA provides that the Commissioner shall for tax purposes approve a PBO that complies with the conditions prescribed in the Act as well as other regulations.[35] The organisation looking to be compliant must also submit to the Commissioner; a copy of the organisation's constitution.[36] The constitution must provide for a minimum of three unrelated persons that undertake the fiduciary responsibility of the organisation and that the decision-making powers shall be affected by more than one person.[37] Moreover, the organisation's constitution must prohibit the distribution of funds

[27] Section 30(1)*(b)(i)-(ii)* of Income Tax Act.
[28] Section 30(1) Income Tax Act.
[29] Item 1*(e)* of the Ninth Schedule to the Income Tax Act.
[30] Item 2*(a)* of the Ninth Schedule to the Income Tax Act.
[31] Item 5*(a)-(c)* of the Ninth Schedule to the Income Tax Act.
[32] Section 30(1)(b).
[33] De Koker op cit note 25 at para 6.50.
[34] Ibid.
[35] Section 30(3)*(a)* Income Tax Act.
[36] Section 30(3)(b) Income Tax Act.
[37] Section 30(3)*(b)(i)* Income Tax Act.

to any person where such is unrelated to any public benefit activity and that the funds must only be used for public benefit activities.[38]

From the above, it is apparent that churches, as religious organisations engaging in activities of an evangelical nature, engage in public benefit activities in terms of the Ninth Schedule. However, this does not automatically render them a PBO They must also be a non-profit association, have the sole purpose of engaging in one or more of the listed public benefit activities and there must be controls around the use and management of funds.

This means no one person may control funds. The ITA requires that no less than 3 unconnected and unrelated persons should share the fiduciary responsibility of the organisation.[39] Furthermore, no leaders of the church may benefit of the funds other than for purposes of reasonable remuneration.[40] This is important considering that the very nature of commercialisation and some of the findings by the RCL Commission indicate how these religious organisations are being used as personal wealth building tools of the religious leaders. This requirement by the legislature essentially aims to ensure that these organisations will not be used for personal wealth creation. This will be done by having unrelated people take over the fiduciary responsibility as well as explicitly requiring that only reasonable remuneration may be issued by these organisations.

Section 10(1)(cN) of the ITA emphasises that exemptions are not automatic by stating that the requirements under section 30(3) of the ITA have to be met for the church to qualify for exemptions.

(c) APPLICATION FOR SECTION 30 TAX EXEMPTIONS

All organisations wishing to obtain PBO classification for tax purposes must apply to the Commissioner of SARS through the SARS' tax exemption unit in terms of Section 30(3) of the ITA.[41] SARS has provided a mechanism to assist organisations wishing to obtain PBO classification on its website by setting out the requirements and process for a PBO

38 Section 30(3)*(b)(ii)* Income Tax Act.
39 Section 30(3)(b)(i) Income Tax Act.
40 Section 30(1)(b)(ii) and Section 30(3)(b)(ii).
41 Legal Counsel SARS (issue 5) *Tax Exemption Guide for Public Benefit Organisations in South Africa* (January 2017) at 4.

to register. . The organisation is required to submit an application form (referred to as an EI 1 form). This form must contain the details and signature of the three unrelated members as well as details of the relevant representative or tax practitioner.[42] In addition, the organisation must submit the written undertaking forms that are used to ensure compliance with section 30 of the ITA.[43] Both the EI 1 form and the written undertakings must be signed by the three unrelated members responsible for the fiduciary duties of the organisation.[44] The organisation must also in terms of section 30 submit founding documents which will depend on the form of the organisation. For non-profit companies this would be the Memorandum of Incorporation as well as the incorporation certificate.[45] For an association of persons, this would be a signed and dated constitution.[46] These must be accompanied by identity documentation of the fiduciary persons overseeing the organisation, proof of residence or business address, bank statements and annual financial statements where the organisation has existed for more than a year.[47]

Notable from this process is that SARS requires all documents showing that there has been formal registration of the organisation by the founders of the organisations, be it with the Master of the High Court for trusts or with CIPC where the organisation is a company. The documents required by SARS are used to ensure that there is a public benefit and that the requirements of section 30 have been met. Where the organisation has already existed for over a year, the requirement of financial statements allows SARS to examine whether the funds are used for a recognised public benefit activity in terms of section 30 of the ITA.

According to SARS, it takes roughly 57 working days until the exemption is approved.[48] Registration may take roughly 21 days, with 36 working days being spent on the evaluation for exemption.[49] This indicates an extensive perusal of the submitted documentation by SARS to ensure that organisations being afforded these tax benefits indeed comply with the requirements set out in section 30 of the ITA.

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[42] SARS 'How do I apply for income tax exemption as a public benefit organisation (PBO)?' *https://www.sars.gov.za/ClientSegments/Businesses/TEO/Pages/Tax-Exemptions-and-PBOs.aspx,* accessed 04 July 2020.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid.

(d) SECTION 30 TAX EXEMPTIONS TO PBOs

Organisations approved as PBOs in terms of section 30, obtain tax exemption status and the tax benefits provided for in 10(1)*(cN)*.[50] The key benefit and reason most PBOs seek tax exemption status is to obtain income tax relief on non-trade income and on some part of the trading income earned by the PBO.[51] This key benefit of income tax relief found under section 10(1)*(cN)* provides that the receipts and accruals of PBOs are exempt from income tax to the extent that the receipts are not obtained from business or trading activities or where they are from business and trading activity that they are within the ambit of the categories in section 10(1)(cN)(ii).[52] The section affords the approved PBO the partial taxation of receipts and accruals of the PBO at the normal tax rates of the entity conducting the public benefit activity.[53] This means that where the organisation receives trade income that would not fall under the exempt income, that income received for trade will be partially taxed at the tax rate of the structural entity the PBO is registered as. For example, where a PBO is a registered NPC with CIPC, it will be taxed at the same rate as companies being 28 per cent.[54]

However, this partial taxation will only apply as far as the receipts and accruals received by the organisation are a result of trading or business activities which do not fall under the exempt categories in section 10(1)(cN)(ii)(aa)-(cc) of the ITA and which are higher than the prescribed limits under the ITA but does not compromise the exemption that is afforded to the PBO for its public benefit activity.[55] This essentially means that where the receipts and accruals are a result of a business undertaking or trading activity, they will only be exempt from income tax if they fall within the specified exemption

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[50] Snyckers, Magda & Gama, Sarah 'Are pension funds, PBOs and universities exempt from all taxes?' (2018) 31 *Taxpro* pp 20-20 at 20 available at *https://0-journals-co-za.innopac.wits.ac.za/doi/10.10520/EJC-f37264a0a*, accessed 5 July 2020.

[51] Steenkamp, Lee-Ann 'Public benefit organisations and tax: Where is the charity and justice?' (2014) 45 *Tax Talk Magazine* pp 27-31 at 30 available at *https://0-journals-co-za.innopac.wits.ac.za/doi/10.10520/EJC152669*, accessed 5 July 2020.

[52] Pretorius, Heather 'The tax treatment of public benefit organisations' (2012) 34 *Tax Talk Magazine* pp 20-23 at 21 available at *https://0-journals-co-za.innopac.wits.ac.za/doi/10.10520/EJC121675*, accessed 5 July 2020.

[53] Ibid.

[54] Item 3(a) of Schedule 1 to the Rates and Monetary Amounts and Amendment of Revenue Laws Act 13 of 2016.

[55] Pretorius op cit note 52 at 21.

requirements under section 10(1)*(cN)* otherwise the receipts and accruals will be taxed at the rate of the entity receiving the accrual is taxed at.[56]

Section 10(1)*(cN)* provides exemptions for business undertaking or trading activities that are integral and directly related to the principal public benefit activity carried out by the PBO.[57] The business undertaking or trading activity must be occasional and done on a voluntary and not compensable basis.[58] The business undertaking or trading activity may also be approved by the Minister of Finance taking into account the relation of the trading activity to the public benefit activity and the level of economic distortion that may result should the trading activity be approved.[59] Where the business undertaking does not fall within the above exempt activities,[60] the basic exemption will apply, meaning that the income received from the business undertaking or trading activity have an allowable basic exemption to be deducted from the receipts and accruals that is as an amount equal to whichever is greater between R200 000 or five per cent of the total receipts and accruals of the PBO during the year of assessment.[61]

Approved PBOs also have available to them other tax benefits. First, in terms of section 56(1)*(h)* of the ITA, donations made by a taxpayer to a PBO are exempt from the payment of donations tax.[62] Secondly, an approved PBO may qualify to issue section 18A tax-deductible certificates,[63] which creates an allowable tax deduction in favour of a donor taxpayer that donates to the PBO, allowing the donor to claim a deduction on condition it does not exceed ten per cent of their taxable income.[64] This benefit has the potential of encouraging donors to donate to the PBO as they would be able to claim a tax deduction on the donation.

Prior to April 2006, PBOs enjoyed complete exemption from income tax and capital gains tax (CGT). However, due to the introduction of partial taxation of PBO's,

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[56] SARS Interpretation Note 24 (Issue 4) *Public Benefit Organisations: Trading Rules – Partial Taxation of Trading Receipts* (February 2018) at 8.
[57] Ibid.
[58] Section 10(1)(cN)(ii)(bb) and Section 10(1)(cN)(ii)(cc) of the Income Tax Act.
[59] Section 10(1)(cN)(ii)(bb) and Section 10(1)(cN)(ii)(cc)(D).
[60] Section 10(1)(cN)(ii)(aa)-(dd) - That is the trading activities are not directly related to the public benefit activities of the PBO, are not on an occasional basis nor approved by the Minister of Finance by notice in the gazette.
[61] Section 10(1)cN)(ii)(dd) of the Income Tax Act.
[62] Legal Counsel SARS op cit note 41 at 37.
[63] Ibid at 23.
[64] Pretorius op cit note at 21.

the minister of Finance removed the complete exemption of CGT.[65] The Minister of Finance at the time, Mr Manuel, defended the changes in CGT rules for PBOs as a means of standardising tax practice and closing the tax avoidance loopholes that existed.[66] He argued that this change allowed the government to balance the protection of the tax base whilst ensuring that PBOs were also able to carry the tax burden.[67] This change meant that any capital gain or capital loss made by an approved PBO must be disregarded where the disposed asset was not used for carrying on a business undertaking or trading activity substantially or whole.[68] The counter result was that any capital gain or capital loss made by a PBO resulting from the disposal of an asset used for business undertaking or trading activity will be taxable.[69] These taxable business undertakings and trading activities referred to in paragraph 63A are applicable to the trading activities that are not carried out in direct relation to the public benefit activity of the PBO.[70]

Furthermore, PBO's are able to obtain exemption from transfer duty when acquiring a property that is 'wholly' or 'substantially whole' to be used for the purpose of performing the public benefit activities set out by the PBO.[71] As to what the meaning of 'substantially whole' is, SARS regards this to being 90 per cent or more being used for the performance of the public benefit activity.[72] It is important to note however that this 90 per cent rule is not found in the ITA or other tax legislation and is found in the SARS interpretation notes which serve as a guideline on what SARS will interpret the reference to ;substantially whole' in the legislation to mean. This CGT exemption is not a blanket exemption, and the exemption will be assessed on a transaction-by-transaction basis on its own merits.[73] PBOs are also exempt from dividends tax where the PBO is the beneficial owner of the paid out.[74]

In addition to these exemptions, other tax benefits afforded to approved PBO's include that PBO's are exempt from making provisional tax payments, meaning that their

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[65] Legal Counsel SARS op cit note 41 at 41.
[66] Maroun, W, Turner, M & Coldwell, D 'Capital gains tax in South Africa: Perceptions of fairness' (2014) 17(2) *South African Journal of Economic and Management Sciences* 124 at 128.
[67] Ibid.
[68] Paragraph 63A of Schedule 8 to the Income Tax Act.
[69] Legal Counsel SARS op cit note 41 at 41.
[70] Paragraph 63A(b)(i)(ii) of Schedule 8 to the Income Tax Act.
[71] Section 9(1)(c) of the Transfer Duty Act 40 of 1949.
[72] SARS Interpretation Note 44 (issue 2) *Public Benefit Organisations: Capital Gains Tax* (February 2014) at 3.
[73] Legal Counsel SARS op cit note 41 at 38.
[74] Section 64F(1)(c) of the Income Tax Act.

income tax liabilities will only become payable on assessment.[75] It is clear that there are several tax benefits for the SARS approved PBOs. These tax benefits allow PBOs to redirect the funds that would otherwise be payable to SARS into performing their public benefit activities by reducing their liabilities.

III JUSTIFYING SECTION 30 TAX EXEMPTIONS

(a) RATIONALE FOR SECTION 30 EXEMPTIONS TO PBOs

Non-profit organisations play a significant role in society. They take on some of the social welfare responsibility needs of the country such as provision of housing, healthcare, justice amongst others. This in turn, reduces the financial burden of the State to provide these needs.[76]

The Davis Tax Committee,[77] in examining the appropriateness of the current tax treatment of PBO's considering the significant philanthropic role they play, referred to The Katz Commission report.[78] The Katz Commission report regarding non-profits noted that there is general and international acceptance for the benefits afforded to PBOs.[79] This is because PBOs are not only viewed as cost-effective tools for delivering social services,[80] they also promote communitarian societal values such as participative democracy by looking to influence the direction that the ruling party take for the State and voluntarism encouraging citizens to volunteer with social welfare organisations.[81] In a country like South Africa where there is a concentration of wealth by the minority and income disparities, these organisations play an important role in encouraging philanthropy and are a useful tool in providing for the redistribution of wealth and resources held by the minority to the most vulnerable communities in society.[82]

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[75] Paragraph 1(aa) of the Fourth Schedule to the Income Tax Act.
[76] Legal Counsel SARS op cit note 41 at 3.
[77] Davis Tax Committee *Report on The Public Benefit Organisation and The Tax System* (2018) is a report on the public benefit organisation and the tax system for the Minister of Finance. The Davis Tax Committee is advisory in nature and makes recommendations to the Minister of Finance.
[78] Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa *Fiscal Issues Affecting Non-Profit Organisations* (1999).
[79] Ibid at 1.
[80] Davis Tax Committee op cit note 77 at 1.
[81] Ibid at 2.
[82] Ibid.

The Davis Tax Committee further put forward that PBOs engage in activities that directly replace government's duties and obligations and as a result should not be taxed as this would result in a reduction of their ability to deliver goods and services, which would redirect the responsibility back to the government.[83] The ability PBOs have to deliver necessities and services in a more efficient manner and on a wider scale to community groups that may be overlooked by the government for the Davis Tax Committee was enough to justify tax benefits afforded to PBOs.[84] The Davis Tax Committee further justified the tax benefits adding that the non-profit nature of these organisations render the application of customary income tax rules for profit entities inappropriate.[85]

(b) IS THERE JUSTIFICATION FOR AFFORDING CHURCHES SECTION 30 TAX BENEFITS?

The recurring theme in justifying the tax exemption of PBOs is their social welfare role. Having recognised this to be the reason for the tax benefits, it is important to consider whether churches play the same role in society even though tax exemptions for religious institutions are a long-standing historical practice.[86]

Churches are said to play a significant role in the public sphere in matters of public importance.[87] De Freitas states that urgent matters such as abortion, the strengthening of the family structure, the fight against HIV/AIDS, alleviation of poverty require the involvement of the church.[88] Cochrane further adds that the church has significant reach into nearly every local community that no other non-governmental body would be able to penetrate and provide for.[89] The reach of the Church is referred to in in the case of *Prince v President of the Law Society of the Cape of Good Hope,*[90] Sachs J in his *obiter*, recognising the influence and reach of religious organisations in the public sphere, stated

[83] Ibid.
[84] Ibid.
[85] Ibid at 3.
[86] Whitehead, W. John 'Tax exemption and churches: A historical and constitutional analysis' (1991) 22(3) *Cumberland LR* 521 at 521.
[87] De Freitas, Shaun 'The constitutional dynamic of civil society and the role of the churches in South Africa' (2005) 37(2) *Acta Academica* 21 at 22.
[88] Ibid.
[89] Ibid at 24.
[90] 2002 (3) BCLR 231.

that faith based organisations have the ability to create strong alliances and materially affect the outcome of elections.[91] As such, the Constitutional Court of South Africa recognised the role that churches are capable of playing in the public realm.[92]

Whilst it is not always essential for the church to have a social welfare role, the church has shown itself to be heavily involved in addressing the social injustice issues as well as meeting the basic needs in both apartheid and post-apartheid South Africa.[93] For example, churches in South Africa have played a significant role to assist the State in addressing housing issues. Through the establishment of a refugee camp in the KwaZulu-Natal province with over a 1000 beds a year, the houses built in Khayelitsha by the Methodist Church or the Ark Christian Ministry Church provides shelter to the homeless in Durban.[94] These are but a few examples indicating the positive social welfare role churches in South Africa are able to play, thus justifying the need for these religious organisations being afforded tax benefits.

Churches have the ability through their wide membership to reach nearly every community and to play a significant role in the public sphere. The Charities Aid Foundation (CAF) in their 2020 report on charitable giving in South Africa found that donations to faith-based organisations were the most common form of charitable work with 28 per cent of the participants of the survey showing that they had supported charitable work of faith based organisations in the past twelve months.[95] According to this CAF report, the most common method of supporting charitable organisations by participants in South Africa took the form of monetary donations, with 74 per cent of the research participants indicating that they had given monetary donations.[96]

It is clear from the factors mentioned above of the social welfare role the church can play and have played in the South African society. Not only do faith-based organisations, have wider reach into the local community as opposed to other non-profit entities, they have also been the trusted and popular choice by the public when it comes to making monetary contributions to philanthropic organisation.

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[91] 2002 (3) BCLR 231 at para 160.
[92] De Freitas op cit note 87at 43.
[93] Ndinda, Catherine, Adebayo, Pauline and Adebayo, Ambrose 'The role of the church in housing provision: Implications for South Africa' (2007) 37(1) *Africa Institute of South Africa* 76 at 76.
[94] Ibid 85.
[95] Charities Aid Foundation *Growing Giving in South Africa* (2020) at 37.
[96] Ibid at 36-37.

There is no reason as to why the tax exemption justifications for PBOs should not be extended to churches as they do have a role that is publicly beneficial and in line with the justifications for tax exemptions put forward by the Katz Commission that were explored by the Davis Tax Committee. Whilst there is justification for affording tax benefits to these religious organisations, the abuse of the tax exemption benefits reserved for organisations engaging in public benefit activities by churches and church leaders engaging in self-centred commercial activities have raised eyebrows. It is this abuse of the system and issue of commercialisation that this paper seeks to address.

IV ISSUES OF NON-COMPLIANCE AND DISREGARD FOR LEGAL RULES

(a) PROBLEMS WITH THE CURRENT LEGAL POSITION

In examining the abuse of the tax exemption benefits afforded to PBOs, it is apposite to consider problems with the current legal position governing PBOs.

The Davis Tax Committee expressed a number of these concerns raised by National Treasury; the first pertaining to registration. National Treasury noted that there is currently no requirement that a non-profit be registered in terms of the NPO Act before applying for tax exemption status under section 30.[97] Similarly, the requirement that non-profit organisations under the NPO Act register for PBO status is not mandatory and is merely done on a voluntary basis.[98] The CRL Commission also identified this administrative loophole during its inquiry when it found that a number of religious institutions failed to formally register as non-profit organisations; either with CIPC or the Department of Social Development.[99] As a result, the CRL Commission proposed that religious organisations should be organised and registered as an organisation in one form or another.[100] Moreover, the Davis Tax Committee noted that whilst there were a hundred and fifty thousand registered non-profit organisations, only forty-nine thousand of these organisations were registered as PBOs with SARS.[101] With a large number of

[97] Davis Tax Committee op cit note 77 at 12.
[98] Ibid 7 at 12.
[99] CRL Rights Commission op cit note 4 at 19.
[100] Ibid at 38.
[101] Davis Tax Committee op cit note 77 at 18.

organisations having no formal registration and less than 35 per cent of the registered PBOs registering with SARS, SARS is unable to monitor the financial transactions of the unregistered organisations. Non-registered organisations are thus able to get away with non-compliance of tax rules as they are not on SARS' radar therefore making it difficult for SARS to audit them and enforce the tax legislation which allows for a possible tax leakage of revenue that would be payable on trading activities.

Another flaw found in the PBO regulations under the ITA relates to income generation and the need to clarify what trading activities will be afforded tax exemption and what trading activities will be subject to normal tax treatment.[102] These rules are both technical and complicated and make it hard to distinguish what is permissible trading activity by PBO's that will be exempt and what may be subject partial tax.[103] The ITA fails to define what is meant by business undertakings and whilst providing a definition for 'trade' provides a definition that is non-exhaustive ranging from the use of intellectual property to including every profession, trade or business. The ITA also fails to define what is meant by 'substantial or whole' which is again left to the interpretation of the taxpayer or SARS themselves who have interpreted it to mean 90 per cent. The ITA fails to properly simplify the determination of partial exemption by failing to properly state and provide for what would constitute business undertakings and trade as well as how one would go about determining 'substantial or whole'.

Although the *Tax Exemption Guide for Public Benefit Organisations in South Africa* has attempted to explain this concept of partial tax exemption for PBOs on some trading activities, it is important to remember that this is not legislation and is merely the interpretation by SARS of the legislation and how SARS will apply the legislative provisions. This distinction does not clearly define the lines at which some trading activities will be able to be fully exempt and which will be subject to partial taxation rules in that it has failed to properly define these important concepts.

This lack of clarity creates two possible forms of non-compliance. The first being due to a mistake in law because of the inability of the legislature and SARS to clearly draw lines between what constitutes exempt trading activities and partially taxed trading activities. This results in organisations erroneously without unlawful intent to evade taxes

[102] Ibid at 10.
[103] Rosenthal, Richard 'Taxation and philanthropy: Past, present and future' *IPASA Annual Review of South African Philanthropy* (2019) at 14.

thinking that their trading activities are exempt when they should not. The second form of non-compliance being intentional and of an unlawful and fraudulent nature such as describing of trading activities within the exempt income tax rules under section 10(1)*(cN)*.

The CRL Commission has found that several religious organisations have impermissibly avoided paying taxes.[104] The Commission stated that the majority of the institutions were registered as non-profit organisations, yet their annual turnover exceeded the prescribed limits of NPOs, and this financial turnover information was never disclosed to SARS in order to evade a tax liability that would otherwise arise were SARS to receive the necessary financial information.[105]

The CRL Commission stated that aside from loopholes in the legislation, the current legislation and rules are not adequately enforced.[106] Whilst SARS' tax exemption unit exists, and SARS is empowered in terms of section 179 of the TAA to issue notices to third parties to pay outstanding tax debts, it is difficult for SARS to issue and enforce these notices on unregistered organisations. In addition, these organisations were found by the CRL Commission not to bank money collected,[107] keep financial records nor engage in financial audits.[108] Although enforcement mechanisms might exist, lack of registration by these organisations and proper record keeping makes it hard for rules to be enforced.

The CRL Commission has clearly shown in its report that these loopholes in the legislation and the inability to enforce the existing legislation properly has played a part in the abuse of the current tax system.

(b) NON-COMPLIANCE BY RELIGIOUS ORGANISATIONS – THE CRL COMMISSION FINDINGS

The CRL Commission listed several of its findings pertaining to non-compliance of various regulations by religious institutions in its report. It found that there was a lack of clear separation between religious activity and business activity. It further found prima

[104] CRL Rights Commission op cit note 4 at 32.
[105] Ibid.
[106] Ibid at 20.
[107] Ibid at 32.
[108] Ibid.

facie evidence of commercialisation of religion with examples of being requested to pay substantial amounts of money for blessings, waters and oils, merchandise such as t-shirts as well as speed points for people to swipe at religious gatherings.[109] This evidence points towards trading activities that are profit driven and has little to do with public benefit activities. The CRL Commission also found that some churches failed to register with the Department of Social Development or register with SARS either as NPOs or PBOs.[110]

In addition, the CRL Commission found that not only do some organisations not disclose the amount of money in annual turnover to SARS to avoid taxes, some of these organisations have revenue that is above the limit [found in section 10(1)(cN)(ii)(dd) for non-exempt trading activities that exceed the greater of 5 per cent of the total receipts of the PBO or 200 000 in that year of assessment] for non-profit organisations.[111] The organisations that were brought before the CRL Commission to be examined were also found to disregard record keeping rules,[112] banking rules by not banking collected monies. As well as not recording financial statements and the movement of funds in and out of the country without approval from the South African Reserve Bank.[113]

Some of the religious leaders brought before the CRL Commission proclaimed that they had not registered any organisations to operate as their church and neither did they have any bank statements.[114] Some leaders were found to operate funds for the personal benefit of family and friends, building family empires with funds collected.[115] During the Commission, pastor Mboro, who is viewed as one of the richest pastors in South Africa, refused to hand over any bank statements or financial statements to the CRL Commission during the enquiry.[116]

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[109] Ibid at 31 & 33.
[110] Ibid at 31.
[111] Ibid at 31-32.
[112] Section 30(10)*(b)-(c)* of the Income Tax Act states *'In the application of the provisions of this Act, the Commissioner may by notice in writing require any person whom the Commissioner may deem able to furnish information in regard to any approved public benefit organisation –*
(a)…
(b) to make available for inspection by the Commissioner or any person appointed by him, any books of account, records or other documents relating to such organisation; or
(c) to attend at the time and place appointed by the Commissioner for the purposes of producing for examination by the Commissioner or any person appointed by him, any books of account, records or other documents relating to such organisation.'
[113] CRL Rights Commission op cit note 4 at 32.
[114] Ibid at 21.
[115] Ibid at 31 & 33.
[116] Staff Reporter 'Pastor Mboro must pay CRL Rights Commission's legal fees' available at *https://bit.ly/3qyMpRWCRLMborodispute,* accessed 11 July 2020.

(c) NON-COMPLIANCE BY THE CHURCH: THE *TWYNHAM* CASE

The unreported Specialised Commercial Crimes Court case of *The State v Twynham* (herein after *Twynham*)[117] provides useful insight into how far the non-compliance ranges within some churches. The case also provides us with a look at how hard it is for SARS to enforce the tax regulations regarding PBOs such as churches when the organisation is unregistered.

In this case the church's pastor, Twynham, was solely responsible to collect monies for the church as well as determine how this money would be distributed.[118] Between 2004 and 2011, the pastor attended to the collection, accounting and banking of the church funds and unilaterally decided how much his remuneration would be.[119] Although there existed a board of trustees for the church, the pastor made all the decisions and simply handed over handwritten booklets to the trustees for signature.[120] In conjunction with the sole decision-making power; the church was not compliant with the section 30 ITA requirements as it had neither drawn up financial statements nor submitted tax returns for the relevant periods.[121] Furthermore, the Church's constitution did not comply with section 30 of the ITA in relation to PBOs[122] and the income declared by the pastor to SARS was far less than was indicated in the books compiled by the Board of Trustees of the Church.[123] All this information was brought to SARS' attention when the Church sought to obtain PBO status by a Mr RJ who reported the information to SARS during the process of registering as a PBO .[124]

In this case, the pastor was found to have misappropriated over R1 million in funds belonging to the church for his own personal expenses as well as that he had falsely declared lower income to SARS.[125] The court in this case found the pastor guilty for fraud,

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[117] SCCC 4-12-2015 case no CCC1/1/2014.
[118] Van Coller, Helena & Akinloye, Idowu A '*The State v Twynham*: The (ir)relevance of further regulation of religious organisations in South Africa' (2019) *Stell LR* 299 at 301.
[119] Ibid.
[120] Ibid.
[121] Ibid at 302.
[122] Ibid.
[123] Ibid.
[124] Ibid at 301-302.
[125] Ibid at 302.

misappropriation of church funds as well as income tax evasion by under declaring taxable income and thus underpaying the tax.[126]

The *Twynham* case is an indicator of the dangers of leaving registration for these organisations voluntary and not mandatory. This makes it harder for SARS to be aware of the underpayment, non-declaration of tax income and the amount of revenue being received as this case only came to light as a result of an informant. This case indicates how leaders of some churches can profit themselves by exploiting the enforcement gaps within the legislation can.

The facts of this case when read together with the findings of the CRL Commission indicate that it is almost impossible for SARS to receive the type of information required to enforce current laws if there is no information provided by a "whistle blower" such as Mr RJ did in this case. This case is an indicator of the possible implications where there are no independent and unrelated fiduciary committees within the organisation and the leader of the organisation is the sole decision maker coupled with poor or no record keeping at all. SARS is unable to receive a true account of funds received by these organisations, as well as a true account for the expenditure of these funds and whether they really are to serve a public benefit purpose. In *Twynham* it took over 6 years and a report from an independent financial professional for SARS to become aware of the non-compliance by the church and the pastor of the church.

Linking these facts to the CRL Commission findings that many churches neither kept records, banked money, nor did some disclose monies received, it indicates and raises alarms that a number of organisations currently operating in South Africa as churches and are non-compliant with tax legislation, NPO regulations in many aspects. It is hard to see how SARS would be able to enforce the current legal rules available where these rules have loopholes that create an environment for churches to withhold information necessary for SARS to fully enforce the tax legislation.

V SUGGESTED WAY FORWARD THROUGH LEGISLATIVE REFORM

Taking into account the role that religious organisations play in the development and advancement of societal benefits, it cannot be ignored that the commercialisation of the

[126] Ibid at 302-303.

church for the individual benefit of church leaders, together with the disregard and abuse of the legislation tax rules are issues that need to be addressed. There is a need for reform as regards to the tax legislation for churches and other religious entities.

(a) MANDATORY REGISTRATION WITH SARS

A crucial finding by the CRL Commission and the Davis Tax Committee was the lack of registration by religious organisations. As illustrated by the *Twynham* case failure to register plays a significant role in the non-compliance by the church. As such, the first recommendation made by the CRL Commission is that registration of all religious organisations be made mandatory. The CRL Commission recommended that religious organisation be organised and registered either as non-profit entities or as PBOs as they enjoy various tax benefits.[127]

Whilst I agree with the CRL Commission's recommendation that religious organisations need to be registered, registration needs to be mandatory with SARS as PBOs regardless of whether or not the entities are registered as an NPC or unregistered association. As long as a religious organisation or association is created and monies are collected either through tithes and offerings or gifts by members of society to the church, such organisation or association must be required by law to be registered with SARS as a PBO whether or not it seeks to obtain tax benefits. This registration with SARS should go together with an automatic issuing of a tax number for the organisations. This will place a mandatory obligation on the organisation to submit annual tax returns in order to remain tax compliant as well as places the organisation on SARS' radar for monitoring.

(b) ADOPTING THE ESTATE DUTY APPROACH BY THE LEGISLATURE

In this paper I draw from the approach taken by the legislature in levying estate duty on deceased estates. In South Africa, estate duty is levied in terms of the Estate Duty Act 45 of 1995 (hereinafter the EDA). This Act imposes estate duty on deceased estates and

[127] CRL Rights Commission op cit note 4 at 38.

provides for matters that are related to the imposition of the estate duty.[128] Executors and Administrators of deceased estates find in the Act systematic guidelines and information on how to calculate the duty and comply with requirements.

(i) Overview of Relevant Provisions of the Estate Duty Act

Estate duty is the amount payable in respect of the estate of every person who has died after 1955, calculated in terms of the EDA.[129] This Act provides that the Commissioner of SARS and SARS officials under his/her control are responsible for the administration of the EDA.[130] However the administrative requirements and procedures are regulated in terms of the TAA.[131] The Commissioner, in terms of the EDA, is responsible for the assessment of the duty and may adjust the dutiable amount upon assessment.[132]

Section 3 of the EDA provides an extensive definition of what will form part of the estate in calculating estate duty. This definition includes property which is considered to be owned by the deceased at the time of their death and extends to fiduciary rights, usufructs or other interests in property.[133] This allows the Executor to have the legislative requirements in a manner that serves as a guideline on what assets must be included in determining the levy.

Section 4 of the EDA then provides for the allowable deductions which are to be subtracted from the total value of the estate calculated using section 3.[134] These deductions include but are not limited to basic administration costs, funeral expenses as well as debts owed.[135]

Section 4A of the EDA notably provides an estate duty rebate of R3.5 million that can be deducted from the net estate, this means that estates valued under R3.5 million will be exempt from estate duty.[136] The provision of a R3.5 million rebate is notable for this paper as the abatement is an indicator of the balancing exercise the legislature and

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[128] Preamble Estate Duty Act.
[129] Section 2 Estate Duty Act.
[130] Section 6(1)-(2) Estate Duty Act.
[131] Section 6(3) Estate Duty Act.
[132] Section 9(1) Estate Duty Act.
[133] Section 3(2)*(a)* Estate Duty Act.
[134] Section 4 Estate Duty Act.
[135] Section 4*(a)*-*(d)* Estate Duty Act.
[136] Section 4A Estate Duty Act.

National Treasury aimed to achieve with collecting a wealth tax, on the one hand, and not prejudicing the smaller estates, on the other.

Importantly, section 7 of the Act, provides the Commissioner with the ability to call upon any person responsible for the control or any interest in the property of the estate to submit a return representing the calculation of the dutiable amount as well as any deductions that were claimed.[137] This gives the Commissioner the powers to satisfy himself that the property and values of the estate set out in the returns are accurate by requesting for information in relation to the estate and account provided. The ability for the Commissioner to request that the responsible party explain and account for the submissions made and exemptions claimed is important in addressing the issue of fraudulent descriptions and non-disclosure by the heads of religious institutions thus creating an extra degree of care and avoiding the situation that had occurred in the case of *Twynham*.

(ii) Adoption of Taxation of Deceased Estates Approach

I recommend that the legislature and Treasury take a similar route to that taken in the taxation of deceased estates where it enacted and developed the EDA as the principal guiding and regulating legislation to be referred to in the levying of estate duty.

I recommend that a new regulative and governing legislation (which I have termed the 'Religious Tax Act' hereinafter the RTA for ease of reference) be developed by the legislature. This Act will follow a similar systematic approach adopted by the EDA above and adopting some principles that were included in the EDA.

The RTA will serve as the principal Act that will regulate the taxation of all religious organisations and offer a more simplistic and systematic approach to religious organisations, their leaders, and persons responsible for the fiduciary responsibilities of the organisations. The Act will aim to make the taxation of these entities simpler and more ascertainable through a separate Act that will state the inclusions in the calculation of the tax, the deductions, exemptions as well indicate what is required of the responsible persons of these organisations in ensuring compliance.

[137] Section 7(1) Estate Duty Act.

Whilst some may argue that amendments to the ITA can be made to address these issues, the aim of the separate legislation is to remove religious organisations and their governance for tax purposes from the lengthy and complex income tax legislation which deals with the taxation of numerous entities and individuals and dedicate a special piece of legislation that would address the limitations in the ITA such as what is 'substantially whole' and what is meant by business undertaking specifically in relation to religious organisations The aim is to simplify the taxation of religious entities by collating all the requirements for exemption status, calculation of tax liability and the various exemptions, procedures and trade rules into one Act that will provide a clear guideline, provide certainty, and allow for all incidents related to the taxation of these organisations to be dealt with systematically and in a simpler manner. This creates an environment where compliance is simpler than non-compliance and inspires compliance by taxpayers who are deterred by the complexity of being compliant. It must however be noted that one cannot entirely remove the religious organisations from the ITA as some general income tax principles will remain applicable such as what is construed as income in nature and what is capital in nature.

As Adam Smith put it; taxation must be certain, the time it should be paid, the amount and calculation must be clear and plain to the taxpayer as the uncertainty of taxation encourages insolence and corruption.[138] Part of the problem with the current tax regime for religious entities is that they are embedded in a lengthy piece of tax legislation that serves as the principal act for all income tax related matters making it complex and dense. The ITA also governs the tax rules of other PBO's such as charities and foundations with complex definitions on exclusions and inclusions. The Act fails to specifically provide for certain things that would only be applicable to religious entities such as tithes. The process and requirements of obtaining exemption status and tax exemptions are also embedded in this bulky piece of legislation dealing with other sophisticated matters. A separate Act can simplify this and provide clear and concise guidelines on what is included, excluded and what is required and deter tax evasion resulting from complex tax rules as complexities and ambiguity contribute to non-compliance by making compliance a 'chore'.

[138] Smith *An inquiry into the nature and causes of the wealth of nations* (2003) (reprint) 1043-1044.

This RTA will like the EDA provide that the Commissioner for SARS and SARS officials powers in terms of the TAA remain and they will be responsible for the administration and levying of the tax in terms of the Act and will be empowered to request from the relevant organisations, information in relation to the levying of any religious tax as well as any property.

It is also recommended that the RTA, like the EDA provides extensive definitions of all assets and income that will form part of the calculation of the duty leviable in that year of assessment on the religious organisation taking into account the current income tax jurisprudence that already exists such as what is capital and revenue in nature. Whilst creating a systematic approach for religious organisations that looks to specifically introduce religious concepts such as tithes, zakat, offerings as part of the taxable income of the organisation as these forms of receipts form a substantial part of the revenue received by these organisations.

In the spirit of acknowledging the role religious organisations play in the development of society through public benefit activities, these organisations will have provision for allowable deductions and exemptions within this Act. These will include expenses in keeping the organisations running such as rental of places of worship, maintenance and repairs to places of worship, and will extend to include the various deductions for public benefit activities performed such as feeding schemes and providing of educational bursaries. These inclusions, deductions and exemptions will draw on the ITA jurisprudence but will go further into religious organisations to specifically include income earned through receipts such as tithes and offerings.

In addition to the allowable deductions, the RTA is to provide for annual abatements to religious organisations of R1.5 million. All receipts and accruals retained exceeding the R1.5 million abatement will be taxed using a similar approach to that taken in the taxation of individuals and special trusts on a sliding scale basis. Using this sliding scale means that smaller religious organisations will have the tax burden shifted off them with being afforded the lower tax rate and the larger religious organisations bearing the bigger taxation.

This proposal seeks to first exclude smaller religious organisations from a religious tax liability that would prejudice them, whilst targeting the organisations with high revenue yields run as wealth creation tools ensuring that they too contribute to the country's fiscus by creating a sustainable revenue stream. Secondly, the abatement is also proposed to start at R1.5 million as this allows for the Minister of Finance to increase the abatement in due course after careful examination of the operation of the abatement and how it is to be received as was done with the estate duty abatement which was increased from R2.5 million to R3.5 million with effect from 1 March 2007.[139] The aim is to avoid a high abatement which could potentially result in a loss in revenue collection from religious tax and to avoid the potential of setting too high an abatement which would have to be reduced and may result in reduced tax payer confidence.

The abatement at R1.5 million would be calculated on income after all allowable deductions and exemptions. It is set at R1.5 million due to the nature of the organisations being non-profit driven entities whilst also acknowledging that every organisation must retain some income to remain liquid and functionable. The abatement amount seeks to balance the need to ensure that smaller religious organisations are not prejudiced by a high tax liability that would reduce income available for them to perform their public benefit activities whilst acknowledging the need to tax the organisations that have sought to commercialise religious entities as these entities are not created as profit driven entities that reserve massive amounts of capital for personal benefit. The abatement and the annual levying on a sliding scale, would therefore do away with the need for partial exemptions on trade and business undertakings contemplated in section 10(1)(cN) of the ITA that has not provided much clarity on what trading activity will be taxable and which trading activity is not taxable by failing to properly define important concepts such as what a business is and what is considered to be 'substantially whole'. This would mean that these organisations would be able to undertake trade and business undertakings providing them with more operating funds and income for the performance of these public benefit activities with the knowledge that the retained excess on these activities exceeding the abatement would be included in the tax liability calculation. This approach would also do away with the questions around the partial exemption of trade and business undertakings and what would be considered as a result of the unexplained concepts of 'business undertakings' and 'substantially whole'.

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[139] The Davis Tax Committee *Second Interim Report on Estate Duty for the Minister of Finance* (2016) at 14.

These recommendations mean that religious organisations would thus be removed the list of public benefit activities that are considered in the determination of PBOs and be administered and regulated under the RTA. This legislation would provide specific rules, deductions, and tax exemptions that aim to balance the rights contained in the Constitution, the role of religious organisations in society as well as the responsibility and legal obligation for the organisations and the various leaders to ensure compliance. The 'RTA', will like section 6(3) of the EDA, contain provisions that the Act and the necessary administration and procedures not addressed in the Act will be regulated by the TAA, thereby continuing the link between the Act and the relevant administrative tax legislation.

The Act will be aimed at ensuring that all religious organisations that have been commercialised and operate as 'empire building tools' are subject to taxation where the funds collected and retained exceed the abatement values or where the funds received were not used for the performance of their public benefit activity.

In terms of this Act, religious organisations will also be required to submit annually a 'religious tax addendum', similar to the estate duty addendum, which will stipulate all assets obtained and income obtained as well as the applicable deductions and abatement and detail expenditure on religious practice. This addendum will allow SARS to keep a record of assets being obtained by the organisation as well as whether there is a public benefit activity being fulfilled as part of ensuring that these organisations are not serving as fronts for the purpose of wealth building by religious leaders.

Where an organisation is found to be non-compliant, either because of non-registration or failure to declare and submit annual 'religious taxation addendum' that would be used in determining the taxable amount, the responsible person, be it the religious leader or the board of trustees, shall be found guilty of an offence and similar provision of offences and punishment shall be applied as in section 28 of the EDA.[140]

The aim of regulating religious organisations through the RTA and the provisions discussed above is to provide for accountability from religious leaders and to deter the

[140] Section 28(2)*(c)*-*(d)* of the Estate Duty Act states that any person that fails to comply with any reasonable requirement in carrying out the duties under the Estate Duty Act or gets in the way of the Commissioner or Master in carrying out provisions of the Act will be guilty of an offence and may be liable for a fine or imprisonment for no more than two years.

use of churches and other religious organisations as wealth creating tools through commercialisation.

VI CONSTITUTIONALITY OF THE 'RTA'

It might be argued that this Act due to the administrative requirements would infringe on the constitutional right to freedom of religion in section 15(1) and the right for one to form, join or maintain a religious organisation in section 31(b) of the Constitution. However, it is important to note that the above 'RTA' does not aim to stop religious practice or inhibit the ability to form and join a religious organisation. This Act aims to put in place legislative measures that will effectively promote honest religious practice not aimed at the individual gain and profit of religious leaders.

It is also important to note that in terms of section 36 of the Constitution, every right in the Bill of Rights may be limited by way of a law of general application if it is reasonable and justifiable taking into account all relevant factors.[141] These include; the nature of the right,[142] importance of the purpose of the limitation,[143] nature and extent of the limitation,[144] the relationship between the limitation imposed and its purpose,[145] and lastly, whether there are less restrictive means to achieved the purpose set out by the limitation.[146] Whilst the case has been made above that the proposed recommendation does not limit the rights to religion and practice of religion enshrined in the Constitution, such a challenge remains possible.

In this respect, it is prudent to acknowledge that where a challenge is brought regarding the constitutional validity of the proposed recommendations, that such challenge would fail as the legislation would be a justifiable limitation in terms of section 36 of the Constitution. This is because the recommended legislative reform does not aim to impose new limitations on the right to religion or the right to form an organisation but the recommendations above are aimed at improving the already set out regulations of organisations performing a public benefit activity and obtaining donations or gifts in cash.

[141] Section 36(1) the Constitution.
[142] Section 36(1)*(a)* the Constitution.
[143] Section 36(1)*(b)* the Constitution.
[144] Section 36(1)*(c)* the Constitution.
[145] Section 36(1)*(d)* the Constitution.
[146] Section 36(1)*(e)* the Constitution.

The Act aims to restrict and potentially eradicate the issue of abuse and commercialisation of religion due to the loopholes existing that are being used by people seeking to gain financial wealth through the operation organisations.

VII CONCLUSION

The CRL Commission in its investigation on the commercialisation of religion found commercialisation of religious organisations was an issue, together with non-compliance of general rules regarding formal registration of organisations, taxation requirements and intentional withholding of income earned by religious organisations to evade tax liability. The case of *Twynham* showed how the abuse would take place if left unregulated or with the current loopholes.

Whilst religious organisations play a public benefit role in society the need to place stricter measures to ensure compliance by these organisations and clamp down on commercialised churches serving as personal wealth building tools.

The separation of religious organisations from other PBOs and the introduction of legislation similar to the EDA allows for a balanced and systematic approach that will guide the administration of the religious organisations as well as enforcement of tax rules by SARS. The Act will aim to balance religious freedom whilst ensuring compliance of SARS regulations. Where religious organisations are created to be commercialised and profit driven, such organisations will find themselves with a higher dutiable amount unless they engage in public benefit activities.

BIBLIOGRAPHY

BOOKS

AP de Koker et al *Silke on South African Income Tax* (LexisNexis 2021)

ML Stein *Stein on Capital Gains Tax* (LexisNexis 2019)

A Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (The University of Chicago Press 2003)

INTERNET REFERENCES

Venter, Zelda 'Prophet Shepherd Bushiri fights to keep $1.2m luxury jet', available at *https://www.iol.co.za/pretoria-news/prophet-shepherd-bushiri-fights-to-keep-12m-luxury-jet-38100551* (accessed 26 June 2020)

Meyer, Dan 'Prophet Bushiri is now charging followers to watch his services online', available at *https://www.thesouthafrican.com/news/prophet-shepard-bushiri-major-1-app-lockdown-2020/* (accessed 04 July 2020).

eNCA 'Pastor went to heaven and took pics to prove it', available at *https://www.enca.com/south-africa/pastor-went-heaven-and-took-pics-prove-it* (accessed 26 June 2020)

SARS 'How do I apply for income tax exemption as a Public Benefit Organisation (PBO)?', available at *https://www.sars.gov.za/ClientSegments/Businesses/TEO/Pages/Tax-Exemptions-and-PBOs.aspx* (accessed 04 July 2020)

Staff Reporter 'Pastor Mboro must pay CRL Rights Commission's legal fees', available at *https://www.timeslive.co.za/news/south-africa/2017-08-10-pastor-mboro-must-pay-crl-rights-commissions-legal-fees/* (accessed 11 July 2020).

JOURNAL ARTICLES

Benjamin, Kujinga 'Factors that limit the efficacy of general anti-avoidance rules in income tax legislation: lessons from South Africa, Australia, and Canada' (2014) 47 *The Comparative and International Law Journal of Southern Africa* 429

Cassim, Maleka Femida 'The contours of profit-Making activities of non-profit companies: An analysis of the new South African Companies Act' (2012) 56(2) *Journal of African Law* 243

De Freitas, Shaun 'The constitutional dynamic of civil society and the role of the churches in South Africa' (2005) 37(2) *Acta Academica* 21

Maroun, W, Turner, M & Coldwell, D 'Capital gains tax in South Africa: Perceptions of fairness' (2014) 17(2) *South African Journal of Economic and Management Sciences* 124

Ndinda, Catherine, Adebayo, Pauline & Adebayo, Ambrose 'The role of the church in housing provision: Implications for South Africa' (2007) 37(1) *Africa Institute of South Africa* 76

Van Coller, Helena & Akinloye, Idowu A '*The State v Twynham*: The (ir)relevance of further regulation of religious organisations in South Africa' (2019) *Stellenbosch Law Review* 299

Whitehead, W. John 'Tax exemption and churches: A historical and constitutional analysis' (1991) 22(3) *Cumberland Law Review* 521

LEGISLATION

Constitution of the Republic of South Africa, 1996

Companies Act 71 of 2008

Estate Duty Act 45 of 1955

Income Tax Act 58 of 1962

Non-Profit Organisations Act 71 of 1997

Rates and Monetary Amounts and Amendment of Revenue Laws Act 13 of 2016

Tax Administration Act 28 of 2011

Transfer Duty Act 40 of 1949

ONLINE ARTICLES

Pretorius, Heather 'The tax treatment of public benefit organisations' (2012) 34 Tax Talk Magazine pp 20-23, available at *https://0-journals-co-za.innopac.wits.ac.za/doi/10.10520/EJC121675*, accessed 5 July 2020

Snyckers, Magda & Gama, Sarah 'Are pension funds, PBOs and universities exempt from all taxes?' (2018) 31 Taxpro pp 20-20, available at *https://0-journals-co-za.innopac.wits.ac.za/doi/10.10520/EJC-f37264a0a*, accessed 5 July 2020

Steenkamp, Lee-Ann 'The relationship between non-profit companies and public benefit organisations' (2011) 30 Tax Talk Magazine pp 14-16, available at *https://0-journals-co-za.innopac.wits.ac.za/doi/10.10520/EJC110497*, accessed 5 July 2020

Steenkamp, Lee-Ann ‘Public benefit organisations and tax: Where is the charity and justice?’ (2014) 45 Tax Talk Magazine pp 27-31, available at *https://0-journals-co-za.innopac.wits.ac.za/doi/10.10520/EJC152669*, accessed 5 July 2020

REPORTS

Charities Aid Foundation *Growing Giving in South Africa* (2020)

Rosenthal, Richard ‘Taxation and Philanthropy: Past, Present and Future’ in *IPASA Annual Review of South African Philanthropy* (2019)

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities *Report of the Hearings on the Commercialisation of Religion and Abuse of People’s Belief Systems* (2017)

SARS REPORTS AND INTERPRETATION NOTES

SARS Interpretation Note 24 (issue 4) *Public Benefit Organisations: Trading Rules – Partial Taxation of Trading Receipts* (February 2018)

SARS Interpretation Note 44 (issue 2) *Public Benefit Organisations: Capital Gains Tax* (February 2014)

Legal Counsel SARS (issue 5) *Tax Exemption Guide for Public Benefit Organisations in South Africa* (January 2017)

The Davis Tax Committee *Public Benefit Organisation Report* (2018)

The Davis Tax *Committee Second Interim Report on Estate Duty for the Minister of Finance* (2016)

The Katz Commission Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa *Fiscal issues affecting non-profit organisations* (1999)

TABLE OF CASES

Prince v President of the Law Society of the Cape of Good Hope 2002 (3) BCLR 231

The State v Twynham (Unreported, SCCC case no CCC/1/1/2014, 4 December 2015)