



**Department of Customs and Inland Revenue**

**Internal Staff Manual for**

# **BENEFICIAL OWNER –**

## **Notes for Tax Auditors**

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# Introduction

Under the Tax Administration Act No.37 of 2018, as part of their record keeping requirements, businesses are required to keep records to identify the owner or beneficial owner of their business. In ongoing work with the Global Forum on Transparency and Exchange of Information for Tax Purposes, clause 52A of the Tax Administration Regulation Order No.154 of 2019 has been amended to reflect the global standard requirements for ‘beneficial owner.’

The first section of this manual sets out the general requirements to keep records of beneficial ownership, particularly that they are kept up to date, and the retention period.

The second section sets out how to identify the beneficial owner(s) of an entity depending on whether the entity is a company, foundation, partnership or trust.

The third section of this manual explains the ownership records that are to be kept.

This manual will help auditors ensure that businesses are keeping the required ownership records.

## 1. The general law regarding ownership records

### **TAX ADMINISTRATION ACT NO.37 OF 2018**

**Paragraph 8(2) (da):** The records required by a business or investing in property must enable the identity of the person (and if the person is an entity, the beneficial owner of that entity) to be available at any time.

### **TAX ADMINISTRATION REGULATION ORDER NO. 154 OF 2019**

#### **PART 12A OWNERSHIP RECORDS**

#### **52A Ownership records to be maintained**

- (1) A person carrying on business within the meaning of section 8 of the Act, must keep and retain records which are adequate, accurate and up to date to enable the identity of the person and if the person is an entity, the beneficial owner of that entity.
- (1A) If there is a change in information on the beneficial owner, that information must be updated by the person as soon as the person becomes aware of the change and no later than 10 days following the relevant change.

- (1B) If the person suspects that a change in information on the beneficial owner has occurred, the person must confirm and validate whether a change has occurred and update the information no later than 10 days from the date the person suspected the change.
- (1C) Despite subclauses (1A) and (1B), the person must confirm and validate information to identify the beneficial owner at least once every twelve months.

Note also:

- (9) Records required to be kept under this section must be retained in accordance with section 8 of the Act.

Therefore:

- TAA paragraph 8(2)(e), records must be retained for 5 years (or such other time as prescribed) after the end of the tax period to which they relate.
- TAA subsection 8(8), if the entity ceases to exist, all directors, partners, trustees and controlling members of the entity must ensure that the records are retained for the required period.

## Summary of Ownership Records

- Applies to all persons carrying on a business
- Must be adequate, accurate and up to date
- For a natural person: To identify the person, or
- For an entity: To identify the beneficial owner of the entity.
- **Up to date** means:
  - **If beneficial owner changes:** the business updates its records within 10 days.
  - **If the person suspects a change:** the person confirms and validates the change and updates the records within 10 days.
  - **Otherwise,** the person must check at least once every 12 months.
- The records need to be kept throughout the life of the business, and for 5 years after it ceases to exist.

## Suggestion if records are not up to date

- The objective is to get up to date records, not to prosecute for failure to do so.
- If the person is aware of a change, or suspects a change, and it is more than 10 days after the change, the person should check and update their records if necessary and advise the Tax Auditor of the change. The Tax Auditor should remind the person to notify the change to VFIU and VFSC as applicable as soon as possible.

- If the person has not checked their records for 12 months or longer, they must check, update their records, if necessary (including advising VFIU and VFSC), and inform the Tax Auditor that they have done a check and notify the Tax Auditor of any changes.
- If the person refuses to check or update their records, the Tax Auditor should warn the person that they may be prosecuted under the Taxation Administration Act and possibly under other legislation administered by the VFIU and VFSC.

## 2. How to identify a beneficial owner (there may be more than one)

First question: What type of entity is it?

- Company (not including a foundation)
- Foundation
- Partnership
- Trust.

### 2.1. Company

**The law:**

#### **52A Ownership records to be maintained**

- (2) For the purposes of subclauses (1), (1A), (1B), and (1C), for an entity which is a Company, **beneficial owner** means a natural person who is a beneficial owner of a company if the natural person:
- (a) ultimately owns or controls the company, in whole or in part, through direct or indirect ownership or control of shares or voting rights or other membership interests in that company; or
  - (b) exercises control of the company via other means. Control via other means includes but is not limited to situations where:
    - (i) a natural person has absolute decision or veto rights over the running of a company, whether by rights attached to shares, or by virtue of a shareholder agreement or other arrangement; and
    - (ii) a natural person controls the decisions that affect the activities of the company through personal connections to those owning or controlling the company, the financing of the company, historical or contractual association, or the use or benefit of the company's assets.
- 2A To avoid doubt, a Company referred to in subclause (2) excludes a Foundation.
- (3) In addition to subclause (2), the beneficial owner of a company is taken to include a natural person who:
- (a) has a membership interest of 25% or more of the company, by way of legal ownership of shares or otherwise, including ownership exercised through a chain of ownership; or
  - (b) exercises control, directly or indirectly, over the legal person or legal arrangement. This is to apply to any natural person acting alone or together

through any contract, understanding, relationship or agreement of a formal or informal nature.

- (3A) If no natural person can be identified as a beneficial owner of the company under subclauses (2) or (3), the beneficial owners will be the natural person who hold the position of the senior management.

### Summary of beneficial owner of a company

The natural person who:

- 52A(2)(a): Ultimately owns or controls the company, in whole or in part through:
  - Shares, voting rights, or other membership interests
  - **Example of BO:** George owns 40% of the shares in a company, but through a chain of trusts, partnerships and other companies. He OWNS the company in part, so that makes him a BO.
  - **Example of NOT BO:** Matilda owns 100 shares in a company with an issued capital of 10,000 shares. Matilda is one of 1000 shareholders. She does not control the company, only by way of voting with 999 other shareholders. She only owns 100/10000, 1% of the shares. So, we cannot say she OWNS or CONTROLS the company, even in part. She is not a BO.

OR

- 52A(2)(b): Exercises control of the company via other means includes:
  - 52A(2)(b)(i) Absolute decision or veto rights or another arrangement; and
  - 52A(2)(b)(ii) Or controls decisions through personal connections to those owning or controlling the company, or through financing of the company, historical or contractual association, or the use or benefit of the company's assets.
  - **Examples of BO:** Assume in each of these cases, the person owns no shares, but exercises control via other means:
    - (52A(2)(b)(i)): A family company where the shares are all held by the 5 children and 20 grandchildren, but the grandfather makes all decisions about running the company and the shareholders have no say. The Grandfather is a BO.
    - In another company, a wife owns all shares, but:
      - The husband approves all decisions regarding the company
      - The wife's brother has fully financed the company
      - It has always been agreed that the wife's sister can make decisions about the running of the company
      - The company owns a house, where the grandmother lives rent-free.
      - In this case, the wife is a BO (52A(2)(a)), but so are the husband, wife's brother and sister, and the grandmother. (52A(2)(b)(ii)).

OR

- 52A(3)(a): has a membership interest of 25% or more of the company, including ownership exercised through a chain of ownership.
  - **Example of BO:**
    - (1) Mary owns 10% of Blue Company directly.
    - (2) The other 90% of Blue Company is owned by Red and Green Partnership.
      - There are 2 partners, 50% each – Red Company, Green Company
      - Mary owns 40% of Green Company.
    - Therefore, Mary’s ownership of Blue Company is:
      - (1) 10% directly, plus
      - (2)  $90\% \times 50\% \times 40\% = 18\%$  through a chain of ownership.
      - $10\% + 18\% = 28\%$ . This exceeds 25%, so even though Mary only owns 10% of Blue Company directly, through a chain of ownership she owns a total of 28% of Blue Company. Therefore, she is a BO of Blue Company.

OR

- 52A(3)(b): exercise control over the legal person or legal arrangement. Applies to any natural person acting alone or together through any formal or informal arrangement.
  - This seems to extend BO to a natural person or persons who exercise control over an entity in a chain of ownership.
  - **Example of BO:**
    - Speedy Company is 100% owned by Freedom Company.
    - Freedom Company is 100% owned by Joe.
    - Sam does not own either Speedy Company or Freedom Company, but he and Joe have an informal agreement that he will approve all decisions made by Freedom Company.
    - 52A(3)(a): Clearly, Joe is a BO of Speedy Company, because he owns 100% of Freedom Company which owns 100% Speedy Company.
    - 52A(3)(b): But Sam is also a BO of Speedy Company. He exercises control over a company (Freedom Company) which is part of the chain of ownership between Speedy Company and Joe.

OR

- 52A(3A): holds the position of senior management. This only applies if a natural person cannot be found under 52A (2) or 52A (3).
  - **Example of BO:**
    - Happy Company is owned by 1,000 shareholders, each own 1 share each.
    - No one person controls the company. Each of the 1,000 shareholders is eligible to vote for the Board of Directors.
    - Each Director receives a set honorarium each year. The amount received does not vary with the performance of Happy Company.
    - The Board of Directors appointed a senior manager to run the company.

- 52A (2) and 52A (3) cannot be applied because no natural person can be found who owns or controls the company. Therefore, under 52A(3A) the BO is the senior manager.
- Note: The senior manager might argue that they do not own or control the company in any way, so they should not be considered the BO. It may be, however, that he is in a performance pay situation, where his remuneration is affected by the performance of the company – for example, he is entitled to 5% of the profits. In this instance, it can be said that he may control the company to ensure profits are made and he benefits from those profits. **But regardless of whether the senior manager gets performance pay or not, it is not up to the DCIR auditor to determine if the senior manager really has beneficial ownership of the company. Clause 52A(3A) says that, in the absence of being able to find another natural person as the BO through ownership and control tests, the senior manager is to be reported as the BO.**

## 2.2. Foundation

### The law:

#### 52A Ownership records to be maintained

(3B) Despite subclauses (2), (3), and (3A), the beneficial owners of a foundation are:

- (a) the natural persons who have the quality of founder, member of the foundation council and beneficiaries irrespective of any ownership interest threshold, and
- (b) any other natural person exercising control over the foundation.

(3C) For the purposes of subsection 8A(6)<sup>1</sup> of the Tax Administration Act No. 37 of 2018 and subclause 52A(7)<sup>2</sup> of the Tax Administration Regulation (Amendment) Order No. 154 of 2019, where any of the qualities mentioned in paragraph (3B)(a) is exercised by an entity, its beneficial owners should be identified in accordance with the methodology applicable to the form and structure of the entity, and considered as beneficial owners of the foundation.

### Summary of beneficial owner of a foundation

The natural persons who:

52A(3B) (a): are the founder, member of the foundation council and all beneficiaries;

and

52A(3B) (b): any other natural person exercising control.

52A(3C): If the founder, member of the foundation council or beneficiaries are an entity (company, partnership or trust), the BO of the foundation will have to be traced through a chain of persons or arrangements. In this case, use the methodology appropriate to the type of entity to determine the beneficial owner of that entity. The beneficial owner of the entity will also be a beneficial owner of the foundation.

○ **Example of BOs:**

- Assume that the Sunny Island Foundation has been set up to preserve the environment and culture of Sunny Island, for the benefit of its current residents and some of its former residents.
- Applying the regulations, it has the following as BOs:
  - 52A(3B) (a):
    - Ralph (the founder of the foundation)
    - Ralph's three brothers (members of the foundation council)
    - 100 residents of Sunny Island (the beneficiaries of the foundation)
  - 52A(3B) (b):

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<sup>1</sup> Comment 1 by Tax Adviser : This was by way of TAA Amendment No.14 of 2021. Subsection 8A(6) states that the BO can be traced through any number of persons or arrangements of any description.

<sup>2</sup> Comment 2 by Tax Adviser: Similar wording to subsection 8A(6). See Comment 1.

- George (as the traditional owner of Sunny Island), has a direct interest in the welfare of Sunny Island and its residents. He exercises control over the Sunny Island Foundation by his power of veto over any decision the Foundation makes.
- 52A(3C):
  - Assume that Sunny Island Tourist Resort Partnership is also a beneficiary of the foundation.
  - To determine the beneficial owner of this entity, use the methodology appropriate to a partnership.
  - Assume that the Sunny Island Tourist Resort Partnership is a partnership of 50 natural persons who were born on Sunny Island but no longer live there. Therefore, using the partnership methodology, the BOs of the Sunny Island Tourist Resort Partnership are the 50 former residents, and they are also BOs of the Foundation.
- **Summary:** Sunny Island Foundation has the following BOs:
  - Ralph
  - Ralph's three brothers
  - 100 residents of Sunny Island
  - George
  - 50 former residents of Sunny Island
  - Note: See the example of the BO for a partnership (page 12). Under that example, more BOs can be added to the BO of the Sunny Island Foundation.

## 2.3. Partnership

### The law:

#### 52A Ownership records to be maintained

(3D) Despite subclauses (2), (3), and (3A), the beneficial owners of a partnership are:

- (a) the natural persons who have the quality of partners irrespective of any ownership interest threshold; and
- (b) any other natural person exercising control over the partnership.

(3E) For the purposes of subsection 8A(6) of the Tax Administration Act No.37 of 2018 and subclause 52A(7) of the Tax Administration Regulation (Amendment) Order No. 154 of 2019, where an entity is a partner, its beneficial owners are to be identified in accordance with the methodology applicable to the form and structure of the entity, and considered as beneficial owners of the partnership.

#### Summary of beneficial owner of a partnership

This is very similar to the methodology for a foundation:

The natural persons who:

52A(3D) (a): are partners. This applies to all partners, irrespective of how many partners there are;

and

52A(3D) (b): any other natural person exercising control.

52A(3E): If a partner is an entity (company, partnership or trust), therefore the BO of the partnership will have to be traced through a chain of persons or arrangements. In this case, use the methodology appropriate to the type of entity to determine the beneficial owner of that entity. The beneficial owner of the entity will also be a beneficial owner of the partnership.

#### ○ Example of BOs:

- Refer to Sunny Island Tourist Resort Partnership (page 11).
- 52A(3D) (a): The 50 former residents are partners, and so are BOs.
- 52A(3D) (b): If Ralph's father (James) can also exercise control over the partnership, then he is also a BO.
- 52A(3E): If a company is formed (Happy Company) and becomes a 51<sup>st</sup> partner, then we have to use the methodology applicable to a company, to first work out the BOs of Happy Company, and then these will also be BOs of the partnership.
  - Assume that Happy Company has two shareholders, Peter and Paul. Also assume that Paul's father David exercises control of the company.
  - Therefore, the three BOs of Happy Company are Peter, Paul and David, and these are also BOs of Sunny Island Tourist Resort Partnership.
  - Note also that Peter, Paul and David would be additional BOs for Sunny Island Foundation (see that example, page 11).

## 2.4. Trust

### The law:

#### 52A Ownership records to be maintained

- (4) In the case of a trust, a beneficial owner includes:
- (a) a settlor, trustee, protector, beneficiary, or class of beneficiaries, of the trust; and
  - (b) any other natural person exercising ultimate effective control over the trust.
- (5) In the case of a legal arrangement other than a trust, a beneficial owner means a person in equivalent or similar positions to the persons under subclause (4).
- (5A) Where any of the qualities mentioned in paragraphs (4)(a) and (5) is exercised by an entity, its beneficial owners must be identified in accordance with the methodology applicable to the form and structure of the entity and considered as beneficial owners of the trust or legal arrangement.

#### Summary of beneficial owner of a trust

This is very similar to the methodologies for a foundation and a partnership:

The natural persons who:

52A(4)(a): are the settlor, trustee, protector, beneficiary, class of beneficiaries;

and

52A(4)(b): and any other natural person exercising control.

52A (5): For a legal arrangement other than a trust, the persons performing similar roles as under 52A (4)

52A(5A): If the roles listed in 52A (4) and (5) are performed by an entity (company, partnership or trust), therefore the BO of the trust or legal arrangement will have to be traced through a chain of persons or arrangements. In this case, use the methodology appropriate to the type of entity to determine the beneficial owner of that entity. The beneficial owner of the entity will also be a beneficial owner of the trust.

#### ○ Example of BOs:

- Assume we have a trust: The Pizza Family Trust. This trust manages investments for the Pizza family. The BOs would be:
- 52A(4)(a)
  - Mary Pizza – the settlor. This is the person who set up the trust, by donating money to it. She is the grandmother of the Pizza family.
  - Fred Pizza – the protector. This is the person who oversees the trustee. He is the grandfather of the Pizza family.
  - Alan and Cindy Pizza. They are the beneficiaries of the trust. They are the grandchildren of Mary and Fred Pizza.

- 52A(4)(b)
  - Frank Pizza – exercises ultimate effective control of the trust. He is a trusted cousin of the Pizza family, well experienced in financial management. Under the trust deed, all investment decisions must be approved by him.
- 52A(5A)
  - Assume that the trustee is a company – Pizza Company.
  - We have to trace the beneficial owners of the company. Assume that the beneficial owners are Jack and Jill Pizza, who each own 50% of the shares in Pizza Company. (They are the parents of Alan and Cindy Pizza - the beneficiaries).
  - Therefore, using the methodology appropriate for a company, Jack and Jill Pizza are the BOs of Pizza Company, and are therefore also BOs of The Pizza Family Trust.

### 3. Other important provisions of clause 52A

#### The law:

#### 52A Ownership records to be maintained

- (6) If two or more natural persons each own or control an interest in an entity, each of them is treated as owning or controlling that interest.
- (7) Beneficial ownership may be traced through any number of persons or arrangements of any description.
- (8) Ownership information required to be kept and retained for the purpose of this clause for each owner or beneficial owner, includes:
  - (a) full name; and
  - (b) residential address; and
  - (c) date of birth; and
  - (d) nationality; and
  - (e) Tax Identification Number;
  - (f) the underlying documentation for which a person is identified as a beneficial owner, including the beneficial ownership interest, control by other means or senior managing position; and
  - (g) if the beneficial owners are foreign tax residents, the tax residency and the foreign tax identification number of such beneficial owners; and

any other information the Director may specify in a public notice or in a public ruling in accordance with Part 12 of the Act.

- (9) Records required to be kept under this section must be retained in accordance with section 8 of the Act.

#### Summary

- 52A (6): Where two or more natural persons each own or control an entity, they are all beneficial owners.
- 52A (7): This refers to ownership through a chain of persons or arrangements or entities. To find the BO, you keep tracing through the entities to find the beneficial owners, as we have seen in 52A(3)(a), (3C), (3E), (5A).
- 52A (8): All items (a) to (g), and any other information specified by the Director, must be retained and kept up to date for each owner or beneficial owner.
- 52A(8)(f): There must be documentation to support the reason why the natural person is identified as a BO.
- 52A (9): See page 4.