

Donations made between spouses

☒ Sections 54 to 64 of the Income Tax Act, No 58 of 1962 (Act) provide for the imposition of donations tax on the value of any property disposed of by way of a donation.

Donations tax is levied at a rate of 20% of the value of the asset or the amount of money donated, and the donor is generally liable for payment.

A donation is defined as 'any gratuitous disposal of property including any gratuitous waiver or renunciation of a right'. Also, in terms of s58 of the Act, the disposal of any property for an inadequate consideration can be deemed to be a donation.

Section 56 of the Act lists various exemptions in respect of donations tax. One such exemption is for donations between spouses. That is, persons who are married to each other may freely donate assets or money to each other (or for the benefit of each other), irrespective of the marital property regime that applies to them, without triggering donations tax. This exemption does however not apply to spouses who are legally separated.

A further exemption applies to donations made between spouses under a duly registered ante-nuptial or post-nuptial contract or under a notarial contract in terms of s21 of the Matrimonial Property Act No 88 of 1984.

Despite the general exemptions from donations tax that apply to spouses, it is important to appreciate the income tax consequences that the anti-avoidance rules contained in s7 of the Act (which are mainly aimed at income splitting) may have

in respect of donations.

In terms of s7(2) of the Act, any income received by or accrued to a person married in or out of community of property will be deemed to be income accrued to that person's spouse, if the income was derived by the person in consequence of a donation made by the person's spouse, and the sole or main purpose of the donation was the reduction, postponement or avoidance of the donor's liability for any tax which would otherwise have become payable by the donor.

If a person has made a donation to any other person (including a spouse or a trust of which the spouse is a beneficiary), which donation is subject to a stipulation that the other person will not receive the income under such donation until the happening of a future event, the income that would otherwise have accrued to the beneficiaries as a result of the donation, will be deemed to have accrued to the person (s7(5) of the Act).

If a deed of donation contains a stipulation that the right to receive any income under such donation may be revoked or conferred on someone else, the income received by or accrued to the donee under such donation will be deemed to be the income of the donor (s7(6) of the Act).

If a person donates (by way of cession or otherwise) his or her right to receive rent, dividends, interest, royalties or other income in respect of any property to another person (such as a spouse, or a third party for the benefit of the spouse), and the donor retains an interest in the property, including a reversionary interest, the rent, dividends, interest, royalties or other income will be deemed to be that of the donor (s7(7) of the Act). The same applies to the donation of a beneficial interest in a trust (s7(7)(b) of the Act).

For the purposes of these anti-avoidance provisions, the

disposal of an asset for consideration that is less than its market value, will be deemed to be a donation (s7(10) of the Act).

Even though donations between spouses are generally exempt from donations tax, married persons should be careful when making donations to each other, especially where the result of the donation is that income is diverted from the donor to the donee.

Taxpayers are obliged in terms of s7(10) of the Act to disclose such donations to the South African Revenue Service when submitting their tax returns.

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