

DRAFT BINDING GENERAL RULING (DONATIONS TAX)

DATE:

ACT : INCOME TAX ACT 58 OF 1962
SECTION : SECTION 64
SUBJECT : DETERMINATION OF THE THRESHOLD FOR APPLYING THE HIGHER RATE OF DONATIONS TAX

Preamble

For the purposes of this ruling –

- “**BGR**” means a binding general ruling issued under section 89 of the Tax Administration Act 28 of 2011;
- “**section**” means a section of the Act;
- “**the Act**” means the Income Tax Act 58 of 1962; and
- any other word or expression bears the meaning ascribed to it in the Act.

1. Purpose

This BGR provides clarity on the rate of donations tax chargeable for the value of any property disposed of under a donation, and the determination of the R30 million threshold to be applied to such value.

2. Background

Section 54 provides that, subject to section 56, donations tax must be paid on the value of any property disposed of (whether directly or indirectly and whether in trust or not) under any donation by any resident. Section 56 sets out the exemptions from donations tax.

Section 64(1)(a) sets out the rate at which donations tax is chargeable.

Section 5(1) of the Rates and Monetary Amounts and Amendment of Revenue Laws Act 21 of 2018 substituted section 64(1)(a) and, in the process, introduced a dual rate of donations tax. The amendment came into operation on 1 March 2018.

Section 64(1)(a) provides as follows:

“64. Rate of donations tax.—(1) The rate of the donations tax chargeable under section 54 in respect of the value of any property disposed of under a donation shall be—

- (a) (i) 20 per cent of that value if the aggregate of that value and the value of any other property disposed of under a donation until the date of that donation does not exceed R30 million; and
- (ii) 25 per cent of that value to the extent that that value is not taxed under subparagraph (i); or”

3. Discussion

The following issues arise in relation to the R30 million threshold, which impact on whether a donations tax rate of 20% or 25% applies:

- Over what period must the sum of all donations preceding the current donation be determined?
- Does the “value” of all donations preceding the current donation include exempt donations?

3.1 Period over which sum of all donations must be determined

Section 64(1)(a) requires the aggregate of the value of any property disposed of by donation to be determined. This aggregate value comprises –

- the current donation; and
- any other property disposed of under a donation until the date of the current donation.

The Act is silent on the period over which the aggregate of donations referred to in the second bullet point is to be determined. Donations tax is not tied to a year of assessment, and the cumulative total can therefore potentially extend over many years.

There is uncertainty as to when donations made by a donor must commence to be aggregated in order to arrive at the R30 million threshold, below which the donations tax rate of 20% applies, and above which the rate of 25% applies.

To aggregate all donations made by a donor since that donor came into existence, even donations prior to the effective date of the amendment introducing the dual rates, 1 March 2018, would be to give retrospective effect to the amendment. A retrospective statute is “one that operates for the future only. It is prospective, but it imposes new results in respect of a past event ... A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted.”¹ There is a general presumption against statutes having retrospective operation,² unless there are clear indications in the statute, express or by necessary implication, that retrospectivity was intended.³

Although section 64 does not stipulate a period over which the aggregate of all donations must be determined, there is no indication that the amendment is intended to apply retrospectively. Donations prior to 1 March 2018 should therefore not be taken into consideration in calculating the aggregate R30 million threshold.

3.2 Exclusion of exempt donations

Section 64(1) refers to “the *value* of any property disposed of under a donation” under section 54 in determining the donations tax chargeable. Section 64(1)(a)(i)

¹ *National Director of Public Prosecutions SA v Carolus and others* 2000 (1) SA 1127 (SCA) at paragraph 34.

² *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* 2007 (3) SA 210 (CC) at para 26; *Mahomed v Union Government* 1911 AD 1 at page 8.

³ *Workmen’s Compensation Commissioner v Jooste* (1997) 3 All SA 157 (A).

refers to the “aggregate of *that* value” (being the “value” referred to in section 64(1) of the current donation) and “the *value* of any other property disposed of under a donation until the date of that donation”.

There are two factors that indicate that exempt donations must be excluded. The first is that under section 64(1) the rate of 20% or 25% must be imposed on the “value” of property disposed of under a donation. Donations tax can not be imposed on exempt donations, and therefore “value” in section 64(1) must of necessity exclude exempt donations. The word “value” in section 64(1)(a)(i) must have the same meaning as it has in the opening words of section 64(1), and therefore exempt donations are not included in the “value” used to calculate the R30 million threshold.

The second is that section 64(1) refers to the rate of donations chargeable under section 54. The “value” referred to in section 54 is subject to section 56. The “value” under section 56 excludes the value of exempt donations.

4. Ruling

This ruling constitutes a BGR under section 89 of the Tax Administration Act 28 of 2011.

- 4.1** The value of property disposed of under a donation prior to 1 March 2018 must not be taken into account in calculating the R30 million threshold for purposes of imposing donations tax at the rates set out in section 64(1)(a).
- 4.2** The value of exempt donations must not be taken into account in calculating the R30 million threshold for purposes of imposing donations tax at the rates set out in section 64(1)(a).

5. Period for which this ruling is valid

This BGR applies from date of issue until it is withdrawn, amended or the relevant legislation is amended.

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SOUTH AFRICAN REVENUE SERVICE