



NPOs and Tax-Deductible Donations

By Ricardo Wyngaard

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By: Ricardo Wyngaard

RICARDO WYNGAARD

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DETAILS:

Postal:
P.O. Box 35131, Menlo Park, 0102

Tel: +27 21 859 1111
Fax: +27 86 538 8435
ricardo@nonprofitlawyer.co.za

www.nonprofitlawyer.co.za

On 23 August 2019, SARS published a *Clarification Note on Donations* (the Note), which they considered a topical issue in the current environment. The purpose of the Note is to clarify 'what would constitute a donation and be taxed, as well as the impact of paying an amount without it being a donation.'

The Note is especially important for NPOs, being regular recipients of donations. SARS describes a donation as 'a gratuitous disposal of property'. The Note further states that: "Where there is an element of expectation for something to be given in return, it can therefore not be a donation."

This meaning is contained within section 54 of the Income Tax Act, which provides that 'donation' means any gratuitous disposal of property including any gratuitous waiver or renunciation of a right. Also, the PBO Guide published by SARS states that: "It is a voluntary gift which is freely given to the donee. There must be no quid pro quo, no reciprocal obligations and no personal benefit for the donor."

The above statements are consistent with the meaning ascribed to donations by the courts. In the matter of *Ovenstone v Secretary for Inland Revenue 1980 (2) SA 721 (A)* the Supreme Court of Appeal (Appellate Division), as it was then known, stated: "In a donation the donor disposes of the property gratuitously out of liberality or generosity, the donee being thereby enriched and the donor correspondingly being impoverished, so much that, if the donee gives any consideration at all therefor, it is not a donation." In *Commissioner for Inland Revenue v Estate Hulett [1990] ZASCA 23*, the Supreme Court of Appeal commented that the word donation in our law has acquired the meaning of "a gratuitous disposal of property prompted by motives of sheer liberality or disinterested benevolence".

The Supreme Court of Appeal, in the matter of *Welch v Commissioner for the South African Revenue Service (23/2003) [2004] ZASCA* stated that the common law regards the following element as essential to a donation: "that the disposition be motivated by pure liberality or disinterested benevolence and not by self-interest or the expectation of a quid pro quo of some kind from whatever source it may come."

Section 18A of the Income Tax Act regulates donations that are deductible in the hands of donors. This is an important incentive being offered to donors to support certain approved PBOs and other institutions with the implementation of eligible public benefit activities.

Section 18A provides that: Notwithstanding the provisions of section 23, there shall be allowed to be deducted from the taxable income of any taxpayer so much of the sum of any *bona fide donations* by that taxpayer in *cash* or of *property made in kind...*".

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NPOs seeking status under section 18A of the Income Tax Act must be approved as PBOs pursuant to sections 30 and 18A of the Income Tax Act. Once approved under those sections, the PBO must comply with the additional requirements listed under section 18A, which permits tax deductions to donors in respect of eligible donations made to certain organisations.

To obtain approval by the Commissioner for the purposes of section 18A, a public benefit organisation must, amongst other:

1. Be a PBO contemplated in paragraph (a) (i) of the definition of “public benefit organisation” in section 30 (1); and
2. Carry on in South Africa any public benefit activity contemplated in Part II of the Ninth Schedule.

Consequently, section 18A(1)(a) adds two important requirements for approval by the Commissioner for the purposes of section 18A, i.e.: the **location** of the public benefit activity (in South Africa); and the **nature** of the public benefit activity (only those under Part II of the Ninth Schedule).

In its *Basic Guide to Tax-Deductible Donations*, SARS states that: “Qualifying organisations are required to maintain proper control over the application and spending of donations received which qualify for a tax deduction. A receipt for a tax-deductible donation may only be issued for a donation which is used solely and exclusively for section 18A approved PBAs.”

It is very important for PBOs approved under section 18A to ensure that section 18A donations are indeed *bona fide donations* and such donations are only used for 18A approved PBAs.

Approved PBOs must annually submit to SARS income tax returns (IT 12EI) in the prescribed format. Only in certain instances will PBOs be required to obtain and retain an audit certificate confirming that donations received, and for which section 18A receipts were issued, were only used for activities in Part II of the Ninth Schedule. This would be in situations where the PBO carries on public benefit activities that are listed **both** in Part II (18A) and Part I (non-18A) of the Ninth Schedule of the Income Tax Act. Approved PBOs are expected to inform SARS in writing within 21 days of any change in registered particulars (e.g. representative, change of name, address, fiduciary details, office-bearers, etc.)



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