EXEMPTION FROM THE PAYMENT OF DONATIONS TAX WHERE IMMOVABLE PROPERTY IS DONATED TO BENEFICIARIES IN TERMS OF THE LAND REFORM PROGRAMME.

(Submitted by Directorate: Redistribution Policy and Systems)

PC.DOC. 36/1998

1. PROBLEM STATEMENT

Cases of individual farmers and companies wishing to donate immovable property have been recorded on several occasions. As yet, there is no indication of how widespread it may become although it can be assumed that once information on donations tax exemption is available, donations
may increase. Exemption from donations tax could encourage the private sector to become involved in land reform. If there is no tax responsibility when immovable property is donated to land reform beneficiaries, the private sector could be more enthusiastic to make land available for land reform.

With a recent high profile case, the Directorate: Redistribution Policy and Systems made an interim recommendation to the Minister, arguing that the Settlement and Land Acquisition Grant be used to pay for any fees or taxes associated with the donation of immovable property. It was, however, agreed that the proposal constituted an interim solution since it still left beneficiaries with limited development funds. This necessitated a proper investigation into the matter.

In undertaking the investigation, two issues required policy clarification:

* In cases where immovable property is donated, whether the Department would commit the full Settlement and Land Acquisition Grant? The reason why this question arose is because the grant is only released when coupled to the acquisition of land or the upgrading of tenure rights; and

* Where immovable property is donated, donations tax is payable. What exemptions could be obtained to encourage the donation of immovable property to beneficiaries of the Land Reform Programme?

2. DISCUSSION

Concerning the first question, the Policy Committee held on 22 October 1997 agreed that the full R15 000 should be available, if the beneficiaries’ land rights are secured and they fit the qualifying criteria. This principle was included in the Grants and Services Document (Version Three) as presented by the Directorate: Redistribution Systems and Procedures. Consequently, the matter does not need further explanation. The second question was more
complex and required a more detailed analysis and role player consultation. In essence, the Income Tax Act (Act No 58 of 1962) previously made little or no provision for a moratorium or relief from the payment of donations tax in circumstances associated with land reform. Any difference between the market value of the property and stipulated exemptions in the Act is taxable at 25%. The following general exemptions apply:

If the donor is a natural person, the first R 25 000 is exempted from donations tax. The balance between the market value of the property and the R 25 000 exemption is then taxed at 25%;

If the donor is married in community of property, the effect would be that the first R 50 000 is exempted from donations tax as the donor and his/her spouse each have an undivided half share in the property and each one being entitled to the R 25 000 exemption. The balance between the market value of the property and the R 50 000 exemption is then taxed at 25%;

If it is a person other than a natural person that is making a donation as a casual gift, only the first R 5 000 is exempted from donations tax. The balance between the market value of the property and the R 5 000 exemption is then taxed at 25% and;

If the donor is a company which is registered as a public company in terms of section 38 of the Income Tax Act, the donation made by such company will be exempted. No limit is placed on the value of such donations and includes both movable and immovable assets.

From the above it is clear that the person or private institution making the donation would be liable for donations tax which would have an inhibiting effect as donors feel they are contributing to the Land Reform Programme and should therefore not be taxed for their goodwill.

To emphasize this point, the following example demonstrates the predicament: A private company (or a natural person) intends to donate 50 hectares of peri-urban land to 25 workers who will, in terms of the Provision of Land and Assistance Act, (Act 126 of 1993) source the Settlement and Land Acquisition Grant for the establishment of an agricultural enterprise. The market value of the property is estimated at R 300 000. In terms of the above stated exemptions, this would have meant that the difference between the
market value (R 300 000) and the qualifying exemption for companies (R 5000) would be taxed at 25%. When calculated, this represented R 73 750 which the donor would have had to pay as donations tax. This unfavourable arrangement necessitated further investigation.

Based on constructive discussions with the South African Revenue Service, it was concluded that the only viable option to address the matter was to suggest to Parliament the inclusion of a section in the Taxation Laws Amendment Act, 1998 to provide for the exemption from donations tax in these circumstances.

Section 39 of the Taxation Laws Amendment Act, (Act No. 30 of 1998) amends section 56 of the Income Tax Act, 1962, by adding to subsection (1) the following paragraph:

Donations tax shall not be payable in respect of the value of any property which is disposed of under a donation:

(o) where such property consists of the full ownership in immovable property, if-

(i) such immovable property was acquired by any beneficiary entitled to any grant or services in terms of the Land Reform Programme, as contemplated in the White Paper on South African Land Policy, 1997; and

(ii) the Minister of Land Affairs or a person designated by him has, on such terms and conditions as such Minister may in consultation with the Commissioner prescribe, approved the particular project in terms of which such immovable property is so acquired;

The exemption is deemed to have come into operation on 27 April 1994 and applies in respect of any donation made on or after that date.

When this section is systematically examined, exemption can be obtained only when a beneficiary qualifies in terms of the criteria for obtaining a
grant or service in terms of the Land Reform Programme. The established criteria as stipulated in the Grants and Services Document (Version Three) would therefore be applicable, thus encapsulating all categories of beneficiaries or claimants that qualify for assistance in terms of the Land Reform Programme. It should be noted that the word *entitlement* in the section does not mean that beneficiaries would first have to qualify and then actually obtain any grant or service before exemption will be applied. The emphasis is rather on the qualifying criteria instead of the actual release of any grant or service. This interpretation provides for exemption from donations tax in cases where donors do not request any financial assistance from the Department.

By pursuing this argument, individuals and companies that make donations of immovable property without making use of any departmental grant, will still be eligible for exemption as long as the beneficiary fits the qualifying criteria in the Grants and Services Document and that the Minister, in consultation with the Commissioner, approved of the project in terms of applicable land reform legislation.

It should be noted that the section is only applicable to immovable property - movable capital assets are therefore not exempted from donations tax. Should a case arise where a donor wishes to donate movable assets with the view of obtaining exemption, this specific relief will not be applicable. However, casual donations up to the value of R 25 000 are permissible without any tax implications for the donor. Private companies or natural persons therefore have some lean way with regard to the donation of movable assets.

The Commissioner views mineral rights as part of the immovable property on condition that it is attached to the surface and accordingly disclosed in the title deed. The owner of the land is in such instances also the owner of the mineral rights. Should mineral rights be separated, exemption from donations tax shall not apply.

Section 56 (1) (o) of the Income Tax Act, 1962 clearly specifies that the Minister or a person delegated by him or her will have to approve of the project in terms of which the donation is made. This means that the Minister or delegated official will have to ensure that the donation is indeed for land reform purposes. In turn, the onus rests with the Provincial Office and the responsible planner who is tasked with the design of the project to confirm that it is indeed a *bona fide* donation for land reform purposes.
To safeguard against possible tax evasion, the Department should ensure that written exemption will only be granted after the Minister or his/her delegate has consulted with the Commissioner for SARS. An arrangement has been negotiated with the Commissioner to ensure that the approval process is not time consuming and the following streamlined procedures are suggested:

I) With the inception of a potential project undertaken in terms of a donation, the Provincial Office needs to consult with the Commissioner prior to the request for approval/designation being submitted to the Minister.

ii) To this end, a letter should be addressed to the Commissioner providing a short background to the specific project as well as reference to the exemption sectional provision. Of crucial importance is the need to confirm that the donation of full ownership in immovable property to a beneficiary or group will be done in terms of certain land reform legislation and that exemption from donations tax is being requested. A pro forma letter appears as annexure: A.

iii) If the Commissioner is satisfied that exemption can be granted, a letter will be forwarded to the Provincial Office.

iv) As indicated in the previous sub paragraph, the Commissioner will formally reply to the Provincial Office and this correspondence should be attached to the actual request for approval/designation submitted to the Minister. Provincial Offices should ensure that the documentation submitted to the Minister sufficiently explains that the project will be undertaken in terms of a donation and that the Commissioner already approves the exemption. In this regard, the letter from the Commissioner needs to be attached.

v) Once the project has been approved by the Minister, the Provincial Office needs to formally reply to the donor, making specific reference to the exemption granted by the Commissioner and the approval by the Minister. A pro forma letter appears as annexure: B. The donor can then attach the necessary documentation to the annual tax return forms.

vi) In order to ensure that the Title Deed be registered, it is important that the exemption from the Commissioner be forwarded to the relevant Deeds Office. The planner concerned should, therefore, confirm that the conveyancer
submits the Commissioner’s letter of exemption approval to the Deeds Office when the Title Deed is lodged for registration.

Since the inception of the Land Reform Programme in April 1994, very few donations actually occurred. However, in order to cater for these donations, the exemption clause was made applicable with retrospective effect to 27 April 1994. In the isolated cases where donors request reimbursement from donations tax, the Provincial Office needs to approach the Commissioner with proof that the Minister approved the project, referring to documentation such as the signed designation/approvals memorandum. If the Commissioner is satisfied with the forwarded arguments and supportive documents, exemption will be granted and donations tax will be refunded after satisfaction of the necessary refund application requirements.

3. RECOMMENDATIONS

It is recommended that:

3.1 The agreement reached at the Policy Committee dated 22 October 1997 allowing for the payment of donations tax by means of the Settlement and Land Acquisition Grant be repealed. To this extent the document: Grants and Services of the Land Reform Programme (Version Three) needs to be amended, specifically section 3.1.2 (g) which must be deleted all together. This section reads as follows: *In cases where land rights are secured through a donation of land, in part, or in its entirety, for purposes described under b) and d) above including, where necessary, the fees and taxes related to the donation and land transfer.*

3.2 In cases where persons or institutions want to donate immovable property to beneficiaries that qualify for assistance in terms of the criteria of the Land Reform Programme, section 56 (1) (o) of the Income Tax Act, 1962 be
3.3 Provincial Offices should ensure that when a project involving a donation is submitted to the Minister for approval/designation, the procedure as set out in section 2.4.4 above be applied.

4. SUPPORTING/REFERENCE DOCUMENTATION

* Grants and Services of the Land Reform Programme (Version Three);
* Technical and Procedural Manual for Land Reform;
* Income Tax Act, Act No. 58 of 1962;

5. INTENDED IMPACT ON PRIORITY TARGETS: INEQUALITY, POVERTY, WOMEN, ENVIRONMENT, ETC

Exemption from the payment of donations tax will broaden the level of entry for applicants. Indirectly it should contribute to marginalised groups having greater access to land reform. Companies could, as part of their social responsibility towards society, decide to donate property to the elderly, seasonal workers or any other category.

6. PROCESS OF INTERNAL APPRAISAL AND EXTERNAL CONSULTATION FOLLOWED

Several bilateral discussions with officials from the South African Revenue Service have been held. Discussions with relevant provincial planners who were exposed to projects that involved the donation of immovable property also took place. On 16 July 1998, all Provincial Directors were informed of
the exemption provision and furthermore requested to forward any questions for clarification.

7. **INPUT FROM THE RESPONSIBLE POLICY DIRECTORS**

The Director: Redistribution Policy and Systems as well as the Chief Director: Redistribution, Land Rights and Land Development have been consulted.

8. **LEGAL IMPLICATIONS**

Section 56 (1) (o) of the Income Tax Act, 1962 will be applicable. The exemption provision will have no impact on the Provision of Land and Assistance Act, Act No. 126 of 1993.

9. **ORGANIZATIONAL AND PERSONNEL IMPLICATIONS**

None additional to the existing.

10. **FINANCIAL IMPLICATIONS**

With exemption from the payment of donations tax obtained, the former arrangement stipulating that the Settlement Land Acquisition Grant be used
to pay for donations tax is suspended. By implication, this means a greater saving for the beneficiaries.

11. COMMUNICATION IMPLICATIONS

The Directorate: Redistribution Policy and Systems will take the responsibility for the integration of the policy position on donations tax into the Technical and Procedural Manual. The policy will, furthermore, be communicated to all Provincial Directors. The exemption from donations tax has been sufficiently communicated in both the electronic and printed media, particularly targeting potential donors.

Further, the Office of the Commissioner has undertaken to forward a letter to all regional offices of SARS highlighting that exemption applies in terms of the Income Tax Act, 1962.

12. IMPLICATIONS FOR INFORMATION SYSTEMS

No new implications.

13. NATURE OF DEPARTMENTAL DELEGATION ARISING

No immediate delegations expected.
14. NATURE OF FURTHER APPROVAL REQUIRED BEFORE IMPLEMENTATION CAN PROCEED.

Final approval by the Minister is required.

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LAND REFORM POLICY 36/1998: EXEMPTION FROM THE PAYMENT OF DONATIONS TAX WHERE IMMOVABLE PROPERTY IS DONATED TO BENEFICIARIES IN TERMS OF THE LAND REFORM PROGRAMME

APPROVED BY MINISTER ON 22 OCTOBER 1998

ANNEXURE: A

GUIDELINES FOR THE DRAFTING OF CORRESPONDENCE TO THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE

Reference number:

The Commissioner

South African Revenue Service

P. O. Box 402
Dear Sir

REQUEST FOR THE EXEMPTION FROM THE PAYMENT OF DONATIONS TAX: DONATION OF THE FARM PLATDRAAI 36 JQ SITUATED IN THE MAGISTERIAL DISTRICT OF BOSKOP IN THE NORTH WEST PROVINCE.

1. BACKGROUND
   Give an overview of the specific project making reference to the beneficiary group, the involvement of the Department of Land Affairs as well as the specific legal framework on which the project is premised. The Provincial Office also needs to confirm that the beneficiaries qualify for assistance in terms of the criteria as stipulated in the Grants and Services document.

   A full property description is needed.

   The legal status of the person or institution that is making the donation also needs to be reflected, in other words, is it a natural person or a legal person such as a Close Corporation or Company.

   Conclude the background by highlighting the fact that the Minister of Land Affairs is required to consult with the Commissioner prior to the exemption being granted.

2. MOTIVATION
   Start the motivation by making reference to Section 39 of the Taxation Laws Amendment Act, Act No. 30 of 1998 which amends section 56 of the Income Tax Act, 1962, by adding to subsection (1) the following paragraph:
Donations tax shall not be payable in respect of the value of any property which is disposed of under a donation:

(o) Where such property consists of the full ownership in immovable property, if-

(i) such immovable property was acquired by any beneficiary entitled to any grant or services in terms of the Land Reform Programme, as contemplated in the White Paper on South African Land Policy, 1997; and

(ii) the Minister of Land Affairs or a person designated by him has, on such terms and conditions as such Minister may in consultation with the Commissioner prescribe, approved the particular project in terms of which such immovable property is so acquired;

The exemption is deemed to have come into operation on 27 April 1994 and applies in respect of any donation made on or after that date.

Of paramount importance is the need to confirm that the donation of full ownership in immovable property to a beneficiary or group will be made in terms of certain land reform legislation and that exemption from donations tax is being requested.

The arguments forwarded in this section are very important since the Commissioner needs to be convinced that the donation is for bona fide land reform purposes and is not aimed at tax evasion. (Provincial offices could consider the involvement of a legal officer in drafting the letter).

3. SPECIFIC REQUEST

The letter needs to specifically request the Commissioner to forward a response to the Provincial Office stating that exemption has been granted. Since the Commissioner has the discretion to request further motivation or clarity, the Provincial Office will have to ensure that communicated requests are answered timeously.
PROVINCIAL DIRECTOR

DATE:

ANNEXURE: B

GUIDELINES FOR THE DRAFTING OF CORRESPONDENCE TO THE DONOR

Reference number:

Mr G Potgieter

P.O. Box 481

POTCHEFSTROOM

2520

Dear Sir
EXEMPTION FROM THE PAYMENT OF DONATIONS TAX: DONATION OF THE FARM PLATDRAAI 36 JQ SITUATED IN THE MAGISTERIAL DISTRICT OF BOSKOP IN THE NORTH WEST PROVINCE.

Start the letter by giving a brief overview of the project and the fact that the Minister of Land Affairs, in consultation with the Commissioner for the SARS, has granted exemption from the payment of donations tax.

The letter from the Commissioner granting exemption must be attached to the prescribed declaration of donation (form - IT 144) when the donor completes his or her annual tax return forms. It is furthermore advisable that reference be made to the legal framework in terms of which the exemption has been granted. In this regard mention should be made of section 56 of the Income Tax Act, 1962, as amended.

The Provincial Office needs to clearly indicate that the Minister has approved of the project and that the Commissioner concurred with the exemption from donations tax.

Any supportive documents such as correspondence from the Commissioner needs to be attached to the reply.

Should the Commissioner request any additional principles that must be adhered to, this also needs to be communicated to the donor.

Regards

PROVINCIAL DIRECTOR

DATE: