

THE DONATIONS TAX AND ESTATE DUTY IMPLICATIONS OF SECTION 56(1)(d) OF THE INCOME TAX ACT

RICHARD JOOSTE*

Professor of Law, University of Cape Town

INTRODUCTION

Section 54 of the Income Tax Act 58 of 1962 imposes donations tax on the value of any property disposed of under any donation by any resident of South Africa. A 'donation' is defined in s 55(1) as meaning 'any gratuitous disposal of property including any gratuitous waiver or renunciation of a right'. Section 58 of the Act extends the meaning of 'donation' by deeming a disposal of property for an inadequate consideration to be a donation to the extent that the consideration is inadequate.

There are various exemptions from donations tax, one of which is contained in s 56(1)(d) of the Act. Section 56(1)(d) provides that 'donations tax shall not be payable in respect of the value of any property which is

* I am indebted to Dale Hutchison for his valued comments and assistance. The views expressed are not necessarily his, nor, of course, is he responsible for any defects in this note.

disposed of under a donation in terms of which the donee will not obtain any benefit thereunder until the death of the donor’.

The objective of this note is to analyse s 56(1)(d) so as to determine its precise ambit and to address the estate duty and planning implications of a donation falling within the exemption.

PACTA SUCCESSORIA

Section 56(1)(d) cannot be referring to a pactum successorium because such a contract is, with certain exceptions (a succession agreement embodied in an antenuptial contract, provisions of which may not be revoked by one of the parties without the consent of the other (see M M Corbett, G Hofmeyr & E Kahn *The Law of Succession in South Africa* 2 ed (2001) 37 and the authorities cited there), a donatio mortis causa executed in compliance with the formalities required for a valid will (see *Borman en De Vos NNO v Potgietersrusse Tabakkorporasie Bpk* 1976 (3) SA 488 (A) at 501D; and *McAlpine v McAlpine* NO 1977 (1) SA 736 (A) at 747D and 750B) prohibited by our law. (Arguments for and against the continued existence in our law of the rule invalidating pacta successoria have been presented (see D Hutchison ‘Isolating the pactum successorium’ (1983) 100 *SALJ* 221 at 237–9), and in *McAlpine* (supra) at 753, Corbett CJ held that, ‘[w]here the pactum forms part of a larger commercial transaction between the parties, a case could be made out for the relaxation of the rule. This is a matter that should perhaps engage the attention of those responsible for initiating law reform.’) A pactum successorium is a contract (not restricted to a contract of donation) whereby a person purports to regulate succession to his estate or part thereof after his death. It has been described as follows by the Appellate Division (per Rabie JA in *Borman* (supra) at 501A–E, quoted with approval in *McAlpine* (supra) at 747A–E):

‘n *Pactum successorium* (of *pactum de succedendo*) is, kort gestel, ’n ooreenkoms waarin die partye die vererwing (*successio*) van die nalatenskap (of van ’n deel daarvan, of van ’n bepaalde saak wat deel daarvan uitmaak) van een of meer van die partye ná die dood (*mortis causa*) van die betrokke party of partye reel . . . ’n Voorbeeld van so ’n ooreenkoms is waar A en B met mekaar ooreenkom om mekaar oor en weer as erfgenaam in te stel; of waar A en B met mekaar ooreenkom dat A sy nalatenskap (of ’n deel daarvan) aan B sal bemaak; of waar A en B met mekaar ooreenkom dat A sy nalatenskap (of ’n deel daarvan, of ’n bepaalde saak wat aan hom behoort) aan C sal bemaak . . . ’n Ooreenkoms van hierdie aard druis in teen die algemene reël van ons reg dat nalatenskappe *ex testamento* of *ab intestato* vererf, en word as ongeldig beskou . . . behalwe in die geval waar dit in ’n huweliksvoorwaardekontrak beliggam is. . . .’

The prohibition relates to both a ‘direct *pactum successorium*’ and an ‘indirect *pactum successorium*’ (*McAlpine* (supra) at 748]). The former covers ‘pacts or contracts which relate directly to the contents of a will’ (ibid at 747G) — for example, A agrees to appoint B as his heir in his will, or A and B agree to appoint each other as heir in their respective wills — and the latter to ‘contracts which, while making no reference to a will, nevertheless purport to bind a party to a post-mortem disposition of his property’ (*McAlpine* (supra) at 747G). (In his article, ‘Isolating the pactum successorium’ op cit at 222,

referred to extensively in the *McAlpine* judgment, Prof Hutchison took the view that Rabie JA, in his description of the pactum successorium quoted above, was only referring to the ‘direct *pactum successorium*’, but this was questioned by Corbett CJ in *McAlpine* (supra) at 747J.)

The reasons for the invalidity of a pactum successorium have been described as twofold: ‘it fetters the freedom of testation of the party conferring the asset in question upon another, and . . . it constitutes an evasion of the formalities required in respect of testamentary instruments’ (per Corbett CJ in *McAlpine* (supra) at 747E–F).

Whether a pactum successorium is contra bonos mores and illegal or merely unenforceable cannot be regarded as settled (Corbett et al op cit 39). The modern view is that a pactum successorium is invalid ‘whether it relates to the whole inheritance or whether it merely relates to a *res particularis*’ (Corbett et al op cit 39; *Borman* (supra) at 501D; *McAlpine* (supra) at 747).

As s 56(1)(d) of the Income Tax Act does not apply to a pactum successorium it is essential to determine how a pactum successorium is to be identified.

The ‘basic determinant’ is the so-called ‘vesting test’ (*McAlpine* (supra) at 750C), which is applied

‘by asking in a particular case whether the promise disposing of an asset in favour of another (whether by way of donation or other form of contract) causes the right thereto to vest in the promisee only upon or after the death of the promisor (which points to a *pactum successorium*); or whether vesting takes place prior to the death of the promisor, for instance, at the date of the transaction giving rise to the promise (in which case it cannot be a *pactum successorium*)’ (per Corbett CJ in *McAlpine* (supra) at 750C–D).

The application of the vesting test involves ‘the distinction drawn in our jurisprudence between vested and contingent rights’ (ibid at 751E). (For criticism of the use of the distinction between vested and contingent rights as a means of isolating the pactum successorium, see W A Joubert (1962) 25 *THRHR* 93 at 101.) Where a right is donated in words indicating that it is not to be enjoyed or exercised until after the donor’s death, then the question arises whether the words indicating future enjoyment were inserted for the purpose of making the donation conditional on the donee surviving the donor or merely for the purpose of postponing the donor’s enjoyment of the donation until the donor’s death (see *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 175–6, referred to with approval in *McAlpine* (supra) at 751–2). If the former construction is placed on the words, the right has not vested (indicating a pactum successorium), whereas in the latter instance it has vested (indicating no pactum successorium). In construing the words of futurity there is a presumption in favour of vesting (Corbett et al op cit 38), and where ‘there is doubt as to whether or not the agreement is of such a nature that it would be invalid the court will incline towards a construction which will render the agreement operative’ (ibid). On the basis of the maxim *ut res magis valeat quam pereat*, it is presumed that the disposition was intended to take effect *inter vivos*. (See Hutchison op cit 229; *Varkevisser v Estate Varkevisser* 1959 (4) SA 196 (SR) at 199; *Costain and Partners v Godden*

NO 1960 (4) SA 456 (SR) at 460; *McCullogh v Fernwood Estate Ltd* 1920 AD 204 at 209; *Kotze v Frenkel & Co* 1929 AD 418; *Hughes v Rademeyer* 1947 (3) SA 133 (A.)

It appears, however, that the vesting of the right on or after the death of the donor will not result in a prohibited pactum successorium if the donation is revocable at the instance of the donor during his or her lifetime; it does not bind the testator and does not inhibit the freedom of testation (see Corbett et al op cit 38 and the authorities cited there). Hutchison op cit 226 points out that, in *Costain* (supra) at 459–60, ‘Murray CJ interpreted a number of earlier cases as establishing that the revocability or otherwise of an agreement determined whether it was a pactum successorium’ but that, as R C Williams has shown ((1969) 2 *Responsa Meridiana* 45 at 52), none of the cases relied upon directly supports this proposition. And, even if they did, Hutchison op cit 226 cogently argues that it would have to be rejected ‘for the contention that only revocable agreements can constitute pacta successoria is the exact converse of the true situation’. While, he says,

‘revocability is indeed one of the major characteristics of a testamentary instrument, to insist on this feature as a sine qua non for a pactum successorium is to overlook the fundamental objection to such agreements in our law, namely, that they restrict freedom of testation. No promise which is unilaterally revocable by the promisor can ever limit his testamentary freedom. That is why the law permits donations mortis causa, and why Quénet J in *Varkevisser v Estate Varkevisser* described a successory pact as being “akin to a mortis causa gift contracted for as being irrevocable”’ (Hutchison op cit 226–7).

Hutchison is supported in his contention by a dictum by Gubbay J in *Ex parte Calderwood NO: In re Estate Wixley* 1981 (3) SA 727 (Z) at 735D–E:

‘The foundation of a *pactum successorium* is that the person who contracts with regard to his own succession purports to bind himself to that contract. He does not seek to retain the unilateral right to revoke his promise. Should he do so, then the contract is not one which conflicts with the general rule of our law that inheritances must devolve *ex testamento* or *ab intestato*.’

As Hutchison op cit 227 says, however, there are other judges who have been ‘less alert’ and have followed Murray CJ in applying the revocability test (see *D’Angelo v Bona* 1976 (1) SA 463 (O) and *Erasmus v Havenga* 1979 (3) SA 1253 (T)), despite the emphasis placed on the freedom of testation. Corbett CJ in *McAlpine* (supra) at 751 referred to Hutchison’s submission regarding revocability but held that, as this was not an issue in the case before him, it was not necessary to consider the correctness of this approach.

The criteria of revocability and vesting are often confused (see particularly *Costain* (supra)). As Hutchison op cit 229–30 says:

‘For example, one writer, after declaring that they are “essentially the same”, goes on to state: “Dit maak geen verskil of ons dit die *vestigingsmaatstaf* of die *herroeplikheidsmaatstaf* noem nie. Die kriterium is of daar *inter vivos* ’n reg ten aansien van die bate op die begunstigde gevestig het — al is die uitoefening van daardie gevestigde reg *mortis causa* uitgestel. Waar dit die geval is, het die begunstigde ’n onherroeplik gevestigde reg *inter vivos* en is die betrokke ooreenkoms nie ’n *pactum successorium* nie. *Caedit quaestio!*”

This equation of the two tests is unsound. While it is true that an agreement providing for an immediate devolution of rights will normally be irrevocable, it need not always be so: the parties might agree on a unilateral right of revocation (in which case there is an immediate vesting of rights subject to a resolutive condition). Conversely, the fact that an agreement is

irrevocable does not necessarily mean that it entails an immediate vesting of rights: an agreement subject to a suspensive condition creates only contingent rights and duties, but is none the less binding on the parties, unless they agree on a unilateral right of revocation. Thus it is quite possible to have an agreement which vests rights immediately and yet is revocable, or one which is irrevocable and yet creates no immediately vested rights.

Although both unilateral revocability and post-mortem vesting of rights in the beneficiary are essential characteristics of a testamentary instrument, the *pactum successorium* displays only the latter characteristic. It is the fact that it purports to effect a post-mortem devolution of the right to the benefit that gives the *pactum successorium* its testamentary or successory character, while it is its purported irrevocability that, by limiting freedom of testation, supplies the ground for its invalidity.⁷

If the donation is revocable it does, however, amount to ‘an evasion of the formalities required to be complied with in regard to the execution of testamentary instruments and would, if submitted, on this basis be invalid’ (*ibid*). If the formalities are complied with, the donation is, of course, a *donatio mortis causa*, which is exempted from donations tax by s 56(1)(c) of the Act.

As a *donatio mortis causa* is not the donation that s 56(1)(d) is referring to, its identification becomes crucial in establishing what s 56(1)(d) is referring to. In the absence of s 56(1)(c) a *donatio mortis causa* would no doubt have fallen within the ambit of s 56(1)(d). It is clearly ‘a donation in terms of which the donee will not obtain any benefit thereunder until the death of the donor’.

Regarding the identification of a *donatio mortis causa*, W A Joubert (ed) *The Law of South Africa* vol 8 para 283 says:

‘A *donatio mortis causa* is a gift which is donated in anticipation of the death of the donor. It might be made in fear of imminent death or in contemplation of one’s own mortality. The motive of the transaction must be pure benevolence. The mere fact that a person disposes of his property by gift and that the gift will come into operation and be implemented only after his death does not characterise the gift as a *donatio mortis causa* if the expectation of the donor’s death is not the motivating factor for the contract. Lee says a gift *mortis causa* is not necessarily made by a dying man or even by a man who is in immediate danger of death provided that it is made in contemplation of death, nor is a gift made by a dying man necessarily a *donatio mortis causa*. It is a question of intention. In case of doubt the presumption is in favour of a gift *inter vivos*. A *donatio mortis causa*, like a *donatio inter vivos*, is a contract (being a species of *pactum successorium*) which requires an offer and acceptance. Dominion will not vest in the donee until there has been either delivery or transfer of the gift. While sharing these features in common with a *donatio inter vivos*, a *donatio mortis causa* is also influenced by a totally different sphere of the law — the law of succession.

A *donatio mortis causa* is akin to a testamentary disposition in that it contemplates the devolution of an estate at death in a manner chosen by the donor. Whatever may be validly bequeathed by a testator may also be given *mortis causa*. Persons who are competent to make a will may also make a *donatio mortis causa*. The capacity and disqualification of beneficiaries are governed by the law applicable to wills. Similarly, although a person married in community of property may not give a *donatio inter vivos* without the authority of [a] spouse, he may execute a *donatio mortis causa* without the knowledge of the other spouse.’

In order to be valid, a *donatio mortis causa* must be executed with the formalities required for a will (Voet *Commentarius* 39 6 4; Van der Keessel *Thes Sel* 492), which requires compliance with the Wills Act 7 of 1953 (Joubert *op cit* para 285). It may be revoked by the donor at any time before the death of the donor (*Meyer v Rudolph’s Executors* 1918 AD 70 at 83).

A *donatio mortis causa*, although a *pactum successorium*, is upheld ‘because it displays none of the “objectionable” features of an ordinary *pactum successorium*: being unilaterally revocable by the donor, it does not curtail his freedom of testation, and since it must be executed in compliance with

testamentary formalities, it in no way undermines the law of testamentary succession' (Hutchison *op cit* 232).

What appears to distinguish a *donatio mortis causa* from a *donatio inter vivos* is vesting. As Corbett CJ said (*McAlpine* (supra) at 750B): '[A] *donatio mortis causa* is, in my view, simply a species of *pactum successorium*. . .'. He then, as seen above, proceeded to rule that the basic determinant as to whether or not a donation is a *pactum successorium* as opposed to a donation *inter vivos*, is the 'vesting test'. The distinguishing feature is, it seems, no longer the 'motive' test, a test previously endorsed by the Appellate Division. Prior to *McAlpine* (supra), in characterizing a donation as a *mortis causa* or *inter vivos*, 'two acid tests have been applied: whether the donation was made in contemplation of death [see *Meyer v Rudolph's Executors* (supra); *Ex parte Steyl* 1951 (1) SA 275 (O)] and whether the donation is revocable' (*Oost v Reek en Snideman* NNO 1967 (1) SA 472 (T)). This elevation of 'the contemplation of death from a constituent requirement of a *donatio mortis causa* to an independent absolute test' was severely criticized (see J Gauntlett 'Distinguishing donations *inter vivos* and *mortis causa*' (1977) 40 *THRHR* 45), and Solomon JA's dictum in *Meyer v Rudolph's Executors* (supra) at 83 called it into question when he said: 'From the authorities cited by him [the court *a quo*] as well as others (e.g. Grotius 3 2 22; Van der Linden 1 15 1 etc) it would appear that the essentials of a *donatio mortis causa* are that it should be made in contemplation of death, and that this should be the moving cause of the gift' (see also *Ex parte Steyl* (supra) at 277). Although Corbett CJ in his judgment in *McAlpine* (supra) makes no reference to the motive test or to *Meyer's* case, this criticism appears to have been vindicated. It appears to be implicit in Corbett CJ's judgment that the vesting test is the basic test. Logically one cannot have both the motive test and the vesting test for the *donatio mortis causa*. If a donor, motivated by his impending death, makes a donation to X, vesting the right to the benefit in him immediately but postponing enjoyment until after death, on the motive test it is a *donatio mortis causa*; on the vesting test it is a *donatio inter vivos*. In the light of the *McAlpine* case it appears that one can now conclude that it would be a *donatio inter vivos*, and that it is not a *pactum successorium* for the same reason. A *donatio mortis causa* is simply a form of *pactum successorium* where the agreement entails no consideration from the other party; it has always escaped the invalidity of the *pactum successorium* because it avoids the objectionable features of the prohibited *pactum successorium*: it must comply with the formalities of a will; and once labelled a *donatio mortis causa* it follows as a matter of law that it is revocable, thereby not limiting freedom of testation.

ITC 1192

The only reported case dealing with s 56(1)(d) appears to be ITC 1192 (1973) 35 SATC 213. The appellant had executed three trust deeds in terms of which certain assets were donated to trustees for the ultimate benefit of members of his family. In each deed provision was made that the interest of the ultimate

beneficiary in the corpus of the assets and income derivable therefrom should only vest on the death of the appellant, and that up to his death all such income was to remain his property and be paid to him. Provision was also made in the trust deeds that, should any nominated beneficiary predecease the appellant, he could be substituted, and that the appellant, during his lifetime, could alter the trust deed as long as he did not deprive any beneficiary of the benefits conferred by the deed or suspend the payment thereof. The appellant was also empowered to declare any of the deeds to be of no force and effect ab initio if any donations tax should be held to be payable by virtue of such deed or deeds.

The appellant claimed that the provisions of the trust deeds brought the donations within the terms of the exemption from donations tax contained in s 56(1)(d). The Secretary for Inland Revenue, however, ruled that donations tax was chargeable on each of the donations.

Regarding its interpretation of 'benefit', the court opted for 'the concrete and more specific connotation of "pecuniary advantage, profit, gain" as opposed to the abstract, general meaning of "advantage, profit, good" as in the phrases "for the benefit of; for the advantage of, on behalf of"' (at 216). The latter meaning, the court said, would lead to s 56(1)(d) being a 'complete dead letter' (ibid). The narrower meaning, the court said, would 'accord with the general policy underlying the other provisions, from which it appears that the tax is exigible in respect of some concrete right in or to property that is gratuitously disposed of and that has a value capable of being determined in terms of s 62 [the valuation provision]' (ibid). The court's view was that it was 'unlikely that the tax was intended to be exacted if, before the donor's death, a donee did not obtain any pecuniary advantage, profit or gain and merely entertained the hope or prospect (*spes*) of acquiring some such benefit on his death' (at 216–17). The court referred to the word 'thereunder' in s 56(1)(d) and said that the word related 'not to the contract of donation but to the gratuitous disposal of property in terms thereof' (at 217). In other words, the court said, ' "the benefit" is the pecuniary advantage, profit or gain received from the gratuitous disposal of the property itself, and not from the mere fact of entering into the contract of donation and thereby acquiring a contractual right to compel performance of the contract according to its terms' (ibid). Where the rights of full ownership were split into those of enjoying its use, fruits or income (usually referred to, the court said (ibid), as 'the beneficial interest') and that of its bare dominium, and are separately donated, the donee, the court held, would not 'obtain any benefit thereunder', as envisaged by s 56(1)(d), 'until the particular right vested in him, in the legal sense, because until then he would not obtain or receive any pecuniary advantage, profit or gain from the respective donations' (ibid).

In the case before it, the court said that 'each of the donatory trusts created a *fideicommissum*, subject to the condition of the *fideicommissaries* surviving the donor' (ibid). As their only present interest was a 'wholly contingent one, a hope or prospect of benefiting' (ibid) if they survived the donor, and '[t]hat interest cannot be attached, ceded or taken by creditors in insolvency ... and

has, therefore, no present inherent value . . .' (ibid), it followed that none of the fideicommissaries obtained or acquired any pecuniary advantage, profit or gain before the donor's death (ibid). The trustees, on the other hand, were vested with the bare dominium of the corpus (at 218).

The court pointed to the fact that 'donee' in s 55(1) of the Act includes a trustee, and was satisfied that that was the sense in which it was used in s 56(1)(d) (at 219). The court was also satisfied that 'benefit' in s 56(1)(d) cannot be qualified to mean 'personal benefit', and concluded that s 56(1)(d) 'simply means that the criterion for exemption is whether or not any pecuniary advantage, profit or gain is received under the donation prior to the donor's death by any beneficiary, or by any trustee in his capacity as such for the benefit of any beneficiary in the wide or general sense' (ibid). This conclusion, the court said, accorded 'with the general intention behind the provisions, because if it were otherwise a donor could divest himself of the full ownership of his income-producing assets by donating them to trustees, and, by deferring all benefits therefrom until his death, avoid liability for income and donations tax in respect of them, which is the very thing that the Act was aimed against' (ibid). Although s 56(1)(d) may be primarily concerned with the 'receiving' aspect of a donation, it was clear to the court that 'the divestment aspect was not lost sight of' and that was proved 'by the deliberate use of "donee" instead of "beneficiary" in the paragraph so as to render the exemption inapplicable where the donor divests himself of his assets to a trustee pending his death' (ibid).

At this point the court asked (at 219) 'in what cases then, other than donations *mortis causa* (for they are specially exempted under the preceding paragraph of s 56(1)), was it intended that the exemption should apply?' Its answer was:

'The kind of case to which it would apply seems to be those in which the donor contracts to donate irrevocably property to a beneficiary, or to a trustee for the benefit of a beneficiary, in terms of which its whole operation is suspended until his death or thereafter; that is, no delivery or transfer of the property or of any pecuniary advantage, profit or gain therefrom is to take place until then.

As stated above, the mere contractual right thereby vested in the "donee" is not a "benefit obtained by the donee thereunder" so as to preclude the exemption from operating, and the donation would not be a *donatio mortis causa*, because it would not be revocable, which are both essential characteristics of the latter kind of donation' (ibid).

The decision of the court was that:

'In the present case the trustees, in their capacity as such received the *bare dominium* of the corpus of each trust. In the hands of a beneficiary that would have a value, capable of being determined under s 62(1)(c), and it would constitute a pecuniary advantage, profit or gain; consequently, as the trustees received it for the benefit of the ultimate beneficiaries, whoever they may be, they must be regarded as having received that benefit in their representative capacity as "donees" within the meaning of s 56(1)(d). The position, therefore, is that whilst no "donee" will receive any benefit from the beneficial interest in the corpus of each trust until on or after the donor's death, the trustees in their capacity as such do receive an immediate benefit in the form of the *bare dominium* for the beneficiaries ultimately concerned. The former is, whilst the latter is not, exempt from donations tax under s 56(1)(d)' (per Trollip J at 219–20).

What is of particular significance in the judgment is the principle established (at 217) that ‘the benefit’ is ‘the pecuniary advantage, profit or gain received from the gratuitous disposal of the property itself, and not from the mere fact of entering into the contract of donation and thereby acquiring a contractual right to compel performance of the contract according to its terms’. Thus if Mr A and Mr B agree that Mr B will obtain Mr A’s property when Mr A dies, the contractual right acquired by Mr B is not a ‘benefit’ within the meaning of s 56(1)(d) and accordingly the donation is exempt from donations tax in terms of the section.

The agreement that is envisaged is a donation of property by Mr A to Mr B in terms of which B acquires an immediately vested right; there is no suspensive condition postponing vesting in B until after A’s death; the right is, however, subject to a *dies* or time term postponing enjoyment and enforcement of the right until after A’s death.

It is submitted, however, that if the contractual right that vests in the donee is cedable (either outright or as security for a debt) or attachable, the exemption in s 56(1)(d) will not apply. In such a case, the donee clearly does obtain an immediate benefit. This is implicit in the judgment in ITC 1192 when Trollip J, in deciding that the fideicommissaries in the case received no ‘benefit’ within the meaning of s 56(1)(d), stressed the fact that their interest ‘cannot be attached, ceded or taken by creditors in insolvency . . . and has, therefore, no present inherent value’ (at 217). In order to qualify for the s 56(1)(d) exemption the contract of donation must, therefore, contain a *pactum de non cedendo* making the right non-transferable.

It must be borne in mind that if the donation of the contractual right is a *pactum successorium* it would be invalid, which would be the case if the donation was conditional upon Mr B’s surviving Mr A. If it is conditional on Mr B’s surviving Mr A, then no right has vested in Mr B and accordingly the donation fails the ‘vesting test’ discussed earlier. If, however, the donation is revocable at Mr A’s instance during his lifetime, it may qualify as a valid *donatio mortis causa* if the relevant requirements are met.

THE ESTATE DUTY IMPLICATIONS OF ITC 1192

The effect of s 56(1)(d) is to exempt the donation in question from donations tax and not merely to suspend the payment of donations tax until the donor’s death. This raises the question as to what the estate duty implications are in the estate of Mr A in the above example, assuming that Mr B acquires in terms of the contract an immediately vested right containing a *pactum de non cedendo*.

The property is owned by Mr A at the time of death and accordingly will be included in his estate for estate duty purposes. (The donated property is included in ‘property’ in terms of s 3(1) of the Estate Duty Act 45 of 1955, which provides that ‘[f]or the purposes of this Act the estate of any person shall consist of all property of that person as at the date of his death and of all property which in accordance with this Act is deemed to be property of that

person at that date'. In terms of s 3(2) of the Estate Duty Act 'property' includes, inter alia, 'any right in or to property, movable or immovable, corporeal or incorporeal'.) However, it is submitted that the value of the property is deductible in terms of s 4(b) of the Estate Duty Act as a debt due by the deceased donor. (See s 4(b) and (f) of the Estate Duty Act. That s 4(b) and (f) of this Act are not confined to money debts only is cogently argued by DB Molteno 1966 *Acta Juridica* 220 at 224, who rejects the contrary finding in *Estate Robottom v CIR* 1961 (1) SA 33 (C). See also D M Davis, C Beneke & R D Jooste 'Estate Planning' (LexisNexis Butterworths) 11.3; 1997 *Taxpayer* 184 at 187. Support for the deductibility of the property is borne out by the specific inclusion of a donatio mortis causa as deemed property in terms of s 3(3)(b) of the Estate Duty Act 45 of 1955. The property donated in terms of the donatio mortis causa is also included as property in terms of s 3(2), and accordingly if it was not deductible there would be a double counting which could never have been intended.) This being the case, the property escapes estate duty. (The donation, as we have seen, is not a donatio mortis causa which is specifically included in the estate as 'deemed property' (s 3(3)(b) of the Estate Duty Act of 1955).)

The estate planning implications of this conclusion are far-reaching. The ideal estate plan seeks to avoid donations tax, to limit the size of the estate for estate duty purposes to its size at the time of implementation of the plan, and to enable the person whose estate is involved to retain the use and control of the estate property until his or her death. These objectives are usually achieved through the utilisation of a trust or a trust in conjunction with a company (or companies). However, by simply donating the irrevocable, unconditional contractual right to one's property (subject to a pactum de non cedendo), it would appear that not only can all this be achieved (assuming ITC 1192 (supra) is followed) without the need for a trust or a trust and companies (and all the expense and complexities accompanying their use), but estate duty in respect of the property in question can be avoided altogether. (It must be borne in mind that if the right vesting in the donee is to acquire immovable property, the vesting of the right triggers an immediate liability for transfer duty (W A Joubert (ed) *Law of South Africa* Vol 22 para 153; *SIR v Estate Roadnight* 1974 (1) SA 253 (A) at 258; *CIR v Freddie's Consolidated Mines Ltd* 1957 (1) SA 306 (A)), which in the case of a trust is 10 per cent (s 2(1) of the Transfer Duty Act 40 of 1949); no transfer duty is, of course, payable in respect of the acquisition of property by an heir or legatee in respect of property of the deceased by testate or intestate succession (s 9 of the Transfer Duty Act)). The donee could be a discretionary trust, which means that the planner does not at the time of implementation of the plan have to pinpoint who his/her beneficiaries are to be on death. The discretionary trust, of course, also provides the means to avoid an estate duty problem in the beneficiaries' estates and a vehicle to regulate control over the planner's property after his or her death.