

of any donation, settlement or other disposition made by a parent, income has been received by or has accrued to or in favour of a minor child, has been expended for his maintenance, education or benefit or has been accumulated for his benefit, the income is deemed to have been received by or accrued to the parent of the minor child. The word 'child' is defined to include a stepchild, a legally adopted child but excludes grandchildren.

Therefore, if a father donates an interest-bearing investment to his minor child, any interest derived on this investment will be deemed to be the income of the father.

In *Kohler v CIR*¹, the court found that, upon a proper construction of the equivalent of s7 (3), it was only income derived in the first instance by a minor from sums donated by his parent that could be included in a parent's income and, therefore, the provision did not apply to income received by the minor from the use of this income.

In contrast, income from a donation made by a parent to a major child is taxable in the child's hands, unless some other anti-avoidance provision is brought into effect, such as s80A of the Act.

For s80A to apply, the Commissioner for the South African Revenue Service ("the Commissioner") must show:

- That there is an arrangement; and
- That there is a saving in tax (a tax benefit) with the result that the 'arrangement' is an 'avoidance arrangement;' and
- If it is a business transaction:
 - It was conducted for *bona fide* business purposes other than obtaining a tax benefit
 - Or has created abnormal rights or obligations
 - Or it lacks commercial substance in whole or in part, taking into account the provisions of s80C;
 - Or it would result directly or indirectly in the misuse or abuse of the Act's provisions (including those of Part IIA of Chapter III [the general provisions], specifically s80A to s80L inclusive
 - Or if it is not a business transaction, then:
 - It was entered into or carried out by means or in a manner not normally used for a bona fide purpose, other than obtaining a tax benefit
 - Or it has created rights or obligations that would normally be present between persons dealing at arm's length
 - Or it would result directly or indirectly in the misuse or abuse of the Act's provisions (including those of Part IIA), and
- That the purpose of the scheme was to avoid tax (SARS is allowed to presume this requirement exists)

If the provisions of s80A are proven to apply to this example, the entire interest (R100 000) will be included in Mr X's gross income. However, if Mr X can show that one (or more) of the above requirements is not met, then the raising of s80A by the Commissioner will be invalid, and the Commissioner will be required to assess the taxpayers on the basis that the



_____ *Maphosa*