

*SOUTH AFRICAN REVENUE SERVICE*

**BINDING PRIVATE RULING: BPR 021**

DATE : 14 July 2008

ACT : INCOME TAX ACT, 58 OF 1962 (“the Act”)

SECTIONS : SECTION 8C AND PARAGRAPHS 2 AND 11A OF THE  
FOURTH SCHEDULE TO THE ACT

SUBJECT : DATE UPON WHICH RESTRICTED EQUITY INSTRUMENTS  
VEST AND THE DATE ON WHICH THE LIABILITY TO  
WITHHOLD EMPLOYEES’ TAX ARISES

**1. Summary**

The issues considered in this ruling are:

- The determination of the vesting date in relation to a “**restricted equity instrument**” as defined in section 8C(7) of the Act.
- The determination of the date on which the liability to withhold employees’ tax in relation section 8C gains arises.

In essence, the principles established are as follows:

- The vesting event as per section 8C of the Act results in the liability to withhold employees’ tax by the employer;
- The vesting event is based on facts and must be ascertained with reference to the provisions of the relevant Trust Deed, the definition of “**restricted equity instrument**” in section 8C(7) of the Act and the provisions of section 8C(3)(b) of the Act; and
- The market value for purposes of calculating the gain in terms of section 8C of the Act is either the actual proceeds realised on the date of vesting, should such shares be disposed of on such date, or the market value may be determined with reference to the Volume Weighted Average Price of such shares on the JSE on the date of vesting.

In terms of the provisions of the Trust Deed considered under this binding private ruling, the participant cannot exercise an option without settling the purchase price and hence the equity instruments remain restricted until the minimum periods stated in the Trust Deed prescribes, the option has been exercised and the option price has been paid.

## **2. Relevant tax laws**

This ruling is a binding private ruling which was requested by the Applicant in accordance with the requirements of section 76E of the Act and issued by Legal and Policy Division: Advance Tax Rulings in accordance with section 76Q of the Act.

All legislative references are to sections of the Act and paragraphs of the Fourth Schedule to the Act applicable at 7 June 2007 and unless the context otherwise indicates, any word or expression in this ruling bears the meaning ascribed to them in the Act.

The relevant provisions of the Act are –

- section 8C; and
- paragraphs 2 and 11A.

## **3. Parties to the transaction**

Applicant: A limited liability resident company and subsidiary of ABL

ABL: A listed resident company which is the holding company of the ABL Group of Companies (“the ABL Group”), including the Applicant

Participants: Qualifying employees and/or officers of any company forming part of the ABL Group of Companies

AB Management Incentive Trust: A resident trust established by the ABL Group to manage and operate the AB Management Incentive Scheme

#### **4. Description of the proposed transaction**

ABL adopted the AB Management Incentive Scheme (“the Scheme”) during 1999 which is intended to act as an incentive to Participants to promote the continued growth of the company by giving them the opportunity to acquire shares in ABL.

In terms of the Scheme, officers and any employees of any company forming part of the ABL Group are entitled to participate in the Scheme to the extent that options are granted to them.

The options are in relation to ordinary listed ABL shares and each option confers the right on the holder thereof to subscribe for one share in ABL at the stated option price. The option price is calculated with reference to the weighted average of the middle market prices at which shares are traded on the JSE on the trading day immediately preceding the date upon which the option is granted.

The ABL shares underlying the options are dematerialised shares and ABL keeps a float of ABL shares in a designated brokerage account with a firm of brokers. Upon the exercise of an option, the share will be transferred from this portfolio to the Participant’s brokerage account with his broker before the Participant can trade the relevant share. However, the Participant may request a group company, the Applicant, tasked with the administration of the Scheme not to transfer the shares to his/her brokerage account but may mandate the Applicant to sell the share arising from the exercise of the options in the market in order to realise cash to settle the purchase price of the shares. The Applicant would treat the date on which the shares were sold in the market as the date of payment of the purchase price. The gross proceeds of the sale of the shares would be paid by the broker into the Applicant’s account with the broker, five days later which is in line with the STRATE Settlement Rules, whereafter the Applicant will transfer the net proceeds (net of the purchase price less the employees’ tax deducted) to the Participant.

In terms of clause 16.4.3 of the deed of the AB Management Incentive Trust (“the Trust Deed”), every exercise of an option shall be accompanied by payment in full of the amount of the option price. Where a Participant exercises an option but fails to pay the purchase price, the underlying ABL share will not be transferred to the Participant’s brokerage account and hence, the Participant will not be able to take delivery thereof. Clause 16.4.4 of the Trust Deed further states that the exercise of an option will only be regarded as complete when payment, in terms of clause 16.4.3 of the Trust Deed, has been received. As noted above, the Applicant will regard the purchase price, in relation to the share, as being paid on the date which the share is sold in the market as per the mandate issued to the Participant.

In terms of clause 26.2 of the Trust Deed, an option will be personal and only capable of being exercised by the option holder to whom the option is granted. Furthermore, no Participant may alienate or encumber any of his/her options. Options lapse after the 7th anniversary or upon a Participant’s sequestration.

Options are subject to the following exercise dates –

- after two years from the acceptance date, one third;
- after three years from the acceptance date, two thirds calculated cumulatively; and
- after four years from the acceptance date, all the options.

Although clause 20 of the Trust Deed provides for a mechanism whereby a Participant can qualify for credit in relation to the strike price upon the exercise of an option, such credit mechanism has not been utilised and should therefore not be a factor when considering the merits of this application.

## **5. Specific conditions and assumptions**

This binding private ruling is made subject to the following conditions and assumptions:

- The ruling only applies to ABL options granted or offered to Participants pursuant to the Scheme on or after 26 October 2004 and exercised on or after 7 June 2007.
- The provisions contained in the Trust Deed in relation to a loan scheme or deferred delivery scheme are not operational in relation to the option scheme and no credit is granted to any option holder in relation to any outstanding share debt.
- To the extent that the board exercises any discretion under the Trust Deed to waive or alter any of the provisions that result in the options being “restricted equity instruments”, such action will result in a material alteration of the Scheme rules and this ruling will not be applicable. The vesting event for purposes of section 8C in such an event will have to be determined in terms of section 8C and not according to this ruling.
- Shares acquired pursuant to the exercise of an option can be freely disposed of by the relevant Participant immediately following such exercise.
- If shares are sold by the Applicant upon exercise of an option at the behest of the Participant in order to settle the purchase price due by the Participant, the date on which the shares are sold is treated as the date on which the payment of the purchase price is made.

## 6. Specific ruling

This specific ruling made in connection with the proposed transaction is as follows:

- Options granted on or after 26 October 2004 (“the equity instruments”) will remain a “**restricted equity instrument**” as defined in section 8C until the following requirements have been satisfied –
  - (a) the minimum period as set out in clause 16 of the Trust Deed has passed;
  - (b) the option has been exercised; and

(c) the option price has been paid.

- Until the above-mentioned requirements have been satisfied, the options remain “restricted equity instruments” and accordingly, pursuant to section 8C(3)(b), have not vested despite the minimum periods stipulated in clause 16 of the Trust Deed having expired.
- No employees’ tax obligation as envisaged under paragraph 11A arises for the Participant until all the events identified in the first bullet above have occurred.
- In determining the market value of the equity instruments for section 8C purposes:
  - a) Employees’ tax is to be calculated with reference to the actual proceeds generated from the sale of the shares, if the shares are sold upon exercise of the options.
  - b) Should, however, the shares not be sold on the date of exercise of the options, the market value for purposes of calculating the gain in terms of section 8C may be determined with reference to the Volume Weighted Average Price achieved in respect of ABL shares on the JSE on the date on which the options are exercised.

## **7. Period for which this letter is valid**

This binding private ruling is valid for a period of five (5) years from 7 June 2007.

Issued by:

**Legal and Policy Division: Advance Tax Rulings**  
**SOUTH AFRICAN REVENUE SERVICE**