SOUTH AFRICAN REVENUE SERVICE

BINDING CLASS RULING: BCR 001

DATE: 6 March 2009

ACT	**:**	**INCOME TAX ACT, NO. 58 OF 1962 (the Act)**
SECTION	**:**	**SECTION 8C**
SUBJECT	**:**	**DEFINITION OF EQUITY INSTRUMENT AND RESTRICTED EQUITY INSTRUMENT**

1. Summary

This ruling deals with the following issues:

- Whether a beneficial interest in an employee share trust acquired by qualifying employees under a share incentive scheme constitutes an **"equity instrument"** as defined in section 8C(7) of the Act, and if so, whether it would constitute **"restricted equity instruments"** as defined in section 8C(7) of the Act.
- Whether the shares acquired by qualifying employees by virtue of their beneficial interests also constitutes restricted equity instruments, until such time as the employees can freely dispose thereof, is also addressed.

2. Relevant tax laws

This is a binding class ruling issued in accordance with section 76R of the Act.

In this ruling legislative references to sections are to sections of the Act applicable as at 8 January 2008 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This ruling has been requested under the provisions of section 8C(7) read with the definition of **"financial instrument"** in section 1.

3. Class

The class members to whom this ruling will apply will be the beneficiaries of a trust to be created in terms of a proposed share ownership plan but excluding any residual beneficiary of such trust.

4. Parties to the proposed transaction

- The Applicant (the Trust): A trust to be created which will be a South African resident
- The Company: A South African company which is a resident
- Qualifying employees: Employees of the Company or a company within the same group as the Company (the Group) who will be beneficiaries (excluding the residual beneficiary) of the Trust

5. Description of the proposed transaction

- The Company intends implementing an Employee Share Ownership Plan (ESOP) in terms of which qualifying employees of the Group will participate as beneficiaries in the Trust to be created for this purpose. There will be a residual beneficiary of the Trust.
- These qualifying employees will be granted beneficial interests in the Trust (vested rights) at inception of the ESOP (effective date) which will enable them to acquire a specified number of ordinary shares (company shares) that will be issued by the Company to the Trust on the effective date.
- The qualifying employees will not be required to make contributions to the Trust and they will be entitled, as from the effective date, to a distribution of a percentage of all ordinary dividends (dividends) paid by the Company to the Trust in respect of the company shares acquired by them in terms of their vested rights granted to them.
- In terms of the proposed Trust Deed the qualifying employees will not be entitled to, *inter alia* –
  - dispose of, pledge, cede in security, mortgage or otherwise hypothecate or encumber any vested rights; or
  - dispose of any company share which has been distributed to them in terms of the Trust Deed until after the expiry of a period of seven (7) days from the distribution date (being the date on which payment of specific taxes and expenses will be made by the qualifying employees).

- The number of company shares which a qualifying employee will ultimately receive will only be determined on the final date, being a date ten (10) years from the effective date. However, the board of directors of the Company will be entitled to determine an earlier final date.

- The Company will have the right to repurchase a number of company shares held by the Trust on the final date. The amount of shares that will be available to be repurchased will be calculated in terms of a specified formula (the repurchase formula). Based on the repurchase formula the possibility may exist that the Company will repurchase all of the shares acquired by the Trust on the effective date.

- At the final date the remaining company shares (not repurchased by the Company) will be distributed to the qualifying employees. Ownership in the company shares will pass to the qualifying employees on the distribution date. All remaining assets will be distributed to the residual beneficiary and the Trust will terminate.

- The vested rights granted to the qualifying employees are subject to them remaining in the employment of the Group for a certain period of time. Thus, if a qualifying employee resigns or is dismissed he/she may forfeit some or all of his/her vested rights depending on the particular circumstances.

6. Conditions and assumptions

This ruling is made subject to the condition and assumption that the draft Trust Deed on which this ruling is based will remain materially the same.

7. Ruling

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

- The vested rights acquired by the qualifying employees will be **"equity instruments"** as defined in section 8C(7).
- The vested rights will be restricted equity instruments until it is converted into company shares or until termination of the vested rights, as the case may be.
- The company shares ultimately distributed to the qualifying employees will constitute restricted equity instruments and will become unrestricted at the time when they are entitled to dispose of those shares, which is seven (7) days after the distribution date. At such date the qualifying employees must include in or deduct from their income for a year of assessment any gain or loss as determined in terms of section 8C(2) in respect of the vesting during that year of any equity instrument.

8 Period for which this ruling is valid

This binding class ruling, issued in January 2008, is valid from the effective date of the ESOP until seven (7) days after the distribution date.

Issued by:

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