

SOUTH AFRICAN REVENUE SERVICE

BINDING PRIVATE RULING: BPR 040

DATE: 06 August 2009

ACT : INCOME TAX ACT, NO 58 OF 1962 (the Act)
SECTION : SECTION 8C AND PARAGRAPHS 2 AND 11A OF THE FOURTH SCHEDULE TO THE ACT
SUBJECT : LIABILITY TO WITHHOLD EMPLOYEES' TAX IN RESPECT OF SECTION 8C GAINS REALISED BY PARTICIPANTS IN AN EMPLOYEE SHARE OPTION SCHEME

1. Summary

This ruling deals more specifically with the timing as to when the liability to withhold employees' tax arises in relation to a gain realised by an employee upon the vesting in such employee of a "restricted equity instrument" falling within the ambit of section 8C of the Act. For this purpose particular regard is had for the specific provisions of the relevant share option scheme and whether the vesting event as per section 8C of the Act gives rise to the withholding liability for the employer.

2. Relevant tax laws

This is a binding private ruling issued in accordance with section 76Q of the Act.

In this ruling legislative references to sections and paragraphs are to sections of the Act and paragraphs of the Fourth Schedule to the Act applicable as at 21 February 2007 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; and
- paragraphs 2 and 11A.

3. Parties to the transaction to take place

The Applicant:	A resident, listed, public holding company of a group of companies
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The Employee Share Trust:	A resident trust set up by the Applicant in order to manage and operate an Employee Share Option Scheme
The Participants:	Qualifying employees and/or officers of any company forming part of the group of companies of which the Applicant is the holding company

4. Description of the transaction to take place

The Applicant created the Employee Share Trust (the Trust) in June 2000. The Trust in turn created a scheme (the Scheme) to act as an incentive to the Participants to promote the continued growth of the group of companies by giving them the opportunity to acquire ordinary shares (shares) in the Applicant.

In terms of the Trust's deed of trust (the trust deed) the Participants are entitled to partake in the Scheme only to the extent that –

- offers to purchase shares are made by the Trust to the Participants and such offers are accepted by the Participants; or
- options to purchase shares are granted by the Trust to the Participants and such options are accepted by the Participants, to the extent specified in the trust deed, by exercising their options.

The purchase price of the shares is stipulated in the letter of offer to the Participants and/or option agreement drawn up and is calculated as follows –

- in the case of an offer, the greater of –
 - the weighted average value per share, determined over a period of five trading days on the JSE immediately preceding the offer date; or
 - the par value of the share; and
- in the case of an option, the greater of –
 - the weighted average value per share, determined over a period of five trading days on the JSE immediately preceding the option date; or
 - the par value of the share.

It is a further provision of the trust deed that an offer or an option will be personal and can only be –

- accepted by the offeree to whom the offer is addressed; or

- exercised by the option holder to whom the option is granted.

The shares forming the subject matter of any offer made or option granted (referred to as a tranche) are subject to release dates stipulated in the trust deed, as follows –

- 25% of each tranche on or after the second anniversary date;
- 50% of each tranche on or after the third anniversary date;
- 75% of each tranche on or after the fourth anniversary date; or
- 100% of each tranche on or after the fifth anniversary date.

Offers and options lapse after the sixth anniversary of the offer date or option date, as the case may be and any outstanding share debt must be settled in full on such sixth anniversary.

In terms of the trust deed, the shares purchased by a Participant (by accepting an offer or by exercising an option) are to be registered in the name of that Participant, subject to such shares remaining in the “possession” of the Trustees until the release date thereof under the Scheme rules.

The Trustees may grant credit to a Participant for purposes of purchasing the shares. The trust deed provides for shares, in respect of which the share debt has not been settled, to be pledged to the Trustees until payment of the share debt.

Should a Participant fail to pay the outstanding share debt when it falls due, the Trust is entitled, under a specific clause in the trust deed, to re-acquire the shares at a price equal to the original purchase price. This clause could result in the Participant forfeiting ownership of the shares for less than the market value thereof. The shares that could be forfeited are thus restricted on the basis that the Participant could forfeit ownership and not on the basis that the share debt remains outstanding.

In the event of cessation of employment, otherwise than due to death, disability or retirement, the Trust has the right to re-acquire the shares for an amount equal to the outstanding share debt as at the date of termination. The Participant may however elect to settle any outstanding share debt in relation to those shares that have been released under the relevant clause.

Where the Trust has offered shares or granted options to the Participants on or after 26 October 2004 and the provisions of the trust deed are in the process of being fulfilled, a gain will be realised by the Participants and tax will have to be withheld.

5. Conditions and assumptions

This ruling is made subject to the following conditions and assumptions –

- the ruling only applies to the shares purchased by the Participant by accepting an offer or by exercising an option pursuant to the Scheme on or after 26 October 2004;
- the terms of any letter of allocation issued to a Participant in relation to a specific offer or option does not contradict or materially alter the provisions relating to the release of the shares as per the trust deed, being the later of the release dates stipulated in the relevant clause or the payment date of the share debt. For purposes of this condition, any extension/amendment of the release dates stipulated in the relevant clause will not be regarded as a contradiction or material alteration of the trust deed;
- to the extent that the trustees exercise their discretion under the trust deed to waive any of the provisions that result in the shares being a “restricted equity instrument” as defined in section 8C(7), such action will result in a material alteration of the Scheme rules and this ruling will cease to be applicable to those shares. The vesting of those shares for purposes of section 8C in such event will have to be determined in terms of the provisions of section 8C and not according to this ruling; and
- shares purchased under the Scheme are only released to Participants once the Scheme Administrator has confirmed in writing that the shares are indeed releasable and that the Scheme rules have been adhered to.

6. Ruling

The ruling made in connection with the transaction to take place is as follows:

- The shares made available to the Participants by way of offers made or options granted on or after 26 October 2004 by the Employee Share Trust will remain a “restricted equity instrument” as defined in section 8C(7) until the later of the release dates as stipulated in the Employee Share Trust or until such time as the following requirement has been satisfied –
 - (a) in the case of an offer, where the offer has been accepted and the share debt has been paid; or
 - (b) in the case of an option, where such option has been exercised and the share debt has been paid.
- The Applicant is not obliged to withhold employees’ tax under paragraph 2 read with paragraph 11A until the happening of the later

event set out in the first bullet above, as this event will be regarded as the “vesting event” for purposes of section 8C and consequently trigger the gain envisaged by paragraph 11A.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of five (5) years as from the date of this ruling until 21 February 2012.

Issued by:

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