BINDING PRIVATE RULING: BPR 161

DATE: 05 February 2014

ACT	**:**	**INCOME TAX ACT NO. 58 OF 1962 (the Act)**
SECTION	**:**	**SECTIONS 11(*a*), 23(*g*), 54 AND 58 AND PARAGRAPHS 2(1) AND 11A(4) OF THE FOURTH SCHEDULE**
SUBJECT	**:**	**EMPLOYEE SHARE OWNERSHIP PLAN**

1. Summary

This ruling deals with the income tax and employees' tax consequences for an employer and a trust through which an employee share scheme will be implemented.

2. Relevant tax laws

This is a binding private ruling issued in accordance with section 78(1) and published in accordance with section 87(2) of the Tax Administration Act No. 28 of 2011.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Fourth Schedule to the Act applicable as at 8 October 2013 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of the provisions of –

- section 11(*a*) read with section 23(*g*);
- section 54 read with section 58; and
- paragraphs 2(1) and 11A(4) of the Fourth Schedule.

3. Parties to the proposed transaction

The Applicant:	A private company incorporated in and a resident of South Africa
The Trust:	A share ownership trust to be formed and registered in South Africa
The Beneficiaries:	Beneficiaries of the Trust who will be qualifying employees of the Applicant

4. Description of the proposed transaction

The Applicant intends implementing an employee share ownership plan (ESOP), by offering it's qualifying employees the right to participate in the benefits attributable to the shares of the Applicant's JSE listed holding company.

The Trust will be used as a special purpose vehicle for carrying on the ESOP and qualifying employees will be allocated notional units (trust units) which will determine their participation in the dividends and net capital proceeds attributable to the shares. Each trust unit will restrict the employee to whom it is allocated from disposing of the shares for a specified "lock-in" period.

The Applicant will make annual cash contributions to the Trust during the first six years. The ESOP will commence with the first trust unit allocation following the Applicant's first annual cash contribution. The ESOP will terminate upon the expiry of the last lock-in period.

The contribution amounts will be used by the Trust to purchase shares in the Applicant's holding company.

The main objectives of the Trust will be to:

- enter into a Contribution Agreement with the Applicant;
- acquire the shares and any other assets from time to time;
- administer the assets for the benefit of the Beneficiaries;
- receive any dividends and net capital proceeds;
- distribute any dividends, net capital proceeds and other amounts due to the Beneficiaries in accordance with the terms of the Trust Deed; and
- vest the shares in and distribute them to the Beneficiaries in accordance with the terms of the Trust Deed.

The Trust will create the trust units as soon as the shares have been acquired. The number of trust units at the time will be equal to the number of shares acquired. Thereafter the trustees will confirm with the founder that the trust units are available for allocation to qualifying employees.

All trust units that are taken up by qualifying employees will form part of the allocated trust units, and all other trust units will form part of the unallocated trust units.

The rights attached to the trust units which are allocated to a Beneficiary will entitle the Beneficiary to –

- an immediate vested right to the dividends received by the Trust;
- an immediate vested right to the net capital proceeds realised by the Trust upon the disposal of the shares; and
- a vested right to the shares held by the Trust when the trustees exercise their discretion to vest the shares in the Beneficiaries.

The trustees will, from time to time, send to each Beneficiary a written notice notifying the Beneficiary of –

- the number and net value of the shares;
- the number of the Beneficiary's allocated trust units which are still subject to the lock-in period; and
- the number of those allocated trusts units which are no longer subject to the lock-in period (matured units).

In respect of the Beneficiary's matured units, the Beneficiary shall be required to indicate by way of an annual election notice whether the trustees must –

- dispose of the related shares and distribute the net capital proceeds to him/her; or
- vest the shares in and transfer them to him/her.

After receipt of the election notice from a Beneficiary the trustees will exercise their discretion and pass a resolution on whether the shares should be sold or vested in the Beneficiary. In exercising this discretion the trustees are obliged to act in the best interests of the Beneficiary, taking into account the wish per the election notice and relevant commercial considerations at the time. The trustees shall, as soon as reasonably possible, notify each Beneficiary of their decision.

Should the trustees decide to vest the shares in and transfer them to the Beneficiary, the Beneficiary shall be obliged to pay employees tax and expenses before such transfer can take place.

The trustees may, notwithstanding the lock-in period, exercise their discretion at any time and dispose of the shares and distribute the net capital proceeds realised to a Beneficiary, or vest the shares in and transfer them to the Beneficiary as indicated in the relevant annual election notice.

Qualifying employees who leave the employ of the Applicant in certain circumstances will forfeit any allocated trust units that are still subject to the lock-in period. Such trust units shall then form part of the unallocated trust units.

Unallocated trust units are then allocated to qualifying employees upon the next allocation date. In view of the fact that it is intended that upon the next allocation date that all unallocated trust units be allocated and that one trust unit is created per share purchased, there should, in the absence of any forfeiture during the year, be no unallocated trust units.

Any amount of the contribution remaining after the purchase of the shares by the Trust will, in the first instance, be used to settle any liabilities of the Trust and any amount remaining thereafter will be rolled over to augment the contribution amounts received by the Trust each year.

5. Conditions and assumptions

This ruling is not subject to any additional conditions and assumptions.

6. Ruling

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

- The contributions made by the Applicant to the Trust for purposes of the ESOP will be deductible under section 11*(a),* read with section 23*(g)*. No ruling is made, and no opinion is expressed, on the application of section 23H.

- The contributions made by the Applicant to the Trust will not be subject to donations tax under section 54.

- The contributions received by the Trust will be of a capital nature and will not be included in the Trust's "gross income", as defined in section 1(1).

- The Applicant will be liable to withhold employees' tax on each section 8C gain made by qualifying employees (Beneficiaries) to the extent that shares vested in the Beneficiaries and the Trust does not have any funds from which to withhold employees tax. However, the Trust will be liable to register as an employer and withhold employees' tax, to the extent that the shares are disposed of and the Trust has funds available.

- The aforegoing ruling will not alter or affect the obligation of the employer, whether it is the Applicant or the Trust, to ascertain from the Commissioner the amount of employees' tax to be deducted or withheld, as contemplated in paragraph 11A(4) of the Fourth Schedule.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of 6 years from 8 October 2013.

Issued by:

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