

*SOUTH AFRICAN REVENUE SERVICE*

**BINDING PRIVATE RULING: BPR 022**

The guidance contained in this ruling is affected by subsequent law changes.

**DATE : 9 September 2008**

**ACT : INCOME TAX ACT 58 of 1962 (“the Act”)**

**SECTION : SECTIONS 1 (DEFINITION OF GROSS INCOME), 11(a) READ WITH 23(g), 23H, AND PARAGRAPHS 1 AND 2 OF THE FOURTH SCHEDULE TO THE ACT**

**SUBJECT : TAXATION ASPECTS OF BONUSES AND PENALTIES PAYABLE IN TERMS OF AN EMPLOYEES’ BONUS INCENTIVE AND RETENTION SCHEME**

**1. Summary**

This ruling relates to some of the tax implications of a cash funded bonus incentive and retention scheme described below as “the scheme” for the Applicant (as the employer) and the participating employees in the scheme.

In relation to the Applicant, the relevant issues can be summarized as follows:

- (a) Confirmation of the Pay-As-You-Earn (“PAYE”) withholding obligations of the Applicant in respect of the participating employee’s liability for PAYE on the cash bonus.
- (b) To the extent that the bonus payments are deductible in terms of section 11(a) of the Act in the hands of the Applicant, whether the bonuses relate to services that would be rendered to the Applicant in the period that extends beyond the year of assessment in which such payment would be made for the purposes of section 23H of the Act.
- (c) Whether the penalties that the Applicant imposes on the participating employees upon early termination of employment would constitute gross income in the hands of the Applicant.

In relation to the participating employees, the relevant issues relates to whether the shares acquired by such employees with the bonus payments will be subject to section 8C of the Act.

## **2. Relevant tax laws**

This ruling is a binding private ruling which was requested by the Applicant in accordance with the requirements of Part IA of Chapter III of the Act and issued by the 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 as at 14 April 2008 and unless the context otherwise indicates, any word or expression in this ruling bears the meaning ascribed to it in the Act.

The relevant provisions of the Act are sections 1 definition of “**gross income**”, 11(a) read with 23(g), 23H, and paragraphs 1 and 2 of the Fourth Schedule.

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

Applicant: A listed company registered in South Africa.

Participating employee: An employee of the Applicant who is also a participant in the scheme.

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

The Applicant proposes to implement the scheme that would essentially operate as follows:

- f* A cash bonus will be awarded by the Applicant, through its Board’s Human Resources Committee (“the HR Committee”), to selected participating employees. The size of the bonus will be determined by the HR Committee in accordance with the Applicant’s Remuneration Policy.
- f* The bonus will be subject to normal tax which will be deducted and paid over to the SARS.

- f* The participating employee would be required to utilise an amount equal to the amount of the bonus after the deduction of employees' tax to purchase shares in the Applicant in the open market. The participating employee would therefore purchase the shares in the Applicant at the current listed price on an arm's length basis. Furthermore, the participating employee would acquire full unrestricted ownership of the shares.
- f* In order to ensure that the participating employee remain in the service of the Applicant for a prescribed retention period, the Applicant will be entitled, in its sole discretion, to require the participating employee to repay the cash bonus or to levy a penalty on the participating employee upon termination of employment within that retention period.
- f* In order to secure this contingent liability of each participating employee to pay the penalty, the Applicant may, but is not obliged to, require the participating employee to provide the Applicant with an acceptable form of security or guarantee as set out in the rules of the scheme. The Applicant determines the value of the security and has the right to increase or reduce the required value from time to time.
- f* The Applicant shall, at the expiry of the relevant retention periods, be obliged to release an appropriate portion of the security to the participating employee.
- f* The participating employee retains full rights of ownership in respect of any asset provided to the Applicant as security, including the right to freely dispose of the asset. In the event that the participating employee wishes to dispose of the asset so held, the Applicant is entitled to require the said employee to provide alternative security to the satisfaction of the Applicant.
- f* The rules of the scheme also sets out specific rules regarding the security held by the Applicant, including under what circumstances the Applicant may dispose of the security as well as rules relating to such disposal.

## 5. Specific conditions and assumptions

This binding private ruling is not made subject to any specific conditions and assumptions.

## 6. Specific ruling

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

- (a) the cash bonuses paid or payable by the Applicant shall constitute **“remuneration”** as defined in paragraph 1 of the Fourth Schedule;
- (b) the Applicant shall deduct or withhold from each of the aforementioned cash bonuses, by way of employees tax, an amount in terms of paragraph 2(1) of the Fourth Schedule;
- (c) for the purposes of determining the taxable income derived by the Applicant from carrying on any trade, there shall be allowed as deductions from the income of the Applicant, the aforementioned cash bonuses actually incurred by the Applicant in respect of each participating employee, in terms of section 11(a) read with section 23(g);
- (d) the amount of each cash bonus in respect of which a deduction is allowable in terms of the provisions of section 11(a), shall be limited in terms of section 23H;
- (e) the shares acquired by each participating employee in terms of the scheme are not **“restricted equity instruments”** as defined in section 8C; and
- (f) the total amount of penalties imposed by the Applicant in terms of the scheme, in cash or otherwise, received by or accrued to or in favour of the Applicant, shall constitute **“gross income”** as defined in section 1 in the hands of the Applicant.

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

This binding private ruling will remain valid until 24 April 2013.

Issued by:

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