

BINDING PRIVATE RULING: BPR 189

DATE: 19 February 2015

ACTS : INCOME TAX ACT NO. 58 OF 1962 (the Act)
SECTIONS : SECTIONS 1(1) DEFINITION OF “CONNECTED PERSON” 24J AND PARAGRAPHS 13 AND 20(1)(a) OF THE EIGHTH SCHEDULE TO THE ACT
SUBJECT : ACQUISITION OF SHARES SUBJECT TO SUSPENSIVE CONDITIONS

1. Summary

This ruling deals with the time of acquisition of shares which are acquired under an agreement subject to suspensive conditions.

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 Eighth Schedule thereto applicable as at 21 October 2014 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 1(1), definition of “connected person”;
- section 24J;
- paragraph 13; and
- paragraph 20(1)(a).

3. Parties to the proposed transaction

The Applicant: Company X, a private company incorporated in and a resident of South Africa

Co-Applicant 1: Trust Y, a resident of South Africa

Co-Applicant 2: Trust Z, a resident of South Africa

4. Description of the proposed transaction

In the past decade, Co-Applicant 1 and Co-Applicant 2 acquired a number of ordinary shares (“BEE shares”) in a listed company (ListCo) via a share subscription agreement, as part of ListCo’s Black Economic Empowerment deal

(ListCo BEE deal). ListCo's BEE deal is set to expire soon making it possible for the Co-Applicants to dispose of their BEE shares in ListCo.

The Applicant intends to make an offer to acquire some of the BEE shares that the Co-Applicants will hold in ListCo after expiry of the ListCo BEE deal.

As part of the BEE deal close out arrangements ListCo may re-acquire some of the BEE shares under a call option that it holds in relation to the financing arrangements the company has with the Co-Applicants relating to the acquisition of the BEE shares.

Each Co-Applicant further has a call option against ListCo to re-subscribe for ordinary shares in ListCo up to the number of the BEE shares that the Co-Applicant holds in ListCo which are the subject matter of the ListCo call option described above. The Co-Applicants' call options may only be exercised after ListCo's call option has been exercised.

The above call option transactions need to take place before the Co-Applicants can determine the number of ListCo shares available for sale to the Applicant (available ListCo shares).

The Co-Applicants are only entitled to sell the available ListCo shares after the expiry of the ListCo BEE deal, subject to fulfilment of the suspensive conditions as listed in the BEE shares subscription agreement.

The Applicant and the Co-Applicants propose to enter into individual sale agreements. The terms of the agreements will be identical for each Co-Applicant, with the exception of the number of available ListCo shares being committed by each Co-Applicant to be disposed of to the Applicant.

The agreements will be subject to a number of suspensive conditions.

Once all the conditions have been fulfilled, each agreement requires delivery of a trigger notice (as defined in the agreement) by the respective Co-Applicant to the Applicant during the sale period for each tranche of shares being sold to the Applicant. The trigger notice must specify the number of available ListCo shares being sold to the Applicant. The Co-Applicants are allowed to sell the committed available ListCo shares in three tranches. If no trigger notice is given for the minimum number of committed shares by a specified date (which date coincides with the end date of the sale period), the Co-Applicant will be deemed to have given a trigger notice as at the specified date for all the available ListCo shares committed under the agreement. The sale period is a period of approximately 3 months commencing after the date the call options have been exercised.

The agreement will specify that ownership, risk and benefit in the available ListCo shares will pass upon delivery of these shares to the purchaser's Central Securities Depository Participant following delivery of the trigger notice. It is envisaged that payment will first take place and then delivery of the available ListCo shares.

The purchase price per ListCo share under the proposed transaction is subject to a formula which takes into account the 30 day volume weighted average share price (reduced by any distribution paid or payable to the respective Co-Applicant

during the sale period) less a specified discount; and the then current average trading price of a ListCo share.

There is no debt funding in the acquisition of the available ListCo shares by the Applicant.

The Applicant is not a beneficiary of the Co-Applicants. Some of the beneficiaries of the Co-Applicants are companies and the Applicant also does not hold any equity shares in any of these companies that are beneficiaries of the Co-Applicants. One of the Applicant's fellow subsidiaries does, however, hold less than 50% of the equity shares in one of the companies that is a beneficiary of Co-Applicant 1.

5. Conditions and assumptions

This binding private 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 time of disposal by the Co-Applicants and the corresponding time of acquisition by the Applicant of the available ListCo shares is the date the suspensive conditions of the sale agreement are satisfied as contemplated in paragraph 13(1)(a)(i).
- The base cost of the acquired available ListCo shares, as contemplated in paragraph 20(1)(a), is the price payable under each trigger notice.
- The Applicant is not a "connected person" as defined in section 1(1) in relation to any of the Co-Applicants.
- The provisions of section 24J will not be applicable to the proposed transaction.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of 1 year from 21 October 2014.