

BINDING PRIVATE RULING: BPR 220

DATE: 16 February 2016

ACT : INCOME TAX ACT NO. 58 OF 1962 (the Act)
SECTION : SECTIONS 15 AND 36(11)
SUBJECT : CONTRIBUTION BY A MINING COMPANY TO A TRUST PURSUANT TO A SHARE INCENTIVE SCHEME

1. Summary

This ruling determines whether a contribution by a mining company to a trust pursuant to a perpetuity share incentive scheme will be deductible in terms of the specific dispensation afforded to mining entities.

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 are to sections of the Act applicable as at 2 October 2015. 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 15 read with paragraph (e) of the definition of “capital expenditure” in section 36(11).

3. Parties to the proposed transaction

The Applicant: An unlisted mining company, incorporated in and a resident of South Africa

The Co-Applicant: A trust, founded by the Applicant, registered in and a resident of South Africa

4. Description of the proposed transaction

The Applicant intends to establish an employee share ownership plan (ESOP) and founded the Co-Applicant for that purpose.

The Applicant will contribute an amount to the Co-Applicant for the sole purpose of enabling the Co-Applicant’s trustees (trustees) to subscribe for a separate class of ordinary shares (scheme shares) in the Applicant.

The scheme shares will rank *pari passu* with the ordinary shares of the Applicant with regards to voting rights, participation in the capital and income of the Applicant and other share related matters. The sole distinction between the ordinary shares and the scheme shares is that the dividends of the scheme

shares must be determined and paid, based on a formula which requires a percentage of the free cash flow determined for that financial year to be distributed as a dividend.

The beneficiaries of the Co-Applicant will be the permanent employees of the Applicant within the Applicant's lower employment grades.

The Applicant's aims, through the ESOP, are to –

- promote shared interests of the employees and the shareholders in the growth of the Applicant;
- maintain and promote sound employment relations and attract, incentivise, empower and retain employees on an on-going basis; and
- enhance its compliance with and furtherance of the objects contained in section 2(d) and (f) of the Mineral and Petroleum Resources Development Act No. 28 of 2002 and compliance with the Scorecard in terms of the Mining Charter.

The objects of the Co-Applicant, in turn, are to –

- accept and use the contribution to be received from the Applicant solely for the purpose of subscribing for the scheme shares in terms of the subscription agreement;
- receive the distributable income arising from holding the scheme shares and distribute such distributable income to the beneficiaries who are entitled thereto;
- receive special payments arising from holding the scheme shares and distribute such payments to the beneficiaries who are entitled thereto; and
- vote the scheme shares through the trustees of which the majority are appointed by the representative worker's unions.

The Applicant's board of directors will, in relation to each financial year after the finalisation of the Applicant's audited financial statements, determine whether a distribution will be paid to the Co-Applicant as the holder of the scheme shares, calculated in accordance with a prescribed formula.

The distributable income (if any) will be paid to the beneficiaries who were employees on the last day of the financial year to which the distributable income relates, in equal amounts (by dividing the distributable income by the number of beneficiaries receiving distributable income). The trustees will ensure that the distributable income will always be paid to the beneficiaries within the same financial year as the receipt thereof.

Persons who cease to be employees will cease to be regarded as beneficiaries or to have any rights under the ESOP.

The trustees will be entitled to vote the scheme shares on behalf of the beneficiaries at all shareholders meetings. Each recognised workers union will be entitled to appoint, remove or replace one trustee and one additional trustee for every completed 25% of the beneficiaries who are members of such union. The

Applicant will appoint one trustee fewer than the number of trustees appointed by the recognised unions. One independent trustee will also be appointed by the majority of the trustees.

It is intended that the ESOP will exist for an indefinite period. In this regard the Co-Applicant's trust deed determines that the Co-Applicant will endure in perpetuity, unless it is terminated on the occurrence of any one of the following events –

- the Applicant terminates its corporate existence;
- there are no beneficiaries left; or
- the Applicant exercises its rights as against the Co-Applicant in terms of a “come along” arrangement, if a third party offers to buy all of the ordinary shares in the Applicant.

If the Co-Applicant is terminated for any of those reasons, the Applicant will repurchase the scheme shares from the Co-Applicant at market value. Upon termination of the Co-Applicant, before the Co-Applicant is deregistered, the trustees will realise the Co-Applicant's assets, discharge the Co-Applicant's liabilities and distribute any surplus to the beneficiaries in equal portions in the same financial year that the Co-Applicant's assets are realised. If there are no beneficiaries left, any surplus will be paid to a public benefit organisation in the same financial year that the Co-Applicant's assets are realised. The public benefit organisation will be decided upon by the trustees.

The scheme shares must remain in the Co-Applicant and the Co-Applicant's trust deed provides that neither the Co-Applicant nor the trustees will –

- be entitled to divest the Co-Applicant of the scheme shares, except in terms of the termination provision as mentioned above; or
- enter into any agreement in respect of the manner in which any votes attached to any scheme shares will be exercised; or
- purport to agree, whether or not subject to any suspensive or resolute condition, to do any of the foregoing.

Beneficiaries will not be entitled to dispose of, cede or encumber any or all of their rights acquired under the Co-Applicant's trust deed.

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 contribution to be made by the Applicant will be deductible from the Applicant's mining income under section 15(a), read with paragraph (e) of the definition of “capital expenditure” in section 36(11).

7. Period for which this ruling is valid

This binding private ruling is valid for a period of 3 years from 5 October 2015.

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