

DRAFT INTERPRETATION NOTE

DATE:

ACT : INCOME TAX ACT 58 OF 1962
SECTION : DEFINITION OF “ASSET-FOR-SHARE TRANSACTION” IN SECTION 42(1)
SUBJECT : MEANING OF “HOLDS A QUALIFYING INTEREST”

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Preamble

In this Note unless the context indicates otherwise –

- **“Companies Act”** means the Companies Act 71 of 2008;
- **“definition of “asset-for-share transaction””** means the definition of “asset-for-share transaction” in section 42(1);
- **“equity share”** as defined in section 1(1) means any share in a company, excluding any share that, neither as respects dividends nor as respects return of capital, carries any right to participate beyond a specified amount in a distribution and under section 41(1) for purposes of sections 42 and 44 includes a participatory interest in a portfolio of a collective investment scheme in securities or in a portfolio of a hedge fund collective investment scheme;
- **“qualifying interest”** means a qualifying interest as defined in section 42(1);
- **“section”** means a section of the Act;

- **“securities register”** as defined in the Companies Act means the register required to be established by a profit company in terms of section 50(1) of that Act.
- **“share”** as defined in section 1(1) means, in relation to a company, any unit into which the proprietary interest in that company is divided;
- **“taxpayer”** means the person chargeable with a tax leviable under the Act;
- **“the Act”** means the Income Tax Act 58 of 1962;
- **“transferor”** means the person disposing of an asset to a resident company as contemplated in paragraph (a) of the definition of “asset-for-share transaction”; and
- any other word or expression bears the meaning ascribed to it in the Act.

1. Purpose

This Note clarifies the meaning of “holds a qualifying interest” in a company, as required under paragraph (a) of the definition of “asset-for-share transaction”.

2. Background

The definition of “asset-for-share transaction” stipulates, amongst other requirements, the issuance of an equity share in the company and that the person disposing of an asset must hold a qualifying interest in that company at the close of the day on which the asset is disposed of. The definition of “qualifying interest” in section 42(1) refers to an equity share “held”.

The term “hold” was previously defined in section 41(1), but this definition has since been deleted.¹ Uncertainty exists regarding the meaning of “hold” or “held” in section 42(1), especially when an asset is disposed of on one day while related administrative actions (such as updating the share register and, if certificated, issuing a share certificate) are completed on a subsequent day. It is common for such exchange agreements to provide for the implementation of the administrative actions a few days after the fulfilment of the last condition precedent, allowing time for the collation of documents and the gathering of relevant individuals at a mutually convenient time and place.

This Note examines the meaning of “hold” and “held” within the context of section 42 and does not address other requirements of an asset-for-share transaction as outlined in that section.

¹ Deleted by section 54 of Act 15 of 2016.

3. The law

Section 42

42.000 Asset-for share transactions.—(1) For the purposes of this section—

“**asset-for-share transaction**” means any transaction—

- (a) (i) in terms of which a person disposes of an asset (other than an asset which constitutes a restraint of trade or personal goodwill), the market value of which is equal to or exceeds—
 - (aa) in the case of an asset held as a capital asset, the base cost of that asset on the date of that disposal; or
 - (bb) in the case of an asset held as trading stock, the amount taken into account in respect of that asset in terms of section 11(a) or 22(1) or (2),

to a company which is a resident, in exchange for the issue of an equity share in that company and that person—

- (A) at the close of the day on which that asset is disposed of, holds a qualifying interest in that company; or
- (B) is a natural person who will be engaged on a full-time basis in the business of that company, or a controlled group company in relation to that company, of rendering a service; and ...”

“**qualifying interest**” of a person means—

- (a) an equity share held by that person in a company which is a listed company or will become a listed company within 12 months after the transaction as a result of which that person holds that share;
- (b) an equity share held by that person in a portfolio of a collective investment scheme in securities;
- (c) equity shares held by that person in a company that constitute at least 10 per cent of the equity shares and that confer at least 10 per cent of the voting rights in that company;
- (d) an equity share held by that person in a company which forms part of the same group of companies as that person; or
- (e) an equity share held in a portfolio of a hedge fund collective investment scheme.”

4. Application of the law

4.1 Share registration and transfer

In *Standard Bank of South Africa Ltd & Another v Ocean Commodities Inc & others*, Corbett JA stated the following regarding the meaning of “a share”:²

“A share in a company consists of a bundle, or conglomerate, of personal rights entitling the holder thereof to a certain interest in the company, its assets and dividends.”

² 1983 (1) SA 276 (A) at 288.

A share issued by a company is movable property, transferable in any manner provided for or recognised by the Companies Act or other legislation.³ An authorised share of a company has no rights associated with it until it has been issued.⁴

The board of a company may resolve to issue shares at any time, but only within the classes and to the extent that the shares have been authorised by or in terms of the company's memorandum of incorporation, in accordance with section 36 of the Companies Act.⁵ Generally, issuing shares in a company is a straightforward process, requiring that the directors only pass a resolution authorising the company to issue shares to a particular individual or juristic person, subject to any specific requirements in the memorandum of incorporation or shareholders' agreement.

The board of a company may issue authorised shares only for adequate consideration, as determined by the board.⁶ Before issuing any specific shares, the board must decide on the consideration and the terms under which those shares will be issued.⁷ The board's determination regarding the adequacy of consideration for any shares can only be challenged in accordance with section 76 of the Companies Act, alongside section 77(2).⁸ Generally, once a company has received the board-approved consideration for issuing shares, those shares are considered fully paid. The company must then issue the shares and ensure that the holder's name is recorded in the company's securities register.⁹

Shares issued by a company can either be evidenced by a certificate or issued in uncertificated form. In the case of uncertificated shares, the company must not issue certificates that evidence or claim to evidence title to those shares.¹⁰ Unless explicitly stated otherwise in the Companies Act, the rights and obligations of shareholders do not differ solely based on whether their respective shares are certificated or uncertificated, and the provisions of that Act apply equally to both types of securities with respect to any uncertificated securities in the same manner as it applies to certificated securities.¹¹

Every company is required to establish or cause to be established a securities register of its issued shares in the prescribed form, and maintain such register in accordance with the prescribed standards.¹² As soon as practicable after issuing any shares, a company must enter or cause to be entered in its securities register, for each class of shares issued, the total number of shares held in uncertificated form,¹³ as well as the following details regarding certificated shares:¹⁴

- “(i) the names and addresses of the persons to whom the shares were issued;
- (ii) the number of shares issued to each of them;

³ Section 35(1) of the Companies Act.

⁴ Section 35(4) of the Companies Act.

⁵ Section 38(1) of the Companies Act.

⁶ Section 40(1)(a) of the Companies Act.

⁷ Section 40(2) of the Companies Act.

⁸ Section 40(3) of the Companies Act.

⁹ Section 40(4) of the Companies Act.

¹⁰ Section 49(2) of the Companies Act.

¹¹ Section 49(3) of the Companies Act.

¹² Section 50(1) of the Companies Act.

¹³ Section 50(2)(1)(a) of the Companies Act.

¹⁴ Section 50(2)(b) of the Companies Act.

- (iii) the number of, and prescribed circumstances relating to, any shares—
 - (aa) that have been placed in trust as contemplated in section 40(6)(d); or
 - (bb) whose transfer has been restricted;
- (iv) in the case of securities contemplated in section 43—¹⁵
 - (aa) the number of those securities issued and outstanding; and
 - (bb) the names and addresses of the registered owner of the security and any holders of a beneficial interest in the security; and
- (v) any other prescribed information.”

The Companies Act provides also that, unless otherwise specified in a company’s memorandum of incorporation, the company’s issued shares may be held by, and registered in the name of one person¹⁶ for the beneficial interest of another person.¹⁷ The term “beneficial interest” is defined in section 1 of the Companies Act to mean –

“when used in relation to a company’s securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to—

- (a) receive or participate in any distribution in respect of the company’s securities;
- (b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company’s securities; or
- (c) dispose or direct the disposition of the company’s securities, or any part of a distribution in respect of the securities,

but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act 45 of 2002).”

In this context, a beneficial owner is the person who enjoys the benefits of ownership even though the title is registered in another person’s name.

The transfer of incorporeal or personal rights from one person to another occurs by means of cession.¹⁸ Cession is a bilateral juristic act whereby a right is transferred simply by agreement between the transferor, known as the cedent, and the transferee, referred to as the cessionary.¹⁹

Generally, no formalities are required for a cession. Specifically, a written deed of cession is not necessary, and if the ceded right is documented, there is no requirement for that document to be delivered to the cessionary.²⁰ The parties involved in the cession may agree on any formalities, or common or statutory law may dictate specific

¹⁵ These are securities other than shares.

¹⁶ See 4.3 for consideration of beneficial owner.

¹⁷ Section 56(1) of the Companies Act.

¹⁸ Lubbe, GF (30 April 2013). Cession in *Law of South Africa (LAWSA) Volume 3 (Third Edition)* in paragraph 129. My LexisNexis [online].

¹⁹ Lubbe, GF (30 April 2013). Cession in *Law of South Africa (LAWSA) Volume 3 (Third Edition)* in paragraph 128. My LexisNexis [online].

²⁰ Lubbe, GF (30 April 2013). Cession in *Law of South Africa (LAWSA) Volume 3 (Third Edition)* in paragraph 152. My LexisNexis [online].

requirements.²¹ The effective date of transfer is a factual matter, determined by the underlying agreement between the parties.

Unless stated otherwise in a contractual term, beneficial ownership of the shares arises when the right to have those shares (along with all associated rights) issued occurs, rather than at a later date when related administrative actions are performed.

In an asset-for-share transaction, the parties may agree on the formalities that the cession must meet, either in the obligatory agreement that creates the right or in the obligatory agreement underlying the cession. For example, they may stipulate that the document of title must be delivered first.²² The formalities for transferring shares may also be outlined in the company's memorandum of incorporation or the shareholders' agreement.

4.2 Meaning of "holds a qualifying interest"

The word "hold" is not defined in the Act and should be interpreted according to its normal meaning, considering the context in which it appears. The *Merriam-Webster Dictionary* defines "hold" as –²³

"1 a: to have possession or ownership of or have at one's disposal".

In *Natal Joint Municipal Pension Fund v Endumeni Municipality*, Wallis JA made the following remarks on interpretation that have been reiterated in many cases:²⁴

"[T]he 'inevitable point of departure is the language of the provision itself', read in the context and having regard to the purpose of the provision and the background to the preparation and production of the document. . . . A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

The essence and purpose of section 42 are to ensure that all assets sold to a company in exchange for equity shares are exempt from normal tax, recouplements, and capital gains tax for the person disposing of the asset. Under paragraph (1)(i)(A) of the definition of "asset-for-share transaction", it is required that the person disposing of the asset "at the close of the day on which that asset is disposed of, holds a qualifying interest in that company".

The Companies Act provides that every company must, as soon as practicable after issuing any share, enter or cause to be entered in its securities register certain prescribed information regarding each class of share issued.²⁵ The reference to "as practicable after issuing" implies that the particulars may not be recorded in the securities register *pari passu* (simultaneously) with the issuance of the share. Consequently, it can be concluded that recording the prescribed information in the securities register is not a prerequisite for holding or owning an issued share. Therefore, a shareholder holds a share and all the associated rights when it is

²¹ Lubbe, GF (30 April 2013). Cession in *Law of South Africa (LAWSA) Volume 3 (Third Edition)* in paragraph 152. My LexisNexis [online].

²² Lubbe, GF (30 April 2013). Cession in *Law of South Africa (LAWSA) Volume 3 (Third Edition)* in paragraph 152. My LexisNexis [online].

²³ www.merriam-webster.com/dictionary/hold [Accessed 19 March 2026].

²⁴ 2012 (4) SA 593 (SCA). at 16.

²⁵ Section 50(2) of the Companies Act.

transferred to the shareholder, not merely when the related administrative tasks are completed. The date from which the share is deemed to be held is a factual question.

The issuance of a share certificate to indicate shareholding is not a prerequisite for holding a qualifying interest, as this scenario does not apply to listed companies with uncertificated shares.²⁶ No distinction is made in section 42, regarding this matter, neither in the definition of “asset-for-share transaction” nor in “qualifying interest”. In this context, the terms “hold” or “held” refer to beneficial ownership rather than registered ownership, should such a duality exist (see 4.3).

4.3 Beneficial owner

The registered owner of a share may not necessarily be the beneficial owner. For instance, an approved nominee may be the registered owner of a share held for the benefit of another person.

The term “beneficial owner” was considered in *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* in which Holmes JA stated the following:²⁷

“A nominee is an agent with limited authority: he holds shares in name only. He does this on behalf of his nominator or principal, from whom he takes his instructions; see *Sammel and Others v. President Brand Gold Mining Co. Ltd.*, at p. 666. The principal, whose name does not appear on the register, is usually described as the 'beneficial owner'. This is not, juristically speaking, wholly accurate; but it is a convenient and well-understood label. Ownership of shares does not depend upon registration. On the other hand, the company recognises only its registered shareholders.”

The term “beneficial owner” should not be interpreted too broadly or out of context. Not every person that benefits from another's shareholding will necessarily be deemed the beneficial owner of a dividend. In *Her Majesty the Queen v Prévost Car Inc.*²⁸ the taxpayer paid dividends to its Dutch shareholder, which subsequently distributed a similar amount of dividends to its corporate shareholders, who were residents of Sweden and the United Kingdom. The court found that the Dutch shareholder, rather than its corporate shareholders, was the beneficial owner of the dividends received. The judge referenced the ruling in *Prévost Car Inc. v Her Majesty the Queen*,²⁹ which established that the beneficial owner of dividends is the person who receives the dividends for his or her own use and enjoyment while also assuming the associated risks and control.

In *Velcro Canada Inc. v Her Majesty the Queen*,³⁰ it was held that –

- when examining the issue of beneficial ownership, one must apply the test outlined in *Prévost*, considering the ordinary meanings of individual words, that is, “possession”, “use”, “risk” and “control”;
- the beneficial owner is the person who enjoys and assumes all attributes of ownership; and
- only if the interest in the item provides that party with unquestionable control over the item will it satisfy the threshold established in *Prévost*.

²⁶ Section 49(2) of the Companies Act.

²⁷ 1976 (1) SA 441 (A) at 453A-B.

²⁸ 2009 FCA 57, [2010] 2 F.C.R. 65.

²⁹ (2008) TCC 231.

³⁰ (2012) TCC 57.

In *The Clicks Group Ltd & Others v The Independent Community Pharmacy Association & Others*³¹ it was stated that –

“[t]he concept of beneficial interest is derived from English law. It connotes someone who is not the legal owner of a thing but has a legal right to the benefits of ownership”.

If a person holds shares in the capacity of a registered shareholder for the beneficial interest of another person,³² the person holding a beneficial interest will be considered as holding a qualifying interest for purposes of section 42(1). Under these circumstances, the date on which the registered shareholder acquires the rights to those shares will be the date from which the person holding a beneficial interest commences to hold a qualifying interest.

From the above, it can be concluded that a person can “hold” a share in a company even if that person’s name is not entered in the securities register of that company.

4.4 Issue of an equity share

A key requirement of an asset-for-share transaction is that the transferee company must issue an equity share to the transferor. This is confirmed by the *Explanatory Memorandum to the Taxation Laws Amendment Bill, 2012*, which stipulates –³³

“an asset transferred under an asset-for-share transaction can only be in exchange of shares “issued” to the transferor by the transferee company.”

Neither the Act nor the Companies Act defines the word “issue” in the context of equity shares; therefore, common law is applicable.

The case of *Bavasah v Stirton and Another*,³⁴ concerned the validity of a share sale agreement. The shares in question, allegedly owned by the appellant, were never allotted, issued, or registered in accordance with the Articles of Association and the Companies Act 61 of 1973. Specifically, there was a failure to comply with section 221 of that Act, which required a resolution to be passed in a general meeting to authorise the directors to issue shares to the appellant. As a result, the shares were never issued to him. The court found that owing to non-compliance with the Articles and the Companies Act, the share sale agreement was null and void. Boqwana J stated the following regarding the issuing of shares:

“Issuing refers to an act which completes the title of the applicant to whom shares have already been allotted. In *Ambrose Lake Tin and Copper Co (Clarkes case)*[1878 8 Chd 635 (CA) at 638] it was held that:

‘In as much as the term “issue” is used, it must be taken as meaning something distinct from allotment, as importing that some subsequent act has been done whereby the title of the allottee becomes complete, either by the holder of the shares receiving some certificate (in the case of certificated securities) or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire or complete.’ ”

³¹ [2022] 1 All SA 297 (SCA) at 304.

³² Section 56 of the Companies Act.

³³ The particular amendment deleted the words “or shares of” in paragraph (a)(i) of the definition of “asset for share transaction” following item (bb). This amendment came into operation on 1 January 2013 and applied to transactions entered into on or after that date.

³⁴ 2014 2 All SA 51 WCC.

For a person to hold a qualifying interest in that company, the equity shares must be issued by the company; these shares cannot merely be acquired by sale from a third party.

The definition of “asset-for-share transaction” does not require that the person disposing of the asset must exchange it for a “qualifying interest”. If that person already meets the requirement of a “qualifying interest” in the company, the asset can be exchanged for any number of shares issued by the company.

4.5 Meaning of “at the close of the day”

The definition of “asset-for-share transaction” requires the person disposing of an asset to hold a qualifying interest at the close of the day on which the asset is disposed of. Relief may be claimed if a transferor acquires a qualifying interest through multiple transactions conducted on the same day. The test is whether the person holds a qualifying interest at the close of the day, rather than whether a qualifying interest is held at the end of each transaction.

The phrase “at the close of the day” is not defined in the Act and should be interpreted according to its ordinary meaning as applied to the subject matter in question.³⁵

The *Meriam Webster Dictionary* defines “close” as –³⁶

“to come to an end or period”.

The *Cambridge Dictionary* defines “day” as –³⁷

“a period of 24 hours, especially from twelve o’clock one night to twelve o’clock the next night”.

The conclusion of an asset-for-share transaction is not restricted to business days or hours. Such transactions can also be concluded on weekends and public holidays. Therefore, the time frame for determining whether the requirement of “at the close of the day” on which the asset is disposed of is met should be interpreted in its ordinary grammatical sense. Whether a person holds a qualifying interest in a company at the close of the day is a factual question.

It is crucial that the qualifying interest in the company is held at the close of the day on which the asset is transferred to the company.

Suspensive conditions often arise in complex transactions, such as corporate reorganisations that require the alignment of various factors before the transaction becomes effective. Since the time clause under paragraph (a) of the definition of “asset-for-share transaction” represents one of the key conditions of such a transaction, it may be beneficial for the parties to include it as one of the suspensive conditions in the exchange agreement to ensure compliance with the requirements of section 42. A suspensive condition incorporating this provision under paragraph (a) of the definition of “asset-for-share transaction” will effectively supersede any other time of disposal rules under paragraph 13 of the Eighth Schedule to the Act, which is necessary in the context of an asset-for-share transaction.

³⁵ Kellaway, EA (1995). *Principles of Legal Interpretation of Statutes, Contracts and Wills* at 224. Butterworth’s.

³⁶ www.merriam-webster.com/dictionary/close [Accessed 19 March 2026].

³⁷ www.dictionary.cambridge.org/dictionary/english/day [Accessed 19 March 2026].

The terms and conditions of the exchange agreement depend on the specific facts and circumstances of each case, as well as the regulatory environment in which the parties operate. The Supreme Court of Appeal (SCA) examined the legal effect of a suspensive condition in a contract in *Codevilla v Kennedy-Smith N.O and Others*.³⁸ The majority judgment delivered by Schippers JA held as follows:³⁹

“There is a long line of authority which establishes the principle that a suspensive condition in a contract suspends in whole or in part, the operation of the obligations flowing from the contract, pending the occurrence or non-occurrence of a specific uncertain future event. If the condition is fulfilled, the obligations under the contract become enforceable. If the condition is not fulfilled, the contract becomes unenforceable.”

Example 1 – Suspensive condition in an exchange agreement to satisfy the definition of “asset-for-share transaction”

Facts:

A owns a vacant undeveloped immovable property that was acquired 20 years ago for R2 500 000. Company B, which is resident in South Africa, and A enter into an agreement whereby A agrees to transfer the immovable property to Company B. In exchange for the immovable property, Company B will issue 12 000 equity shares to A. After the equity shares have been issued, A will effectively hold 12% of the issued equity shares and voting rights in Company B. The exchange agreement provides for the following:

- The shares in Company B will be issued to A upon registration of the immovable property at the Deeds Office.
- The immovable property will be held as a capital asset by Company B.

The directors of Company B are authorised by its Memorandum of Incorporation to issue additional shares. Furthermore, Company B has sufficient authorised unissued shares to meet its obligation to A.

Assume all other requirements of section 42(1) are fulfilled to satisfy the requirements of an asset-for-share transaction.

Result:

In accordance with the concluded agreement, A will transfer the immovable property to Company B in exchange for equity shares to be issued by the latter.

The issuance of equity shares to A is subject to a suspensive condition, specifically the registration of the immovable property at the Deeds Office. On the date that the immovable property is registered in the Deeds Office, Company B will issue A with 12 000 equity shares. On the day the shares are issued to A, it can be stated that, effective from that day, A holds a “qualifying interest” in Company B. A will meet the requirements under paragraph (c) of the definition of “qualifying interest” as it will then hold more than 10% of the equity shares and voting rights in Company B.

³⁸ [2024] 4 All SA 637 (SCA).

³⁹ At paragraph 43.

5. Conclusion

The definition of “asset-for-share transaction” requires that the person disposing of an asset must hold a qualifying interest in the company at the close of the day on which the asset is disposed of.

An asset transferred under an asset-for-share transaction can only be exchanged for shares “issued” to the transferor by the transferee company. A sale of shares in the company by a third party will not satisfy this requirement. The holding of a share issued by a company is generally evidenced by a certificate. Every company must, as soon as practicable after issuing any share, enter or cause to be entered in its securities register certain prescribed information. The phrase “as practicable after issue” suggests that entering the particulars in the register is not a requirement for holding a share. The Companies Act also provides for beneficial interest in shares. Thus, a shareholder holds a share and all the rights attached to it when it has been transferred to the shareholder, not only when the related administration is completed. The date from which the share is held is a factual question.

The issuance of a physical share certificate to reflect the shareholder is not a prerequisite for holding a qualifying interest. The terms “hold” or “held” in this context refer to beneficial ownership rather than registered ownership should such a duality exist.

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