BINDING PRIVATE RULING: BPR 386

DATE: 31 October 2022

ACT	**:**	**INCOME TAX ACT 58 OF 1962 (the Act)**
SECTION	**:**	**SECTIONS 1(1) – DEFINITION OF "CONNECTED PERSON", 54, 58(1) AND PARAGRAPH 38 OF THE EIGHTH SCHEDULE TO THE ACT**
SUBJECT	**:**	**SHARE DISPOSAL BETWEEN TWO EMPLOYEE SHARE INCENTIVE TRUSTS**

Preamble

This binding private ruling is published with the consent of the applicant(s) to which it has been issued. It is binding between SARS and the applicant and any co-applicant(s) only and published for general information. It does not constitute a practice generally prevailing.

1. Summary

This ruling determines the income tax treatment of share disposals between two Employee Share Incentive Trusts with different beneficiaries.

2. Relevant tax laws

In this ruling references to sections are to sections of the Act applicable as at 21 October 2022. 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 –

- section 1(1) definition of "connected person";
- section 54;
- section 58(1); and
- paragraph 38.

3. Parties to the proposed transaction

The applicant:	An employee share incentive trust set up by Company A for the benefit of the employees of the Company A group of companies
Company A:	A company incorporated in and a resident of South Africa and listed on the JSE. It is also a parent company of a group of companies
New trust:	A newly formed employee share incentive trust with the employees of the Company A group of companies as the beneficiaries

4. Description of the proposed transaction

The applicant is an employee share incentive trust that was established by Company A for the benefit of the employees of the Company A group of companies. The applicant currently holds a number of shares in Company A (the Shares). Company A is the ultimate beneficiary of the applicant, that is, upon dissolution of the applicant, Company A stands to receive the residual proceeds (i.e., after settling any liabilities of the applicant) of all the Shares sold. The current employee share scheme in place does not fulfil the envisaged objectives of Company A and its subsidiaries. Accordingly, Company A intends to establish a new trust that will be more aligned with its objectives.

It is anticipated that the applicant will sell the Shares to the new trust for a consideration equal to the cost at which the applicant acquired the Shares. These Shares will be sold in multiple tranches as and when the new trust requires the Shares in order to make awards to eligible employees. The applicant uses the specific identification method to determine the base cost of batches of Shares purchased and will sell each batch of Shares to the new trust for an amount equal to the base cost thereof.

A new employee share scheme is proposed, as detailed below.

A person who is eligible to participate under the share incentive scheme administered by the new trust will fall within one of three categories. Excluded is any employee who –

- has, at any time, whether before or after the establishment of the new trust, participated in, or benefitted from, any share incentive trust or any other share incentive scheme of whatsoever nature of any of the Company A group of companies;
- is a trustee, a member of the board of Company A or a member of the remuneration committee of Company A, as the case may be, on the date that such person is identified by the remuneration committee as an offeree;
- is, directly or indirectly, a shareholder of any Company A group of companies, other than Company A;
- is the spouse of a shareholder of any Company A group of companies, other than Company A;
- is a fixed-term employee, independent contractor, consultant, service contractor, temporary contract holder (including any person employed by a labour broker/temporary employment service and rendering services to any Company A group company); or
- is a spouse or other relative of a person who has participated in, or benefitted from, the scheme embodied in the second amended and restated deed of trust in respect of the applicant.

Once an eligible employee has been identified by the remuneration committee, on the advice of the relevant subsidiary of the Company A group (i.e. the relevant group company who employs such eligible employee), the trustees of the new trust will, pursuant to the written directive received from the remuneration committee, make an offer to such eligible employee, to acquire and be allocated units (based on the pre-determined formula set out in the proposed trust deed of the new trust) for no consideration. An eligible employee will become a ‘participant’ once the participation offer is accepted. These units will be linked to an equal number of Shares held by the new trust.

The units shall be awarded subject to certain restrictions. The participant will be a vested income and capital beneficiary of the new trust. Company A or a connected person in relation to Company A will not in any circumstances be a beneficiary of the new trust. On termination of the new trust, any unallocated Shares will be sold by the new trust and the proceeds (after the deduction of all expenses) will be distributed to the participants, or if there are no participants at that time, a public benefit organisation contemplated in section 30(3) of the Act.

5. Conditions and assumptions

This binding private ruling is subject to the additional condition and assumption that none of the participants of the new trust alone or together with any connected person holds, directly or indirectly, 20% or more of the shares in Company A.

6. Ruling

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

a) Paragraph 38 of the Eighth Schedule will not apply to the sale of Shares by the applicant to the new trust and as a result the disposal of the shares held by the applicant for a consideration equal to base cost will not result in capital gains.

b) The sale of Shares by the applicant to the new trust for a consideration equal to base cost is not deemed a donation under section 58(1).

7. Period for which this ruling is valid

This binding private ruling is valid for a period of five years from 21 October 2022.

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