

BINDING PRIVATE RULING: BPR 264

DATE: 3 February 2017

ACT : INCOME TAX ACT 58 OF 1962 (the Act)
SECTION : SECTIONS 1(1) – DEFINITION OF “EQUITY SHARE” AND “CONTROLLED GROUP COMPANY”, 12J(1) – DEFINITION OF “VENTURE CAPITAL SHARE”, “QUALIFYING COMPANY” AND “QUALIFYING SHARE”
SUBJECT : VENTURE CAPITAL COMPANY SHARES

1. Summary

This ruling determines whether each share to be issued by a venture capital company (VCC) and another company (target company) will be an “equity share” as defined in section 1(1) and whether the target company will be a controlled group company for purposes of the definition of “qualifying company” in section 12J(1).

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 28 of 2011.

In this ruling references to sections are to sections of the Act applicable as at 5 January 2017. 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 “equity share” and “controlled group company”; and
- section 12J(1) – definition of “venture capital share”, “qualifying company” and “qualifying share”.

3. Parties to the proposed transaction

The Applicant: A company incorporated in and a resident of South Africa

The Target Company B: A company incorporated in and a resident of South Africa

The Investors: Persons investing as shareholders in the Applicant

4. Description of the proposed transaction

The Applicant is a company which has been approved as a VCC under section 12J.

The Applicant proposes to raise funds by issuing shares to the Investors. These funds will be allocated to the Target Company. The proposed transaction steps will be implemented as follows:

- a) Transaction step 1
 - i) The Applicant's board of directors will classify and assign preferences, rights, limitations and other terms to a class of its ordinary shares (class A ordinary shares) which will rank *pari passu* with all its other ordinary shares.
 - ii) The Investors, who wish to invest in the Target Company, will subscribe for class A ordinary shares in the Applicant, and a management company (Manco A) will co-invest in the Applicant.
- b) Transaction step 2
 - i) The Applicant will use the subscription price to be received from the Investors to subscribe for class A ordinary shares in the Target Company.
 - ii) The Applicant will subscribe for no more than 69% of the total equity shares to be issued by the Target Company. The capital which the Applicant will contribute to the Target Company will be disproportionately high compared to the number of shares which it will hold in the Target Company. Although the Applicant will subscribe for no more than 69% of the equity shares in the Target Company, it will contribute in excess of the 69% of the Target Company's capital.
 - iii) The total equity shares to be issued by the Target Company will comprise of ordinary shares and class A ordinary shares. Target Company's class A ordinary shares will rank *pari passu* with all its other ordinary shares.
 - iv) The Target Company will issue the remaining 31% of its equity shares (ordinary shares) to a management company (Manco B).
 - v) Manco B is not required to contribute capital to the Target Company.

The rights attaching to the shares will be as follows:

- a) The Applicant's ordinary shares will entitle their holders to –
 - i) vote on every matter to be decided by the shareholders of the company. A share will entitle the holder to one vote for each ordinary share; and
 - ii) share in the net assets of the Applicant upon its liquidation together with the Applicant's class A ordinary shareholders.

- b) The Applicant's class A ordinary shares will entitle their holders to –
 - i) share in distributions from only the Target Company. The class A ordinary shareholders may not share in any distributions from any other target company in which the Applicant may invest;
 - ii) share in the net assets of the Applicant upon its liquidation together with the other ordinary shareholders of the Applicant;
 - iii) vote on every matter on which the shareholders are required to vote in relation to the Target Company's class A ordinary shares and on any proposal to amend the preferences, rights, limitations and other terms associated with the Target Company's class A ordinary shares in accordance with the relevant provisions of the Applicant's memorandum of incorporation (MOI); and
 - iv) one vote on every matter on which that shareholder may vote, for each class A ordinary share held in the Applicant.

- c) The Target Company's ordinary shares will entitle their holders to –
 - i) vote on every matter to be decided by the shareholders of the company. A share will entitle the holder to one vote for each ordinary share held in the Target Company; and
 - ii) share with the Target Company's class A ordinary shareholders in the net assets of the company upon its liquidation.

- d) The Target Company's class A ordinary shares will entitle their holders to –
 - i) vote on every matter to be decided by the shareholders of the company. A class A ordinary share will entitle its holder to one vote;
 - ii) be paid the full amount of each and every distribution in respect of the class A ordinary shares, subject to the relevant provisions of the Companies Act, the MOI of the Target Company and any other applicable laws, in priority to the holders of the Target Company's ordinary shares and or the holders of any other class of shares in the company; and
 - iii) share with the Target Company's ordinary shareholders in the net assets of the Target Company upon its liquidation. In respect of all other distributions, the full amount of each and every distribution must be made only to the holders of the Target Company class A ordinary shares.

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:

- a) For purposes of the definition of "venture capital share" in section 12J(1), each of the Applicant's ordinary shares and each of the Applicant's class A ordinary shares will constitute an "equity share" as defined in section 1(1).

- b) For purposes of the definition of “qualifying share” in section 12J(1), each of the Target Company’s ordinary shares and each of the Target Company’s class A ordinary shares will constitute an “equity share” as defined in section 1(1).
- c) For purposes of the definition of “qualifying company” in section 12J(1), the Target Company will not constitute a “controlled group company” as long as the number of equity shares to be held by the Applicant in the Target Company will constitute less than 70% of the total number of equity shares, despite the fact that the Applicant may invest more than 70% of the aggregate share capital in the Target Company in monetary terms.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of five years from 5 January 2017.

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