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Selling shares at a discount for B-BBEE benefits is not a donation

Where any asset is disposed of for a consideration which, in the opinion of the South African Revenue Service (Sars), is not an adequate consideration, that asset is deemed to have been disposed of as a donation. In such circumstances, Sars can levy donations tax at a rate of 20% on the value of the donation up to R30m, and at a rate of 25% on donations over and above R30m.

By Graeme Palmer 21 May 2024

Image source: Rabia Elif Aksoy – 123RF.com

In *Welch's Estate v CSARS*, the Supreme Court of Appeal (SCA) held that the test to be applied at common law to determine whether the disposition of an asset amounted to a donation was that the disposition must have been motivated by 'pure liberality' or 'disinterested benevolence' and not by self-interest or the expectation of a *quid pro quo* of some kind from whatever source it may come. The SCA pointed out that the statutory definition of a 'donation' in the Income Tax Act 58 of 1962 had not eliminated the common law test.

Companies have a very real self interest in ensuring that they have a good B-BBEE scorecard. A good B-BBEE scorecard allows a company to do business with the government. It also opens up opportunities fo company to do business with large companies that insist on their suppliers and service providers having a good B-BBEE scorecard in order that they can improve their own scorecard.

Ownership is one of the five elements measured on the overall B-BBEE balance scorecard. It is difficult fo a company to have a high B-BBEE level without addressing the issue of ownership.

Binding Private Rulings

There are two Binding Private Rulings (BPR) that give us some insight into how Sars views the disposition shares in a B-BBEE transaction, and whether such disposition amounts to a donation.

In *BPR 253 (19 October 2016)*, the taxpayer wanted to introduce a B-BBEE shareholder to improve its B-BBEE scorecard. Sars was asked to rule on whether the disposal of shares in a company at a discount an the subsequent acquisition of shares by the seller in the acquiring company at a nominal subscription price in order to introduce the acquiring company into the seller's existing group structure for B-BBEE purposes constituted a donation. Sars ruled that neither the disposal of the shares at a discount nor the acquisition o shares at a nominal price were donations subject to donations tax.

More recently in *BPR 400 (14 December 2023)*, Sars was asked to rule on whether donations tax would b payable on the amendment of a company's Memorandum of Incorporation to allow for the issue of shares a nominal value to a corporate social investment trust, in order to enhance the B-BBEE status of a group o companies. Once again, Sars ruled that the issue of shares to the trust for a nominal value did not give rise to a donations tax liability.

Self-interest

Disposing of shares for a nominal value in a B-BBEE transaction with a view to improving a company's B-BBEE scorecard is not an act of disinterested benevolence but rather one of self-interest.

Such a disposal will not meet the requirements of the common law definition of a donation and therefore n donations tax should be levied by Sars.

However, while the disposal of shares at a nominal value may not be a donation, it may still be a disposal f capital gains tax (CGT) purposes. The disposal of the shares for a nominal value may trigger CGT on the market value of the shares.

Taxpayers should therefore always obtain professional tax advice before entering into a B-BBEE restructuring transaction.

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