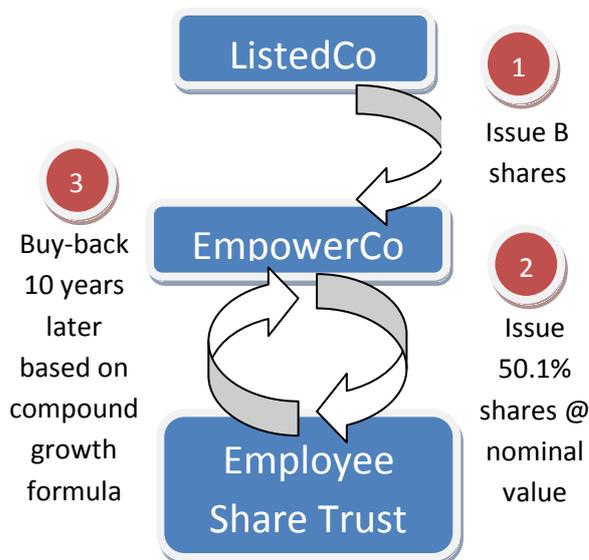


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Equity ownership is an essential component of black economic empowerment. The funding for the previously disadvantaged persons to acquire such equity interests in a company often presents a challenge when setting up an empowerment structure. Binding Private Ruling 138 (hereafter BPR 138) deals with a structure developed to overcome this challenge.

In brief, the transaction considered in the ruling can be depicted as follows:



The EmpowerCo shares remaining in the hands of the Employee Share Trust after the buy-back, will be available for the benefit of the previously disadvantaged employees, as beneficiaries of the Trust. Finally, the B shares in ListedCo held by EmpowerCo will be exchanged for listed shares in ListedCo, giving the beneficiaries an indirect interest in these listed shares.

In this specific arrangement the shares were initially issued to the Trust at a nominal value. A question that often arises (also in the structure in BPR 138) is whether such an issue of shares at a nominal value could constitute a donation,

which would attract donations tax in the hands of the issuer.

Section 54 of the Income Tax Act imposes donations tax on the value of any property donated by a resident. For this purpose, a donation is defined in section 55 as “any **gratuitous** disposal of property” (emphasis added). In the case of *Welch’s Estate v C: SARS* it was held that a gratuitous disposal would be a disposal motivated by pure liberality or disinterested benevolence. Section 58(1) further makes provision for a deemed donation where “any property has been disposed of for a consideration which, in the opinion of the Commissioner, is not an adequate consideration that property”. The crisp issue to consider in an empowerment arrangement where shares are issued at a nominal value is therefore whether the issue is purely gratuitous or otherwise made for consideration that is not adequate.

In both BPR 138 as well as an earlier ruling, BPR 95, the view was held that such a share issue will not result in a deemed donation in terms of section 58(1). Two reasons that support this view can be presented. Firstly, the cases in both rulings had conditions attached to the entitlement to the shares (in BPR 95, a target IRR and in BPR 138, the value determined in terms of the compound growth formula). Secondly, section 40 of the Companies Act states that shares may only be issued for “adequate consideration”. Where the board of a company deems the contribution of the empowerment status as adequate, this may also suffice for tax purposes. Despite the indications of SARS’ view on the matter in the rulings, the issue of shares at a nominal value remains a grey area to ponder and be aware of when structuring empowerment transactions.

If you require technical tax or IFRS assistance or an inhouse seminar please feel free to contact Pieter van der Zwan at 083 417 5904 or [pieter@pvdz.co.za](mailto:pieter@pvdz.co.za) or to visit [www.pvdz.co.za](http://www.pvdz.co.za) and submit a request on the relevant page.

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