A number of changes has taken place in the BEE landscape in South Africa over the past number of years, including amendments to the BBBEE Act, regulations issued under this legislation as well as revision of BBBEE codes. These developments could mean that South African businesses may need to revisit existing structures put in place to comply with BEE requirements or enter into new structures to ensure compliance with the relevant regulatory requirements in a manner that they are able to continue to carry on business effectively.

The number of binding rulings issued by SARS on transactions relating to BEE structures is an indication that tax is a critical aspect to consider when designing transactions and arrangements to comply with the relevant BEE regulatory requirements. The most recent of these rulings is BPR253, in which SARS was requested to consider the donations tax implications of transactions to introduce a BEE shareholder into a group.

Proposed transaction

The proposed transactions can be depicted as follows:

- **Seller Trust (S)**
  - Issue 49% at nominal
  - 26% at discount

- **Non-profit company**
  - 100%

- **Acquirer (A)**
  - 100%

As part of an arrangement that is intended to benefit C by improving its BEE scorecard and increasing profitability, S will sell 26% of the shares held in C to A at a value that appears to be a discounted value and that is to be settled over 8 years without interest on the outstanding amount. As part as of an indivisible transaction, A will issue 49% of its issued equity shares to S for a nominal subscription price. SARS was requested to provide a ruling on whether either of the two transactions would constitute a donation or fall within section 58(1) of the Income Tax Act.

Relevant legislation

A donation of property attracts donations tax. A donation is “any gratuitous disposal of property including any gratuitous waiver or renunciation of a right”. In addition, a transaction may also give rise to donations tax under section 58(1) if “any property has been disposed of for a consideration which, in the opinion of the Commissioner, is not an adequate consideration…”. SARS confirms in BPR253 that neither of the two transactions will constitute a donation or be deemed a donation under section 58(1). It also confirms that section 57 will not apply, which could presumably be a risk on the transaction 2 where A disposes of something of value for a nominal amount to S.

What can other taxpayers take from this?

Unfortunately rulings to not provide the rationale for the views provided. The outcome in BPR253 would suggest that a strong argument could exist that the value transferred with the purpose of gaining benefit from compliance with BEE requirements, even if indirectly as shareholder of the empowered entity, lacks the element of gratuitousness necessary for it to be a donation. It should however be borne in mind that BEE transactions may also involve a number of other aspects not specifically covered in this particular ruling, for example, taxability of value transferred to the BEE shareholder, tax implications of the funding structures used and in some instances the deductibility of costs incurred in terms of the arrangement. A holistic tax assessment of a structure and related transactions is critical. (October 2016)