South African
Institute of
Tax Professionals

30 January 2015

Group Executive: Interpretation & Rulings
SARS Legal & Policy Division
Khanyisa Building
Brooklyn
Pretoria
0001

BY E-MAIL: policycomments@sars.gov.za
Cc: cecil.morden@treasury.gov.za
Cc: yanga.mputa@treasury.gov.za
CC:ftomasek@sars.gov.za

Dear Sir/Madam

RE: CALL FOR COMMENT – DRAFT BGR ON UNBUNDLING TRANSACTIONS

Thank you for the opportunity to contribute commentary on the Draft binding general ruling on unbundling transactions as to the meaning "at the end of the day".

Set out below, is the consolidated commentary developed from both an internal review of the provisions as well as from consultations with members, stakeholders and industry. The commentary reflects the collective view of members, stakeholders and the industry role players consulted.

To put the comments into perspective we have firstly set out below our understanding of the law and secondly some unbundling scenarios. We have also taken the opportunity to raise practical and legislative comments in regard to valuation timing and the determination for contributed tax capital.

1. LEGISLATIVE BACKGROUND

1.1. Where a share is distributed in terms of an unbundling transaction, section 46(3)(a)(v) ITA requires that the expenditure and market value ("MV") of the unbundled shares, in relation to the shareholder, must be determined by the ratio of the market value as at the end of the day after that distribution is to the MV of the unbundled and unbundling shares combined as at the end of the day of the distribution. However this provision is to apply in section 46(3)(a) ITA "where a shareholder acquires equity shares", which we are of the view means to "acquire" ownership.

1.2. "Distribution" is not defined in the ITA and should take a meaning which gives a commercially sensible interpretation (*See Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

T: +27 86 177 7274
F: +27 86 626 0650
E: info@thesait.org.za
W: www.thesait.org.za
Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg Roads
Pretoria, South Africa
0081
PO Box 712
Menlyn Retail Park
0063

1.3. Section 1 of the Companies Act 2008 defines “distribution” as meaning:

> *“A direct or indirect -*
> *Transfer by a company of money or any other property of the company….to or for the benefit of any holders of its shares or to the holder of a beneficial interest in its shares…..”*

1.4. “Transfer of property for the benefit of a shareholder” seems to indicate transfer of ownership though this is not beyond refute and when dealing with shares would have to be a transfer of ownership complying with section 51-53 of the Companies Act 2008. The Companies Act 2008 does not deal separately with listed and unlisted shares but rather with certificated and uncertificated shares, though in practice the vast majority but not all listed shares are uncertificated.

1.5. In respect of certificated shares, section 51(5) Companies Act 2008, requires that when shares have been transferred, such information as required of the transfer must be entered in the securities register (i.e. post facto). Such entry may only be made in terms of section 51(6) Companies Act 2008 if evidenced by a proper instrument of transfer (i.e. cession agreement) that has been delivered to the company or was effected by operation of law. The former would apply to unbundling transactions. The common law therefore determines the transfer date namely the cession agreement effective date of transfer.

1.6. In respect of uncertificated shares, section 53 Companies Act 2008 regulates the transfer of uncertificated securities whereby ownership is transferred in section 53(2) by debiting and crediting the uncertificated securities register in accordance with the rules of central securities depository, which is after a proper instruction has been received.

1.7. “Transfer” of certificated shares therefore follow the common law and cession and for uncertificated shares transfer occurs once the relevant entries have been made in the share register in terms of the CSD’s rules.

1.8. The Johannesburg Securities Exchange Listing Requirements (April 2014) provide certain requirements whereby listed shares are dealt with. In respect of unbundling transactions (which has the same definition as the ITA), the Schedule 24 Timetables prescribe the minimum dates between the various actions that must occur for unbundling shares (Attached as “**Annexure A”). **The Record Date per clause 24.1(c) is the date that the securities register is finalized for the purposes of section 53(2) of the Companies Act 2008. Clause 24.2(v) and (w) set out the required minimum days between actions for both unbundling’s where the mother share is cancelled or retained. In terms of this timetable, the Last Day to Trade date must be at least 5 business days before the Record Date and the distribution of the securities occurs at least 1 day after the Record Date. The List Date (i.e. date that new shares listed , entitled to trade new shares and mother share adjusted) in this regard must be 4 days before the Record Date which result in it being 1 day after the Last Day to Trade.

T: +27 86 177 7274
F: +27 86 626 0650
E: info@thesait.org.za
W: www.thesait.org.za

Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg Roads
Pretoria, South Africa
0081

PO Box 712
Menlyn Retail Park
0063

1.9. The Pay Date (date of distribution of securities) is indicated at the first business day after the record date (i.e. the Monday if a business day as the Record Date is always on a Friday except if not a business day).

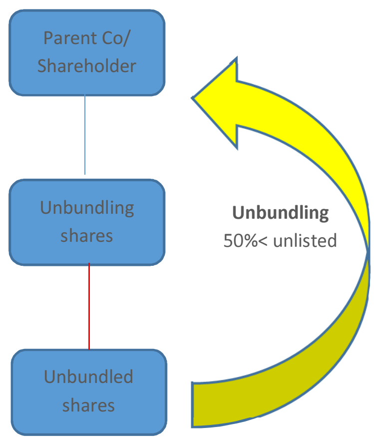
2. UNBUNDLING SCENARIOS AND COMMENTS

There are various scenarios where unbundling's apply but we have dealt with only a view variations. We have not dealt with for example where an unlisted share is unbundled from a listed unbundling company but with the purpose to list immediately with such unbundling.

2.1. UNLISTED UNBUNDLED SHARES AND UNLISTED UNBUNDLING COMPANY

Unlisted certificated shares

Listed uncertificated shares



<u>COMMENT</u>

2.1.1. Where an unlisted certificated share is unbundled, the date of distribution would be determined in terms of section 51 of the Companies Act 2008 in terms of the transfer instruments, namely the sale agreement. The market value after such transaction of both the unbundled and unbundling company would then have to be determined at the end of the day of such event.

2.1.2. This is not problematic if a single corporate reorganization transaction is done. However where for example the shareholder wants to immediately dispose of the unbundled shares in terms of section 42 ITA, section 46 does not prohibit the disposal but the timing of the valuation criteria means that it has to be applied at a time when the shareholder does not own the shares anymore.

2.1.3. It should also be noted that section 46(3A) ITA requires for the purposes of determining the allocated contributed tax capital that the market value of the

T: +27 86 177 7274
F: +27 86 626 0650
E: info@thesait.org.za
W: www.thesait.org.za
Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg Roads
Pretoria, South Africa
0081
PO Box 712
Menlyn Retail Park
0063

unbundled and unbundling shares must be determined immediately before and after the distribution.

2.1.4. Technically the current requirements of section 46 require market values of the unbundled and unbundling shares at:

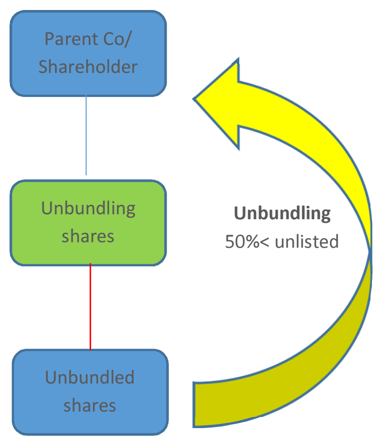
- End of day of distribution
- Immediately after the distribution
- Immediately before the distribution

2.1.5. It is submitted that the current procedures are unnecessarily complicated and overly burdensome in this case especially as more than 50% of the shares must be owned to utilize this provision (section 46(1)(a)(ii)(bb) ITA).

2.2. UNLISTED UNBUNDLED SHARES AND LISTED UNBUNDLING COMPANY

Unlisted certificated shares

Listed uncertificated shares



COMMENT

2.2.1. Where an unlisted certificated share is unbundled by a listed unbundling company, the date of distribution would still be determined in terms of section 51 of the Companies Act 2008 in terms of the transfer instruments, namely the sale agreement. The market value after such transaction of both the unbundled and unbundling company would then have to be determined at the end of the day of the distribution, however the date of distribution is now legally different dates.

2.2.2. The distribution date for the purposes of determining market value of the unlisted shares would in most instances be the equivalent of the Finalization Date (per JSE Listing Requirements) which is when the transaction becomes binding (i.e. all

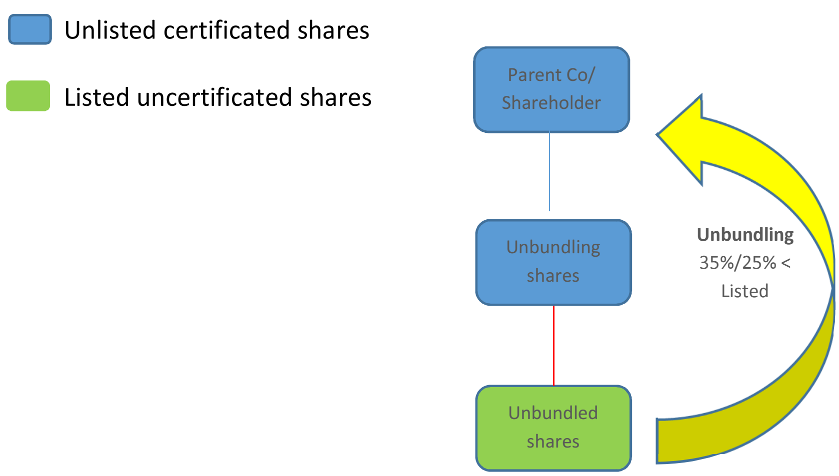
T: +27 86 177 7274
F: +27 86 626 0650
E: info@thesait.org.za
W: www.thesait.org.za
Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg Roads
Pretoria, South Africa
0081
PO Box 712
Menlyn Retail Park
0063

contingencies have been complied with) but can also be another specified effective date.

2.2.3. The valuation of the listed share at the end of such day for the purposes of section 46(3)(v) is therefore not problematic as it would be the closing price for the day. However for section 46(3A) ITA that requires for the purposes of determining the allocated contributed tax capital that the market value of the unbundled and unbundling shares must be determined immediately before and after the distribution it may be more problematic. For example if the effective date of the transfer is 12pm on Friday of a day, guidance would have to be given as to whether the spot trading price would then have to be used.

2.2.4. The above is again less problematic if a single corporate reorganization transaction is done. However where for example the shareholder wants to immediately dispose of the unbundled shares in terms of section 42 ITA, section 46 does not prohibit the disposal but the timing of the valuation criteria means that it has to be applied at a time when the shareholder does not own the shares anymore. In respect of the listed unbundling share that could result in a material variation between the value of the share immediately after compared to at the end of the day.

2.3. LISTED UNBUNDLED SHARES AND UNLISTED UNBUNDLING COMPANY



COMMENT

2.3.1. In addition to the above, where a listed uncertificated share is unbundled by an unlisted unbundling company, the date of distribution of ownership would still be determined in terms of section 53 of the Companies Act 2008 read with the JSE requirements, which will be when the entries are made in the central securities register by the central securities depository. In our view this would be the Record Date (See **Annexure A**). This date is therefore substantially after the last day to trade +1

T: +27 86 177 7274
F: +27 86 626 0650
E: info@thesait.org.za
W: www.thesait.org.za
Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg Roads
Pretoria, South Africa
0081
PO Box 712
Menlyn Retail Park
0063

(i.e. List Date). The market value after such transaction of both the unbundled and unbundling company would then have to be determined at the end of the day of the distribution.

2.3.2. It should also be noted that where the listed shares also have certificated shares (we acknowledge it is a small amount but still exists in practice), the distribution date will be different as that would be regulated by the instrument terms in section 51 Companies Act 2008 and not by the securities register entries as per section 53 Companies Act 2008 which would be much later. This is very problematic as it gives different distribution dates for different shares in the same unbundling, making the practicalities of calculating ratios and values so much more difficult.

3. CONCLUSION

3.1. The complexities detailed above seem to indicate that not only is interpretative guidance required from SARS but that National Treasury would have to revisit some of the provisions to not only align them but make it more legally and practically tenable to implement.

3.2. It should be recognized that for the purposes of the calculation the market value of both the unbundled and unbundling shares must be determined at the end of the day of the occurrence of the distribution. This as noted above is in contrast to section 46(3A) ITA for the calculation of contributed tax capital which requires valuations to be done immediately before the distribution and immediately after the distribution.

3.3. Furthermore the timing and value determinations where certificated and uncertificated shares are unbundled are also impractical and seemingly legally untenable.

3.4. It would seem that in practice the practical complexities have resulted in may persons just using the value of the listed shares on the last date to trade as being reflective of the value immediately before and after of the unbundled share and the value on List Date as the value after if the listed share is the unbundling share and its value has been adjusted after the unbundling. We will however request more of our members to provide details in this regard to confirm the prevalence of this or any other practice in the determination of value and timing thereof in respect of listed share.

We would appreciate and in fact invite any engagement and discussion that SARS or National Treasury may want to have on the above comments.

Pieter Faber
Technical Executive: Tax Law & Policy

South African Institute of Tax Professionals

ANNXURE A – Schedule 24 of the JSE Listing Requirements (April 2014)

(w) **Unbundling – no removal of mother share – with/without election**

Day	Event
D – 15 Declaration date	Publication of declaration data and circular to be made available
D – 10 Finalisation date	Publication of finalisation information
D – 5 Last day to trade	Last day to trade
D – 4 List date	Maximum new shares listed (if applicable) Entitled to trade new shares Price of mother share adjusted
"Friday" D + 0 Record date	Record date If applicable, election closes
D + 1 Pay date	Securities distribution/cash payout