Dear Sir/Madam,

SUBMISSION: DRAFT BINDING GENERAL RULING (BGR) ON “DATE OF DISTRIBUTION” OF UNBUNDLING TRANSACTIONS

1. The South African Revenue Service’s (“SARS”) draft BGR on when is the “end of the day” of the distribution of shares in an unbundling transaction, as envisaged in section 46 of the Income Tax Act, refers. Please find below SAICA’s National Tax Committee’s response to the request for comments on the draft BGR.

Distribution vs. first date to trade

2. The BGR still does not in our view properly explain that the focus of the enquiry is to when is the share distributed, which is not always connected to when the share is tradable.

3. For listed shares (i.e. mainly uncertificated shares), the List Date (i.e. day after last day to trade) is theoretically the first day to trade though this is not practically always the case. In this regard certificated shares would first have to be converted to dematerialised shares and the new share certificates issued before the shares can be traded. The JSE only compels the issue within 5 days of the List Date.

4. This approach of using List Date also results that the values are distorted as it then becomes the value after the first day of trade.

5. If the law, especially section 51 and 53 of the Companies Act No. 71 of 2008 (“the Companies Act”), is strictly interpreted then the date of distribution and acquisition of ownership could not be before Record Date (i.e. 5 days after last day to trade). However commercially trading happens on List Date which means distribution of
economic control occurs before Record Date. We agree with SARS’ approach that a strict interpretation would be impractical and that a pragmatic approach to the interpretation should be followed.

6. It is our view that the distribution of economic control happens just after closing of the last day to trade with it becoming exercisable on List Date.

7. It is submitted that the value that is commercially most akin to an after distribution value would be the value as at the beginning of trade on List Date that effectively represents the closing value immediately after trade closes as at the end of the day on last day to trade.

8. It is submitted that the end of that day of distribution for purposes of section 46(3)(a)(v) should be the last day to trade and its value should be represented by the opening trade value on List Date on the basis that the opening value equates to the value as at the end of the previous day which may not be the value as at the close of trade on the previous day.

9. This then also addresses the problems of before and after distribution values for purposes of CTC as the before value is the value as on the end of trading on the last day to trade and the after distribution value is then the opening trade value on the List Day

Unlisted shares

10. The draft proposes the following for determining the valuation date for unlisted shares:

   In the case of unlisted shares, the market value of the unbundling and the unbundled shares as at the end of the first day on which the shareholders become entitled to trade in the unbundled shares must be used when applying the ratio as specified in section 46(3)(a)(v).

11. As noted above the linking of distribution to a right to trade is problematic and legally untenable.

12. For example, an unlisted share distributed but with terms preventing sale for two weeks (or such other period) after distribution will defer the valuation date notwithstanding that the distribution has already occurred once all the contractual terms for cession of the share by the holder have been complied with as provided in the instrument of transfer.

13. It is submitted that for unlisted shares that the distribution be linked to the date when the transferor has an obligation to transfer the share to the recipient in terms of the transfer instrument. This position in our view accords with the common law and section 51 of the Companies Act.
Transfer of ownership – Listed shares

14. The covering email makes the following statement as to background to the changes made by SARS to the first draft:

The appearance of a person’s name in the share register on record date (LDT + 5) merely indicates entitlement to take delivery of the unbundled share on record date + 1. It does not connote ownership of the unbundled share on record date.

15. In this regard we cannot agree with your interpretation of the law.

16. Section 53(2) of the Companies Act is very clear that the transfer of ownership can only be achieved by entries to the CSDP register. As statutory legislation the express provisions regarding transfer of ownership will supersede the common law on the transfer of ownership of incorporeal moveable property which is done by mere cession of rights.

17. The latter is retained for certificated shares per section 51 of the Companies Act.

18. We do however, agree that the transfer of ownership per the Companies Act does seem at odd with the rights to trade per clause 24.2(w) of Schedule 24 of the JSE Listing requirements and it may require legislative intervention to align.

19. Though transfer of ownership may be inferred per section 46(3) it is our view that as "distribution" remains the main requirement for determining the date of valuation, the interpretation should be limited to such and a distribution is in our view a much wider concept than mere transfer of ownership.

Thank you again for the opportunity to engage on the development of the tax law in South Africa. Should you have enquiries in respect of this submission we will gladly meet with you to discuss and clarify our submissions.

Yours faithfully

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The South African Institute of Chartered Accountants