

Circular No. 2/2017

Date: 23 June 2017

REPORTING ON BEE TRANSACTIONS

On 9 June 2017, the Department of Trade & Industry published a notice requiring all parties involved in major B-BBEE transactions to register the transaction with the B-BBEE Commission within 15 days of concluding the transaction. In addition, major B-BBEE transactions concluded between 24 October 2014 and 8 June 2017 must be registered within 60 calendar days counted from 9 June 2017.

The notice states that a major BEE transaction is one where the transaction value equals or exceeds R25 million.

Although the notice does not expressly clarify the position, it would appear that the threshold of R25 million applies to the entire transaction value as opposed to the BEE component of the transaction. This is evident from the statement made in the notice that “for Statement 102, Transaction Value means the value of the sale asset / business / equity instrument.”

The obligation to register is imposed not only on the empowerment investor but every person “involved” in the transaction. Thus, the banks, in some cases, attorneys and other parties connected to the transaction may be caught by this obligation.

It is also unclear as to what is meant by a major B-BBEE transaction.

The B-BBEE Codes and the BEE Act do not define a B-BBEE transaction let alone a major B-BBEE transaction.

The notice states that a B-BBEE transaction is a “transaction between entities / parties that results in ownership recognition in terms of Statement 100 of the Codes”.

Statement 100 of the Codes is simply a statement which sets out and prescribes the principles which are to apply in measuring BEE ownership and how points are allocated. It would seem that the notice contemplates that if a transaction would involve the allocation of BEE points under Statement 100 of the Codes, then this is a BEE transaction.

Thus, the situation may arise where a transaction, if measured under Statement 100, results in the allocation of a score for ownership, even if not material, would require registration provided the transaction value equals or exceeds R25 million.

The B-BBEE Commission have clarified that registration must be done by the completion of a form BBBEE18 accompanied by a description of the transaction, a copy of the transaction agreements, finance agreements where applicable, a schematic diagram of the structure and any other relevant documents. These documents must be submitted before a certificate of registration is issued by the Commission. The Commission is entitled to request additional information and call for a meeting between the parties with a view to ensuring that the principles behind the B-BBEE Act are achieved.

It follows that contracting parties to empowerment transactions may now be forced to structure the transaction in a manner acceptable to the Commission. This may include complying with conditions that extend beyond the Codes themselves.

The notice is vague and does not achieve what is obviously the intended objective. The monetary threshold set out in the notice should have applied to the BEE element of the transaction and not the entire transaction. In addition, a B-BBEE transaction should be defined as a transaction whereby BEE investors acquire a material percentage in ownership of a business or company as opposed to a minor or immaterial percentage.

By defining a broad based black economic empowerment transaction as being almost any transaction involving black people, even if insignificant, we believe the Minister has exceeded the powers conferred upon him under the B-BBEE Act.

Pending clarification, it would be wise to ensure that all transactions involving ownership by black people exceeding R25 million and concluded after 24 October 2014, be reported. Any member of the commercial team will be able to assist you in reporting the transaction. These transactions must all be reported by 9 August 2017.

FURTHER ADVICE

Should you require advice or assistance on Reporting on BEE Transactions, please contact Michael Jackson on 031 536 8512 email : mjackson@coxyeats.co.za, Keren Watson on 031 - 536 5818, email : kwatson@coxyeats.co.za or Simon Watson on 031 - 536 8530, email : swatson@coxyeats.co.za or Jason Goodison on 031 - 536 8517, email : jgoodison@coxyeats.co.za or Jenna Padoa on 031 - 536 8529, email : jpadoa@coxyeats.co.za, Cherese Thakur (031 – 536 8529, cthakur@coxyeats.co.za), Spencer Cason on 031 – 536 8596, email : scason@coxyeats.co.za

