October 4, 2022

Is the Sale of an Asset a viable alternative to Traditional Share Transactions?

What is a Sale of Asset Transaction?

In terms of Statement 102 of the Broad-Based Black Economic Empowerment (B-BBEE or BEE) Codes of Good Practice, a Measured Entity (ME) may sell an operational asset or a separate business that is related to the seller to a BEE Party in order to claim points on the *ownership element of the BEE scorecard* although the BEE Party does not own a portion of the seller's primary operation.

Companies, particularly *multi-nationals and generic enterprises* are often hesitant to enter into a traditional share transaction as they do not want to relinquish any part of their voting rights or economic interest to a third party.

These companies, therefore, typically consider the Sale of Asset as an alternative to selling their shares.

To receive points for ownership, the transaction must result in:

- the creation of viable and sustainable businesses or business opportunities for the BEE Party; and
- the transfer of critical and specialised skills, managerial skills and productive capacity to the BEE Party.

Further to the above, the asset must be sold to a separate entity that has no reasonable limitations on clients and as a result of the sale, has separate clients, customers or suppliers, other than the Measured Entity. According to Vuyo Jack in his book *Broad-Based BEE: The Complete Guide*, a possible outsourcing relationship between the Measured Entity and the BEE Party must be negotiated at arm's length and on a basis that is fair and reasonable.

Vuyo Jack further explains that the following transactions are specifically excluded in terms of Statement 102:

- *Rental, Leases and Licences* – as the right to an asset is leased for a specific period, the asset was not sold, and the right will revert to the original owner at the end of the licence or lease period.
- *Franchising* – where the sale is from a franchisor to a franchisee, the transaction is not deemed to be in accordance with Statement 102, as the franchisor will be claiming notional ownership points for something that is part of the normal course of business. However, where a franchisee sells the franchise to another franchisee (BEE Party), the transaction will qualify subject to certain requirements.

The key benefit for *Black People* in a Sale of Asset transaction is having control over operating assets, which in return results in operational involvement in the company and ensuring transformation. To ensure operational involvement, the BEE Party should be in the position to create a sustainable business out of the asset and therefore achieve the objectives of ownership within the BEE context.

Calculating Ownership Points

The final ownership score achieved takes three years to determine, as it is based on the value of the Measured Entity and the value of the separately identifiable related business, in respect of each year of a three-year period.

The Measured Entity must comply with the sub-minimum requirement for ownership, being 40% of the Net Value Points insofar as it relates to the transaction.

When calculating Net Value Points, the following 3 points must be taken into consideration:

1. The total value of the transaction;
2. The value of the asset sold to the BEE Party;
3. The carrying value of the Acquisition Debt of the BEE Party.

It is important to note that where a seller has claimed benefits in terms of Statement 102, they may not claim under Enterprise and Supplier Development.

Food for thought

In conclusion, if the BEE Party is sold a sustainable asset instead of equity, the Measured Entity is open to possible risk, as it is forced to sell strong assets capable of growth. From the above it is clear that the transaction must be a sale of real assets, capable of being independent businesses beyond the control of the Measured Entity.

It is therefore important that the Measured Entity electing to sell assets should be confident that the assets are sold to Black businesspeople who have a vested interest in the performance of the sold asset and the ability to make the asset grow.

A Statement 102 Transaction can be very complex, and it is important to determine the strategic reasoning for implementing such transaction for ownership purposes, as there are far less risky and complicated ways to achieve the same result.

About the Author: Andrea Heyl obtained her LLB Law Degree in 2014 from the North West University. In 2018 she was admitted as an Attorney whilst also completing her LLM Degree. Andrea joined SERR Synergy in 2021 where she currently holds the position of Corporate Legal Advisor. She specializes in B-BBEE Ownership and prides herself in assisting Companies with their B-BBEE requirements.

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