TR 178

Facts

Qualifying employees of X Limited, including non-Mauritian citizens who are relocated to Mauritius so that their legal and economic employer is X Ltd, are entitled to join a 'share scheme' operated by K Ltd, the holding company of X Ltd. The share scheme is typically administered outside Mauritius and provides the employees of X Ltd certain a right pertaining to the shares of K Ltd. K Ltd is resident in South Africa and is a public company whose shares are listed in South Africa.

K Ltd operates two schemes, namely the Equity Growth Scheme ("EGS") and the Share Incentive Scheme ("SIS").

The Equity Growth Scheme

Under the the Equity Growth Scheme ("EGS"), the employees receive Participation Rights ("PR"), subject to certain conditions being met. The conditions may include the number of years of employment with any company forming part of the SBGL group.

The PR is converted into shares at the time the employee exercises the rights. The number of shares that he would be entitled to is determined on the basis of a specified methodology/formula which takes into account the market price of the share at the time the PR is awarded and the market price of the share at the time he exercises his rights. At that time the employee may receive no shares at all should the market price at the date of exercise be lower than the market price of the share at the date of the award of the PR.

The employee is entitled to the shares, if any, free of any charge.
At the time the employee exercises his rights he does not receive the shares to which he is entitled but rather the shares are disposed of by the administrators of the Scheme at the market price prevailing at that date.

The employee receives the cash value/the proceeds of the sale of the shares less the brokerage fees he is required to pay under the Scheme.

The Share Incentive Scheme

Under the Share Incentive Scheme ("SIS"), a qualified employee receives an option to purchase shares of K Ltd at an agreed price. An employee is only able to participate in the SIS if he has been employed by X Ltd for at least 5 years. The SIS is made up of 2 alternatives:

a. *Purchase alternative*

Under the purchase alternative, the employee has the option to purchase a number of shares on a future date at a predetermined price and is under the obligation to acquire the shares at the agreed price on that date. At the exercise date, the employee is required to dispose of the shares.

b. Option alternative

Under the option alternative, a qualified employee has the option to purchase a number of shares on a future date at a predetermined price and can elect whether to acquire the shares on the exercise date. The employee can choose the date on which the shares should be disposed of.

Points at issue

Whether the gains realised on the disposal of the shares, under the Equity Growth Scheme, should be subject to income tax in the hands of the employee?

(1) Whether, under the Share Incentive Scheme, either under the Purchase alternative or the Option alternative, the acquisition of the shares at a price lower than their market value at the exercise date gives rise to a taxable benefit in the hands of the employee?

Ruling

On the basis of the aforesaid facts, it is confirmed that:

(1) A benefit arises at the time the employee exercises his rights under the Equity Growth Scheme. The value of the benefit is the proceeds from the sale of the shares less the brokerage fees. The employee is entitled to the 'cash' realised on the disposal of the shares, i.e the proceeds of the sale less brokerage fees, by virtue of his office or employment and hence, the amount received constitutes employment income. Therefore, the employee is liable to income tax thereon in view of the provisions of section 10(1)(a)(i) of the Income Tax Act.

(2) The excess of the market price of the share over the agreed price, at the time the employee acquires the share under the Share Incentive Scheme, is a benefit in kind to the employee and is taxable under section 10(1)(a)(i) of the Income Tax Act.