

BEE points and income tax - a double deduction?

Can a business claim BEE points for socioeconomic development contributions and deduct those contributions from its income for tax purposes as well?



Source: Supplied. Gary Moore is a senior consultant at the Free Market Foundation.

Can a business deduct from its income under section 18A of the Income Tax Act the amount of any contribution it makes to socio-economic development, while also claiming black economic empowerment (BEE) points for the contribution?

The 2003 Broad-Based Black Economic Empowerment Act aims at facilitating broad-based BEE by promoting economic transformation to enable meaningful participation of black people in the economy.

The Act authorises the Minister of Trade and Industry to issue codes of good BEE practice that may include criteria to qualify for preferential procurement and other economic activities, and weighted indicators to measure broad-based BEE.

Organs of state and public entities must apply any relevant code of good practice, in determining qualifying criteria for the issuing of statutory licences to conduct economic activity; in applying policies for preferential procurement from enterprises owned or managed by black people; and in determining qualifications for sales of state-owned enterprises, for partnerships with the private sector, and for incentives and investments to support broad-based BEE.

The Minister issued a code of good practice in 2007, and replaced or amended it in 2013 and 2019. Apart from this

generic Ministerial code of good practice, codes for various sectors of the economy have been issued.



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The Minister's code of good practice includes a so-called scorecard comprising several weighted empowerment elements. One of these elements is "socio-economic development".

Socio-economic development measures the annual extent to which a business contributes in general to skills development, education or other programmes aimed at promoting sustainable access to the economy for groups of beneficiaries of whom at least 75% are black people.

To claim all the BEE points which the weighted scorecard allocates to that socio-economic-development element, a business would need to contribute one percent of its net profit after tax towards socio-economic development in the financial year concerned.

It used to be commonly accepted that a business could obtain the double benefit of claiming BEE points for contributing to socio-economic development in the financial year concerned and of also (in most if not all cases) deducting the amount or value of that socio-economic-development contribution from its income (under section 18A of the Income Tax Act) to determine its taxable income for that year.

Read with other bits of the Income Tax Act, section 18A permits a taxpayer, in determining its taxable income, to deduct "bona fide donations" in cash paid or property transferred in the year of assessment to any non-profit public-benefit organisation approved by the Commissioner of the Revenue Service which carries on any listed public-benefit activity in specified categories of benevolence that include adult education and training, among other things.

Tax deduction dilemma

Two Johannesburg lawyers have argued that a taxpayer cannot claim both a section 18A deduction for such donations and the BEE points. It is contended, goes this argument, that to qualify for deduction under section 18A a donation must have been made with philanthropic or altruistic intent without conferring any benefit on the donor.

Claiming BEE points for a socio-economic-development contribution contradicts that requirement, because BEE points benefit the donor and thus extinguish the true intent of a donation and disqualify the contribution from being deducted under section 18A. That contention may be valid.



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However, a taxpayer who makes a BEE socio-economic-development contribution could likely deduct it under s 11(a) of the Income Tax Act, the Act's so-called general deduction provision.

Section 11(a) states that, to determine a person's taxable income from carrying on a trade, the taxpayer may deduct from his income from that trade any expenditure incurred in producing the income (if the expenditure is not of a capital nature).

So, a taxpayer who carries on a trade and who makes a BEE socio-economic-development contribution as contemplated in the scorecard in the Minister of Trade and Industry's code of good BEE practice could claim BEE points for the

contribution and probably also deduct the amount from the taxpayer's income from that trade to determine his taxable income from it.

This arrangement ensures that a taxpayer can deduct BEE socio-economic-development contributions from his income under section 11(a) and is consistent with Supreme Court of Appeal rulings.

Legal precedent

The court in *Warner Lamberts v Commissioner for Sars* dealt with the deductibility of general social-responsibility expenditure by a US company's South African subsidiary to comply with a particular principle of the US "Sullivan code" which at the time governed the conduct of business in apartheid South Africa by US companies. That Sullivan code principle required a company to work in general to eliminate laws that impede social, economic and political justice.

The court held that this general social-responsibility expenditure was expenditure incurred for the performance of the subsidiary's income-producing operation as part of the cost of performing it. So, general social-responsibility expenditure was deductible under section 11(a).

The Broad-Based BEE Act (and its accompanying codes of practice, scorecards, measurement indicators and preferential-procurement criteria) violate the Rule of Law, in being unclear and unintelligible except to the army of consultants and advisers it has spawned.

Observers note that BEE's complex and frequently changing rules have led to increased investment uncertainty and a consequent growth in unemployment.

Commentators, even on the left, acknowledge that BEE is a failed policy which has led to abuse, rent-seeking, cronyism and corruption. BEE resources have been misappropriated on a gigantic scale for the benefit of "tenderpreneurs" and politically connected people. The vast majority are excluded.

The Broad-Based BEE Act must be repealed.

ABOUT THE AUTHOR

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