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“Creating BUSINESS sense out of BEE”

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Justification for viewing THE CLIENT as a Qualifying Small Enterprise (QSE) under both the 2007 and 2013 BEE codes of good practice.

Caird Holdings has been the black economic empowerment (BEE) consultant to THE CLIENT since 2012. There has been a steady improvement in the company's BEE performance during this period.

It is Caird's considered opinion that THE CLIENT should be viewed as a qualifying small enterprise under both the 2007 codes (turnover between R5m and R35m) and the 2013 codes (turnover between R10m and R50m) even though the company turns over in excess of the maximum threshold for a QSE.

In cases such as THE CLIENT, which is a local broker for its parent THE CLIENT INTERNATIONAL, the turnover thresholds in determining the size of a business are prejudicial. Our view is that the Gross Profit figure is a fairer appreciation of the company's financial performance when it comes to determining its size in terms of the relevant scorecard. (This is made all the more pertinent as cost of sales amounts to in excess of 90% of the company's revenue. This amount is paid the local operation's parent.)

In determining that THE CLIENT is a QSE Caird has strictly adhered to the key principles of the Broad-Based Black Economic Empowerment Act and the BEE Codes of good practice, specifically:

Paragraph 3.4 of the BEE Strategy document

) *Black Economic Empowerment is an inclusive process.*

and;

Paragraph 2 code series 000 of both the revised and original BEE codes of good practice

) *The fundamental principle for measuring B-BBEE compliance is that substance takes precedence over legal form.*

) *In interpreting the provisions of the Codes any reasonable interpretation consistent with the objectives of the Act and the B-BBEE Strategy must take precedence.*

At all times we have remained consistent with section 3 of the BEE Act

(1) *Any person applying this Act must interpret its provisions so as—*

(a) *to give effect to its objectives and purposes;*

A more detailed assessment and justification for THE CLIENT's QSE status follows in the paragraphs below.



Paul Janisch

CEO – Caird Holdings (Pty) Ltd

Our understanding of THE CLIENT South Africa's business

The points below list the significant aspects of THE CLIENT's South African operations as it pertains to the implementation of a BEE programme

1. Formed as a local broker for its parent THE CLIENT INTERNATIONAL
2. Three staff members as of last verification, currently five. In excess of 50% black and 40% black female
3. No production capabilities within South Africa. All manufacturing is done by the parent outside of the borders of South Africa.
4. Productive assets are limited to ICT equipment and sundries.
5. Cost of sales amounts to in excess of 90% of the revenue. This amount is paid the local operation's parent.

If one was to map the company's size against the National Small Business Act¹ it would appear to be somewhere between a micro or very small enterprise if the turnover is not taken into account.

<i>Sector or subsectors in accordance with the Standard Industrial Classification</i>	<i>Size or class</i>	<i>Total full-time equivalent of paid employees</i> <i>Less than</i>	<i>Total annual turnover</i> <i>Less than</i>	<i>Total gross asset value (fixed property excluded)</i> <i>Less than</i>
Manufacturing ²	Medium	200	R40.00 m	R15.00 m
	Small	50	R10.00 m	R 3.75 m
	Very small	20	R 4.00 m	R 1.50 m
	Micro	5	R 0.15 m	R 0.10 m

¹ No. 102 of 1996. It must be noted that the thresholds listed in the Schedule to the Act are almost 20 years old. The Schedule does not appear to have been amended since 1996.

² From the Schedule attached to the National Small Business Act.

Pertinent primary and secondary legislation

Broad-Based Black Economic Empowerment Act³

Section 2 states the lists the “objectives of this Act are to facilitate broad-based black economic empowerment by”⁴

- a) promoting economic transformation in order to enable meaningful participation of black people in the economy;
- b) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;
- c) increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;
- d) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;

Section 3

- (1) Any person applying this Act must interpret its provisions so as—
 - (a) to give effect to its objectives and purposes; and
 - (b) to comply with the Constitution.

³ Act No. 53 of 2003 – as amended

⁴ Objectives have been edited for the purposes of this document.

A Strategy for Broad-Based Black Economic Empowerment⁵

Paragraph 3.4 lists the following key principles that underpin the national BEE strategy.

-) Black Economic Empowerment is broad-based.
-) Black Economic Empowerment is an inclusive process.
-) Black Economic Empowerment is associated with good governance.
-) Black Economic Empowerment is part of our growth strategy.

BEE codes of good practice

BEE codes referenced here are both the original BEE codes (2007, gazette number 29617) and the revised BEE codes of good practice (2013, gazette number 36928).

Paragraph 2 code series 000⁶ lists the key principles as being (inter alia)

-) The fundamental principle for measuring B-BBEE compliance is that substance takes precedence over legal form.
-) In interpreting the provisions of the Codes any reasonable interpretation consistent with the objectives of the Act and the B-BBEE Strategy must take precedence

THE CLIENT as a qualifying small enterprise as opposed to a large entity

The principles and guidelines highlighted above are relevant to THE CLIENT's specific situation.

BEE is an inclusive process

As has been discussed [above](#), THE CLIENT's revenue prejudices the company from being a positive and meaningful contributor to BEE. Its micro or very small size, as measured against the schedule attached to the National Small Business Act, makes it extremely difficult to adhere to the strict requirements of the large enterprises scorecard.

⁵ Formally known as South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment, circa 2003

⁶ Consistent for the original and revised BEE codes of good practice.

Conclusion

The relevant legislation (including codes and strategy) provides for deviation from the codes' requirements, provided that deviation

- i) Gives effect to the objectives and purposes of the Act, and
- ii) Is a reasonable interpretation that is consistent with the objectives of the Act and the B-BBEE Strategy

It is our opinion that the turnover thresholds in determining the size of a business can be too rigid and in this case have definitely prejudiced THE CLIENT who is a broker or agency with little choice as to who its principle is.⁷ THE CLIENT is better positioned to advance the objectives and purpose of the BEE Act by regarding itself as a Qualifying Small Enterprise.

Our view was that the Gross Profit⁸ figure was a fairer appreciation of the company's financial performance when it came to determining its size in terms of the relevant scorecard. It must be stressed that the same NPBT and NPAT figures were used to determine the value adding supplier status and enterprise development and socio-economic contributions⁹. We believe that the inclusivity argument provides a stronger case for this company to make a contribution to BEE, this is in keeping with both section 3 of the BEE Act and statement 000, paragraph 2 of the original and revised BEE codes of good practice. In our opinion this interpretation is consistent with the Constitution, the BEE Act and the BEE strategy document.

⁷⁷ We have come across similar situations with fuel retailers who have an incredibly high turnover, most of which is based on levies and taxes, margins are a fraction of this turnover and in many cases these margins are determined by legislation.

⁸ THE CLIENT had committed to measure themselves under the QSE scorecard even if the GP figure fell within the EME threshold

⁹ It must also be noted that THE CLIENT is fully compliant with SARS and VAT requirements