SOUTH AFRICAN REVENUE SERVICE

BINDING PRIVATE RULING: BPR 070

DATE: 20 January 2010

The guidance contained in this ruling relating to the tax treatment of exchange differences is affected by new legislation.

ACT	**:**	**INCOME TAX ACT, NO. 58 OF 1962 (the Act)**
SECTION	**:**	**SECTION 1, DEFINITION OF "GROSS INCOME" AND SECTIONS 7(8), 25D AND 54 AND PARAGRAPHS 11, 38, 43, 72, 80 AND 84 OF THE EIGHTH SCHEDULE TO THE ACT**
SUBJECT	**:**	**CAPITAL GAINS TAX IMPLICATIONS IN RESPECT OF THE TRANSFER OF TRUST FUNDS HELD IN AN OFFSHORE TRUST TO NEWLY FORMED OFFSHORE DISCRETIONARY TRUSTS**

1. Summary

This ruling deals with –

- whether the transfer of trust funds held in an offshore trust to newly formed offshore discretionary trusts (New Trusts) will trigger donations tax and/or capital gains tax ("CGT");
- whether the future income earned by the assets to be transferred will result in income in the hands of the settlors;
- whether a future disposal of the assets by the New Trusts without any of the gain vesting in the beneficiaries is a CGT event; and
- the income tax implications in respect of loans made to the New Trusts.

2. Relevant tax laws

This is a binding private ruling issued in accordance with section 76Q of the Act.

In this ruling legislative references to sections and paragraphs are to sections of the Act and paragraphs of the Eighth Schedules to the Act applicable as at 7 February 2007 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This ruling has been requested under the provisions of –

- section 1, definition of "gross income";

- sections 7(8), 25D and 54; and
- paragraphs 11, 38, 43, 72, 80 and 84 of the Eighth Schedule.

3. Parties to the proposed transaction

The Applicants:	Settlors of the respective Trusts
The Trust:	The existing trust which is a discretionary *inter vivos* trust registered in the Island of Jersey
New Trusts:	Three newly formed discretionary trusts registered in Guernsey

4. Description of the proposed transaction

4.1 Background

The Trust was established in terms of a Deed of Settlement whereby the settlors (Applicants) donated a part of their foreign assets, received either by way of inheritance or donation from their late parent, to the Trust. The Trust is a discretionary *inter vivos* trust registered in the Island of Jersey. The beneficiaries are the settlors and their respective families. The Trust consists of distinct funds, one for each family of beneficiaries.

4.2 Salient features of the Deed of Trust (the Trust Deed)

The Trust is a discretionary *inter vivos* trust and the settlement of trust funds was irrevocable. The trust fund consists of cash and listed investments. The trust period is for a 100 year term or such earlier date as the trustees may decide. The Trust Deed provides the trustees with the necessary authority to transfer or deal with the capital of the trust fund to or in any manner, provided it is for the benefit of all of the beneficiaries and with the authority to change the jurisdiction governing the Trust. In terms of the Trust Deed the trustees have the power to transfer the whole or any part or parts of the income or capital of the trust fund to another trust created either by the trustees or by any other person in any part of the world, provided that the trustees are satisfied that the transfer is for the benefit of one or more of the beneficiaries.

4.3 Exchange control amnesty

Amnesty has been granted in terms of section 9 of the Exchange Control Amnesty and Amendment of Taxation Laws Act, 2003 (Act No. 12 of 2003) (the Exchange Control Amnesty Act), and the fees for amounts held in excess of offshore allowances have been paid. This amnesty application was submitted for exchange control purposes only.

The settlors made the election to be the deemed owners of the assets of the Trust in terms of section 4 of the Exchange Control Amnesty Act. In terms of this election the settlors are deemed to be the owners of the assets for the purposes of the Act from the first day of the last year of assessment ending on or before 28 February 2003 until such a time as the assets are disposed of by the Trust to any other person. This election resulted in the settlors being subject to tax in South Africa on all income generated by these assets and being subject to CGT in terms of the Eighth Schedule on any disposal of the assets by the Trust to any other person. The settlors are, therefore, obliged to include any income of the Trust in their "gross income" as defined in section 1 and entitled to claim any deduction with regards to expenditure incurred in the production of income in terms of section 11(*a*) read with section 23(*g*). For purposes of avoiding double taxation the provisions of sections 7(5), 7(8) and 25B and paragraphs 70, 72 and 80 of the Eighth Schedule will not apply in respect of any income, expenditure or capital gain relating to that foreign asset, while it is so deemed to be held by that person.

4.4 Transaction details

- *Transfer of trust funds*

  The settlors wish to divide the trust fund into equal amounts representing each settlor's entitlement. Thereafter each settlor's entitlement to the total assets will be transferred to a New Trust specifically formed for each settlor. The reason for this transfer is to ensure that each beneficiary's entitlement is ring-fenced. This transfer will be done in terms of a proposed Supplement to the original Trust Deed of the Trust (Supplement to the Trust Deed).

- *Salient features of the Supplement to the Trust Deed - Deed of Appointment*

  A separate supplemental Trust Deed will be entered into by each of the settlors. This will ensure the transfer of the Trust's trust fund from the existing to new trustees in equal proportions. The new trustees will be subject to the original Trust Deed.

- *Interest-bearing loan*

  In addition to their respective entitlements to the trust funds, the settlors will lend additional funds to each of their respective New Trust. These loans will carry interest calculated at Libor with no predetermined repayment date. The accrued interest will be capitalised annually, whereafter the following year's interest will be calculated on the new capital amount being capital and capitalised interest.

5. Conditions and assumptions

This ruling is not subject to any conditions and assumptions.

6. Ruling

The ruling made in connection with the proposed transaction is as follows:

6.1 The division and transfer of the Trust's trust fund to the three New Trusts, subject to the original Trust Deed will have the following consequences:

- under section 4(3)(*a*) of the Exchange Control Amnesty Act, once the trustee disposes of the trust assets to anyone other than the Applicants, the Applicants are deemed to have disposed of the foreign asset for consideration equal to its market value on the date of disposal. As a result of this deemed disposal at market value, no donations tax under the provisions of section 54 will be payable by the Applicants when the Trust distributes its assets to the three New Trusts;
- deemed ownership will terminate on the transfer of the Trust's assets to the three New Trusts. This will trigger a disposal for CGT purposes in the hands of the Applicants;
- the disposal of the foreign deposit account will be subject to the provisions of paragraph 43(1) of the Eighth Schedule and thereafter to Part Xlll of the Eighth Schedule to determine the foreign currency capital gain or loss;
- the foreign listed investment is a "foreign equity instrument", as defined in section 1 and the capital gain or loss on the disposal thereof will be determined in accordance with paragraph 43(4) of the Eighth Schedule;
- future income derived from the assets so transferred by the Trust will be subject to tax in the hands of the settlors under section 7(8); and
- any capital gain arising upon the disposal of the transferred assets by the three New Trusts will be attributed to the Applicants in terms of paragraph 72 of the Eighth Schedule to the extent that it has not been vested in them in terms of paragraph 80(3) of the Eighth Schedule.

6.2 The Applicants will be subject to income tax on the accrued but unpaid interest in terms of the loan agreement to be entered into by each Applicant with their respective New Trust. This accrued interest will be included in their "gross income" as defined in section 1, after taking into account the foreign currency fluctuations under the provisions of section 25D. If any amount of the loan capital is repaid at a future date, it will result in a CGT event.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of five (5) years as from the date of this ruling.

Issued by:

Legal and Policy Division: Advance Tax Rulings

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