

BINDING CLASS RULING: BCR 092

DATE: 31 March 2025

ACT : INCOME TAX ACT 58 OF 1962 (the Act)
SECTION : SECTION 8EA
SUBJECT : APPLICATION OF THE *PROVISO* TO SECTION 8EA(3)

Preamble

This binding class ruling is published with the consent of the Applicant(s) to which it has been issued. It is binding between SARS and the Applicant, any Co-Applicant(s) and the class members only and published for general information. It does not constitute a practice generally prevailing.

1. Summary

This ruling determines how the *proviso* to section 8EA(3) will apply in certain circumstances where equity shares in an operating company that were acquired by a person through the application of preference share funding, are no longer held, directly or indirectly, by that person.

2. Relevant tax laws

In this ruling references to sections are to sections of the Act applicable as at 27 February 2025. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the Act.

This is a ruling on the interpretation and application of section 8EA.

3. Class

The class members to whom this ruling will apply are the members of a trade association.

4. Parties to the proposed transaction

The Applicant: The trade association who applied on behalf of its members.

5. Description of the proposed transaction

The class members subscribe for preference shares in companies in circumstances where the issuer applies the subscription proceeds for a qualifying purpose as envisaged in section 8EA(3). As such, equity shares are acquired directly or indirectly in an “operating company” as defined in section 8EA(1). In the course of such a process, security is typically given by third parties, amongst others, the operating company and/or the shareholders of the Issuer.

The introduction of the *proviso* to section 8EA(3) may impact existing preference share arrangements of the class members where preference shares were issued for a “qualifying purpose” but some, or all, of the operating company shares were disposed of by the acquiror thereof, and the proceeds from that disposal were not applied to redeem the outstanding preference shares or settle the outstanding dividends. The disposal of the operating company shares in these circumstances would have been undertaken for commercial reasons.

Consequently, certain existing preference shares, which met the requirements of section 8EA(3) prior to the introduction of the *proviso*, now fall into the ambit of the *proviso* to section 8EA(3) (Tainted Preference Shares).

The class members propose the following transactions, depending on the circumstances:

- Continue with the existing preference share arrangements;
- Call for the redemption of the outstanding capital and accrued dividends in respect of the Tainted Preference Shares; or
- Where the outstanding capital and accrued dividends are not so redeemed, if appropriate, amend the security arrangement(s) to release the third party from the security in respect of the Tainted Preference Shares.

6. Conditions and assumptions

This binding class ruling is subject to the following additional conditions and assumptions:

- a) At the time that a dividend is received by or accrues to a person in respect of the preference shares referred to in this application, in each instance, such share in respect of which the dividend is received by or accrues to its holder, constitutes a “preference share” as defined in section 8EA(1) in respect of which an “enforcement right”, as defined in section 8EA(1), is exercisable by the holder.
- b) The funds derived from the issue of the preference shares were applied for a qualifying purpose at the time of the issue of the preference share as contemplated in section 8EA(3)(a).
- c) The enforcement rights were exercisable at the time of the issue of the preference share against the persons contemplated in section 8EA(3)(b).
- d) Section 8E does not apply.

7. Ruling

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

- a) If a share in an operating company that was acquired by any person referred to in the *proviso* to section 8EA(3) is no longer held, directly or indirectly, by that person at the time of the receipt or accrual of a dividend in respect of the preference share, the funds from the issue of which were applied in acquiring that share in the operating company, and the funds from the disposal of that share in the operating company are not used in redeeming that preference share in full, and the settlement of an amount of dividends

or foreign dividends, if any, in respect of that preference share, within 90 days of the disposal, section 8EA(3) will not apply. In terms of section 8EA(2), any dividends received or accrued in respect of that preference share, that is a “third-party backed share”, at any time during the year of assessment will be deemed to be income.

- b) If a share in an operating company that was acquired by any person referred to in the *proviso* to section 8EA(3) is no longer held, directly or indirectly, by that person at the time of the receipt or accrual of a dividend in respect of the preference share, the funds from the issue of which were applied in acquiring that share in the operating company, and the funds from the disposal of that share in the operating company are used in redeeming that preference share in full, and the settlement of an amount of dividends or foreign dividends, if any, in respect of that preference share, within 90 days of the disposal, the *proviso* to section 8EA(3) will not apply to the preference share, with the result that section 8EA(3) will apply.
- c) In applying the *proviso* to section 8EA(3), it is necessary to trace the share in the operating company to the preference share or shares, the funds from the issue of which were used to acquire that share in the operating company that is no longer held, directly or indirectly, as per the *proviso* to section 8EA(3). Depending on the facts, if direct tracing is not possible, a method that is appropriate to the facts may be used to perform the tracing in another manner.
- d) The *proviso* to section 8EA(3) will not apply to prevent the application of section 8EA(3) in respect of a preference share (Untainted Preference Share), the funding of which is traced to the acquisition of a share in an operating company which is still held, directly or indirectly, by the person referred to in the *proviso* to section 8EA(3) at the time of receipt or accrual of a dividend in respect of the preference share. If the preference share is not a “third-party backed share” at any time during the year of assessment, then section 8EA(2) will not deem any dividends received in respect of that preference share during that year of assessment to be income.
- e) No view is expressed on the legal consequences of any proposed amendment of security arrangement(s), because any proposed amendment will have to be considered on its own terms.

8. Period for which this ruling is valid

This binding class ruling is valid for a period of three years from 27 February 2025.