



South African Revenue Service

BINDING PRIVATE RULING: BPR 368

DATE: 5 November 2021

ACT : INCOME TAX ACT 58 OF 1962 (the Act)
SECTION : SECTIONS 11(a) READ WITH 23(g), 11(f), 54, 55 – DEFINITION OF “DONATION”, AND 58
SUBJECT : PAYMENTS MADE PURSUANT TO AN AGREEMENT RELATING TO A PERMISSION TO OCCUPY

Preamble

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

1. Summary

This ruling determines the income tax and donations tax consequences resulting from payments to be made pursuant to an agreement relating to a permission to occupy.

2. Relevant tax laws

In this ruling references to sections are to sections of the Act applicable as at 30 June 2021. 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 11(a) read with 23(g);
- section 11(f);
- section 54;
- section 55, definition of “donation”; and
- section 58.

3. Parties to the proposed transaction

The applicant: A resident company

The trust: A resident trust

4. Description of the proposed transaction

The trust holds certain land for the benefit of a community. The trustees granted Permissions to Occupy (PTOs) in respect of two properties to a third party financing house (Financier) for the purpose of developing and leasing out the properties to the applicant.

The Financier let the properties to the applicant in terms of a long-term lease and the same parties also concluded a development agreement on the same day, in terms of which the applicant was appointed to develop the properties on the lessor's behalf. In terms of the development agreement, the applicant was required to construct, on each property, business premises for its use together with certain ancillary facilities to be used by other businesses.

The applicant carries on a business operation on each property. The Financier paid for the costs incurred by the applicant to develop the properties out of funding which it obtained from a bank. In terms of the lease agreement, the applicant was to pay rentals during the first 10 years of the term of the lease agreement that were sufficient to enable the Financier to repay the bank loan together with interest thereon. Thereafter it paid a nominal rental as per the lease agreement. The applicant was also obliged to pay annual rental due in respect of the PTOs.

The PTOs provided for the payment of a nominal annual rental and furthermore provided that the rental amount may be renegotiated every three years.

The traditional authority representing the community engaged with the applicant and expressed the view that the trust has not been adequately compensated in accordance with the relevant clauses of the PTOs read together with the terms of the lease agreement for the privilege of occupying the properties and therefore requested the applicant to adequately compensate the community for its use of the properties.

The applicant acknowledges that:

- The properties it occupies together with the improvements that have been constructed on it are valuable for both the applicant and sublessees who hire ancillary facilities on the properties.
- It has enjoyed the benefit of occupying the properties at relatively insignificant rentals.

The applicant wishes to retain the use of the properties for the remaining term of the lease agreement, which exceeds 10 years, and does not wish to become involved in protracted and costly disputes with the community and the trust and, in the circumstances, it has agreed to make payments envisaged in an in principle agreement it has entered into with the trust. The payments will consist of a once-off initial lump sum payment and additional monthly payments for the remainder of the lease term.

In return for the payments that the applicant will make to the trust in terms of the agreement, the traditional authority will confirm that the PTOs, in respect of the properties, remain valid and enforceable and undertakes that it shall do certain additionally agreed things to ensure that the applicant can enjoy its rights under the lease agreement and to ensure that the PTOs remain in place.

5. Conditions and assumptions

This binding private ruling is not subject to any additional conditions and assumptions.

6. Ruling

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

- a) The proposed initial lump sum payment will qualify for the allowance under section 11(f). In calculating the amount that will be deductible in each year of assessment, paragraph (aa) of the proviso to section 11(f) will apply.
- b) The proposed monthly payments will be deductible under section 11(a) read with section 23(g).
- c) Neither of the proposed payments will be regarded as a “donation” as defined in section 55(1) or deemed to be a donation as envisaged under section 58(1) for donations tax purposes.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of five years from 30 June 2021.

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