BINDING PRIVATE RULING: BPR 137

DATE: 13 March 2013

ACT : INCOME TAX ACT NO. 58 OF 1962 (the Act)

SECTION : SECTIONS 45 and 47

SUBJECT : SALE OF A BUSINESS IN TERMS OF AN INTRA-GROUP TRANSACTION

1. Summary

This ruling concerns the sale of a business in terms of an intra-group transaction and whether –

- the sale can be seen as a transaction relating to a liquidation, winding-up and deregistration as envisaged under section 47 of the Act; and
- certain assets may be excluded from the ambit of section 45 of the Act where a business is sold.

2. Relevant tax laws

This is a binding private ruling issued in accordance with section 78(1) and published in accordance with section 87(2) of the Tax Administration Act No. 28 of 2011.

In this ruling references to sections are to sections of the Act applicable as at 16 January 2013 and 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 the provisions of –

- section 45(6)(*e*) and (*g*); and
- section 47.

3. Parties to the proposed transaction

The Applicant	:	A company incorporated in and a resident of South Africa
The Co–Applicant	:	A company incorporated in and a resident of South Africa that holds 100% of the shareholding in the Applicant

4. Description of the proposed transaction

The Co-Applicant purchases and distributes goods manufactured by the Applicant. The Applicant has long-term loan financing from offshore companies (who are shareholders in the Co-Applicant). This loan financing was obtained for the purpose of financing the construction of the Applicant's manufacturing plant and

funding the working capital of its operations. The interest on this loan is currently deducted in terms of section 24J. This loan will be assumed by the Co-Applicant as part of a restructure, set out below.

The shareholders have agreed to combine the Co-Applicant and the Applicant. As part of the combination of the Co-Applicant and the Applicant, the shareholders intend to move the Applicant's business to the Co-Applicant in order to improve the current supply chain.

Both the Co-Applicant and the Applicant have incurred significant tax losses since inception – for the Applicant it is due largely to the accelerated depreciation allowances on its manufacturing assets, and for the Co-applicant it is due largely to the high cost of the procurement of the Applicant's products.

It has been proposed that the supply chain between the Applicant and the Co-Applicant be removed by transferring the Applicant's business to the Co-Applicant.

The Applicant and the Co-Applicant will enter into a sale of business agreement, wherein the Applicant agrees to sell its business as a going concern to the Co-Applicant. Accordingly, all assets are purchased and liabilities are delegated to the Co-Applicant in terms of this agreement (some minor assets may remain to settle debts). It is envisaged that the sale of business qualifies as an intra-group transaction, as contemplated in section 45.

At the time that the proposed transaction, which is the subject of this ruling, will take place, the Applicant will be 100% held by the Co-Applicant.

As it is likely that section 45 will automatically apply to the transfer of the assets, an agreement envisaged in section 45(6)(*g*) will be included in the sale of business agreement that will provide for the 'election' out of the operation of section 45 in respect of certain assets, to be identified at a later date, but such date to be before the completion date of the contract.

The net purchase consideration for the business will be left outstanding on loan account, although this may be repaid in due course.

5. Conditions and assumptions

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

- A directors' resolution will be passed to approve the transfer of the assets through a sale of the assets.
- The Co-Applicant and the Applicant will form part of the same group of companies at the time of the sale of the business.
- Capital assets to be disposed of by Applicant will be held as capital assets by Co-Applicant.
- Trading stock to be disposed of by Applicant will be held as trading stock by Co-Applicant.
- The Applicant will not take steps to liquidate, deregister or unwind within a period of 36 months from the time the sale of business agreement is implemented.

- The Applicant and Co-Applicant will elect, in terms of section 45(6)(*g*), that section 45 will not apply to certain assets to be sold in terms of this transaction.
- To the extent that section 23K applies to the shareholder loans, it is assumed that a directive, as envisaged in that section, will be sought and obtained from the Commissioner for SARS. This binding private ruling does not constitute a directive under section 23K.
- The interest deduction claimed by the Applicant in the past was fully deductible under section 24J or 11(*a*), taking into account the provisions of section 31.
- The loans will be transferred at face value which will equal the then market value.
- The provisions of section 31 have not been considered.

6. Ruling

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

- To the extent that assets are not elected out of section 45 under section 45(6)(*g*), the sale of these assets and liabilities by the Applicant to the Co-Applicant will constitute an intra-group transaction as contemplated in section 45.
- Section 47 will not apply to the sale of assets to the Co-Applicant, as it is not the intention of the parties to liquidate, wind up or deregister the Applicant. The assets are accordingly not disposed of in terms of a liquidation distribution referred to in section 47, hence section 45(6)(*e*) will apply to this disposal.
- To the extent that loans are transferred from the Applicant to the Co-Applicant, and where interest paid was deductible by the Applicant on these loans, interest paid by the Co-Applicant, going forward, will be deductible on these loans.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of 5 years from 16 January 2013.

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SOUTH AFRICAN REVENUE SERVICE