

BINDING PRIVATE RULING: BPR 149

DATE: 24 July 2013

ACT : INCOME TAX ACT, NO. 58 OF 1962 (the Act)
SECTION : SECTIONS 1(1), DEFINITION OF “CONTRIBUTED TAX CAPITAL”, AND 42, DEFINITION OF “ASSET-FOR-SHARE TRANSACTION” AND PARAGRAPH 64B OF THE EIGHTH SCHEDULE TO THE ACT
SUBJECT : DISPOSAL OF AN ASSET THAT CONSTITUTES AN EQUITY SHARE IN A FOREIGN COMPANY

1. Summary

This ruling deals with the tax consequences arising from a disposal of an equity share held in a foreign company to another foreign company in exchange for an equity share in that other foreign company.

2. Relevant tax laws

This is a binding private ruling issued in accordance with section 87, read with section 270(3), of the Tax Administration Act, No. 28 of 2011.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Eighth Schedule to the Act applicable as at 20 March 2012 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 1(1), definition of “contributed tax capital”;
- section 42, definition of “asset-for-share transaction”; and
- paragraph 64B of the Eighth Schedule.

3. Parties to the proposed transaction

The Applicant: A company that is incorporated in and a resident of South Africa that holds 100% of the equity shares in Company X

Company X: A company that is incorporated in and a resident of the Netherland that holds the foreign investments (in various foreign countries) of the Applicant

Co-operative: A Dutch Co-operative to be established in terms of the laws of the Netherlands and a resident of that country

4. Description of the proposed transaction

The Co-operative will be established by the Applicant and interposed between the Applicant and Company X with the purpose of acting as the holding vehicle for the foreign investments currently held by Company X.

The Applicant intends to dispose of its equity shares in Company X to the Co-operative at market value in return for the issue of 99,99 per cent of the member's interest in the Co-operative. The amount representing the market value will be recorded by the Co-operative as contributed capital by the Applicant.

The Applicant will hold 99,99 per cent of the interest in the Co-operative, whereas, the Co-operative will hold 100 per cent of the equity shares in Company X. The remaining 0,01 per cent interest in the Co-operative will be held by another group company.

5. Conditions and assumptions

This ruling is subject to the conditions and assumptions that –

- no opinion, conclusion or determination is made in this ruling in relation to the application or interpretation of the laws of the Netherlands;
- the ruling is issued on the condition that the profit distributed by the Co-operative will be treated by the Dutch Tax Authority as a dividend or similar payment for purposes of the laws relating to tax on income of the Netherlands;
- in the context of paragraph 64B(5) of the Eighth Schedule, Company X is not a “foreign financial instrument holding company” as defined in section 41; and
- the participating members of the Co-operative will have an unlimited right to distributions, when declared, and return of capital on the winding-up of the Co-operative.

6. Ruling

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

- The interest in the Co-operative will qualify as a “share” and an “equity share” as defined in section 1(1). The Co-operative will therefore be a “company” and a “foreign company” as defined in section 1(1).

- The disposal by the Applicant of its interest in Company X to the Co-operative will be governed by section 42.
- Under section 42(2)(a) –
 - the Applicant will be deemed to have disposed of the equity shares held in Company X for an amount equal to its base cost and to have acquired the interest in the Co-operative for an amount equal to such base cost; and
 - the base cost of the interest in Company X to be acquired by the Co-operative will be equal to the original base cost of the equity shares when the shares were held by the Applicant.
- The definition of “contributed tax capital” will not apply to the Co-operative whilst the Co-operative remains a “foreign company” as defined in section 1(1). The provisions contained in the Act in respect of a “foreign dividend” and “foreign return of capital”, as defined in section 1(1), will be applied without reference to the definition of and rules governing “contributed tax capital”.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of 5 years from 20 March 2012.

Issued by:

**Legal and Policy Division: Advance Tax Rulings
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