

BINDING PRIVATE RULING: BPR 288

DATE: 17 January 2018

ACT : INCOME TAX ACT 58 OF 1962 (the Act)
SECTION : SECTIONS 1(1) – PARAGRAPH (a)(i) OF THE DEFINITION OF “TRADING STOCK”, 42(1) – PARAGRAPH (a) OF THE DEFINITION OF “ASSET-FOR-SHARE TRANSACTION”, AND 42(7)
SUBJECT : CONSECUTIVE ASSET FOR SHARE TRANSACTIONS WITHIN 18 MONTHS

1. Summary

This ruling determines whether shares are acquired as capital assets or trading stock pursuant to a corporate reorganisation and whether consecutive asset-for-share transactions concluded within a period of eighteen months will render the anti-avoidance provision in section 42(7) applicable.

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 28 of 2011.

In this ruling references to sections are to sections of the Act applicable as at 26 July 2017. 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 1(1) – paragraph (a)(i) of the definition of “trading stock”;
- section 42(1), paragraph (a) of the definition of “asset for share transaction”; and
- section 42(7).

3. Parties to the proposed transaction

The applicant: A company incorporated in and a resident of South Africa

Company A: A company incorporated in and a resident of South Africa

Company B: A shareholder of the Applicant and of Company A, incorporated outside South Africa and a non-resident. Company B holds 89.8% of the Company A shares

MD: The managing director of Company B who holds 10.2% of that company

SPV: A special purpose vehicle, to be incorporated as a private company and to be resident in South Africa

4. Description of the proposed transaction

As a result of changes to the applicable black economic empowerment framework, the shareholders of Company A have decided to take steps to improve the company's BEE scorecard and agreed to introduce a new BEE shareholder.

The steps to implement the proposed transaction will be as follows:

- The BEE participant will acquire 6.5% of Company A's shares at market value from each of the Company A shareholders in quantities proportionate to their respective shareholdings.
- The BEE participant will then dispose of its 6.5% shareholding in Company A to the SPV in exchange for shares in the SPV.
- The Company A shareholders will dispose of 19.5% of their Company A shares directly to the Applicant in exchange for shares in the Applicant in quantities proportionate to their respective shareholding in Company A. Company B will do so in terms of an asset for share transaction as contemplated in section 42. MD will not hold a qualifying interest in the Applicant. His share swap will therefore not afford him any section 42 relief.
- The Applicant will dispose of the 19.5% shareholding in Company A to the SPV in terms of an asset-for-share transaction contemplated in section 42. After this transaction the Applicant will hold 75% of the issued share capital of the SPV. The Applicant stated that it intends holding the shares in Company A on capital account.

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:

Disposal of Company A Shares by Company B to the Applicant

- a) The disposal by Company B of its 19,5% shareholding in Company A to the Applicant will be an asset-for-share transaction as contemplated in paragraph (a) of the definition of that term in section 42(1);
- b) Based on the specific facts of this application, the Company A shares will be regarded as having been acquired and held by the Applicant on capital account even though the equity shares in Company A will be disposed of to the SPV shortly after its acquisition. The facts and circumstances of this matter, taking into account the proposed steps before and after the acquisition of the Company A shares by the SPV, are very specific, and in the context of the corporate rules contained in Part III of Chapter II, indicate that the SPV, and the group as a whole, will not deal with the Company A shares as trading stock.

- c) Section 42(7) will apply as the disposal by the Applicant of the shares in Company A in terms of the proposed transaction will take place within eighteen months of the acquisition of those shares in terms of the asset-for-share transaction. No gain or loss will however arise. The shares will be transferred at the cost at which they would have been acquired.

Disposal of Company A Shares by the Applicant to the SPV

- d) The disposal by the Applicant of its 19,5% shareholding in Company A to the SPV will be an asset-for-share transaction as contemplated in paragraph (a) of the definition of that term in section 42(1).

7. Period for which this ruling is valid

This binding private ruling is valid for a period of three years from 16 August 2017.

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