

BINDING PRIVATE RULING: BPR 325

DATE: 23 August 2019

ACT : INCOME TAX ACT 58 OF 1962 (the Act)
SECTION : SECTIONS 9D(2A), 9H, 44 and 47 AND PARAGRAPH 43A OF THE EIGHTH SCHEDULE TO THE ACT
SUBJECT : LIQUIDATION DISTRIBUTION AND AMALGAMATION TRANSACTION BETWEEN NON-RESIDENT COMPANIES

Preamble

This binding private ruling is published by consent of the applicant to which it has been issued. It is binding as between SARS and the applicant only and published for general information. It does not constitute a practice generally prevailing.

1. Summary

This ruling determines whether the proposed mergers under foreign law will constitute a liquidation distribution and an amalgamation transaction.

2. Relevant tax laws

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 16 May 2019. 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 9D(2A);
- section 9H;
- section 44;
- section 47; and
- paragraph 43A.

3. Parties to the proposed transaction

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|----------------|--|
| The applicant: | A resident company |
| Partnership A: | A foreign registered limited partnership |
| Partnership B: | A foreign registered limited partnership |
| Company A: | A non-resident company, which is wholly-owned by Partnership B |

Company B: A non-resident company, which is wholly-owned by Partnership B

Company C: A non-resident company, which is wholly-owned by Company A

4. Description of the proposed transaction

The applicant is a 100% limited partner in Partnership A, a limited partnership. Partnership B is a limited partnership. Partnership A is a 100% limited partner in Partnership B.

Partnership B has two wholly-owned subsidiaries, Company A and Company B. Company A holds all of the shares in Company C.

Company A is a services company. Companies B and C carry on manufacturing activities.

Partnerships A and B each constitutes a “foreign partnership” as contemplated in paragraph (a) of the definition of that term in section 1(1). This means that they are fiscally transparent for South African tax purposes and income received by or accruing to them is therefore taxable in the applicant.

Companies A, B and C are controlled foreign companies (CFCs) in relation to the applicant.

The applicant intends to rationalise its offshore investments so that it will only have one operating company in the jurisdiction concerned. It proposes the following transaction steps:

Step 1: Liquidation Distribution

- Company A will dispose of its shareholding in Company C and its own business undertaking as a going concern to Partnership B in terms of a “liquidation distribution” as contemplated in paragraph (b) of that definition in section 47(1). All its assets and liabilities will be transferred to and assumed by Partnership B. No other consideration will be paid in respect of the disposal. For South African tax purposes, the disposal is made to the applicant.
- Company A will be wound-up and dissolved as a consequence of the liquidation distribution and its shares will be cancelled.

Step 2: Amalgamation Transaction

- Company B will dispose of its business undertaking as a going concern to Company C in terms of an “amalgamation transaction” as contemplated in paragraph (c) of that definition in section 44(1). All its assets and liabilities will be transferred to and assumed by Company C. No other consideration will be paid in respect of the disposal of the assets.
- Company B will be wound-up and dissolved as a consequence of the amalgamation transaction and its shares will be cancelled.

The restructuring will take place in accordance with the statutory law governing mergers in the foreign jurisdiction.

Following the transactions contemplated above, the applicant will continue to hold a 100% interest in Company C via its partnership interests in Partnership A and Partnership B. Company A and Company B will cease to exist.

The market values of the shares held by Company A in Company C exceed the base costs of those shares.

From the foreign jurisdiction's tax perspective, the consequence of the liquidation distribution under section 47 is a deemed profit distribution and a deemed capital distribution in Partnership B. The deemed profit distribution will be taxed as a dividend under the law of the foreign jurisdiction.

5. Conditions and assumptions

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

- a) The shares held in Companies A, B and C are all held as capital assets by the respective shareholders of these companies.
- b) The shares in Company C that will be acquired in transaction step 1 will be acquired as capital assets.
- c) The base costs and tax costs of assets that will be transferred by Company A in transaction step 1 (other than the shares held in Company C) will not be less than the market values of the assets at the time of the implementation of the transaction.
- d) The liabilities assumed in transaction steps 1 and 2 will consist of qualifying debt only, as contemplated in sections 44(4) and 47(3A)(b).
- e) The deemed profit distribution that will arise under the foreign jurisdiction's law between Company A and Partnership B will not be deductible by Company A in the determination of its tax on income.
- f) Company A will, within a period of 36 months after the date of the liquidation distribution, or such further period as the Commissioner may allow, take the steps as contemplated in section 41(4) to liquidate, wind-up or deregister.
- g) Company B will, within a period of 36 months after the date of the amalgamation transaction, or such further period as the Commissioner may allow, take the steps as contemplated in section 41(4) to liquidate, wind-up or deregister.

6. Ruling

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

Transaction step 1

- a) The disposal by Company A of all its assets (other than assets it elects to use to settle any debts incurred by it in the ordinary course of its trade) to the applicant will constitute a "liquidation distribution" as contemplated in paragraph (b) of that definition in section 47(1).

- b) The roll-over relief afforded in section 47(2) and (3) will apply to Company A and the applicant in respect of the disposal of assets by Company A.
- c) Section 47(5) will apply to the transaction so that there will be no tax consequences for the applicant in respect of the disposal of the shares of Company A.
- d) Any foreign dividend deemed to be received by the applicant will be exempt from tax in terms of section 10B(2)(a).
- e) Section 9D(2A) will not apply to the transaction. There will therefore not be an imputation of net income in the applicant.
- f) Section 9H(3)(b) will not apply to the transaction when Company A ceases to be a CFC.
- g) Paragraph 43A(2) will not apply to the transaction.

Transaction step 2

- a) The disposal of assets by Company B to Company C will constitute an “amalgamation transaction” as contemplated in paragraph (c) of that definition in section 44(1).
- b) The roll-over relief provided for in section 44(2) and (3) will apply in respect of the disposal of assets by Company B to Company C.
- c) Section 9D(2A) will not apply to the transaction. There will therefore not be an imputation of net income in the applicant.
- d) Section 9H(3)(a) will not apply to the transaction when Company B ceases to be a CFC.
- e) Paragraph 43A(2) will not apply to the transaction.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of five years from 16 May 2019.

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