

**BINDING PRIVATE RULING: BPR 332**

DATE: 8 November 2019

**ACT : INCOME TAX ACT 58 OF 1962 (the Act)  
SECURITIES TRANSFER TAX ACT 25 OF 2007 (STT Act)**

**SECTION : SECTIONS 1(1) – DEFINITION OF “DIVIDEND” AND 46 OF THE ACT  
AND PARAGRAPH 11 OF THE EIGHTH SCHEDULE TO THE ACT  
SECTIONS 1 – DEFINITION OF “SECURITY” AND “TRANSFER” AND  
8(1)(a)(iv) OF THE STT ACT**

**SUBJECT : UNBUNDLING AND SUBSEQUENT ISSUE OF LISTED SHARES BY  
NON-RESIDENT SUBSIDIARY OF RESIDENT HOLDING COMPANY**

***Preamble***

This binding private ruling is published by consent of the applicant(s) to which it has been issued. It is binding as 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 securities transfer tax (STT) consequences of the transaction steps to achieve the primary listing of the offshore assets, held in a subsidiary company (Listco) of a multi-national group on a foreign stock exchange, with a secondary listing on the JSE.

**2. Relevant tax laws**

In this ruling references to sections and paragraphs are to sections of the relevant Act and paragraphs of the Eighth Schedule to the Act applicable as at 19 July 2019. Unless the context indicates otherwise any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

This is a ruling on the interpretation and application of –

- the Act –
  - section 1(1) – definition of “dividend”;
  - section 46; and
  - paragraph 11.
- the STT Act –
  - section 1 – definitions of “security” and “transfer”; and
  - section 8(1)(a)(iv).

### 3. Parties to the proposed transaction

The applicant:	A listed resident company
The co-applicant:	A resident company that is a wholly-owned subsidiary of the applicant
Listco:	A non-resident company incorporated outside South Africa that is a wholly-owned subsidiary of the co-applicant

### 4. Description of the proposed transaction

The applicant intends to list approximately 25% of an existing and wholly-owned indirect subsidiary company (Listco) housing the applicant's offshore assets on a foreign index and a secondary, inward, listing on the JSE. The remaining share capital of Listco (approximately 75%) will be retained by the applicant.

The applicant's issued share capital currently comprises listed X class shares (X shares) and unlisted Y Class shares (Y shares). The X shares and the Y shares are separate classes of ordinary shares. The Y shares have high voting rights attached to the shares, but they participate in a portion only of the dividend entitlement of the X shares. The X shares entitle their holders to one vote per share. As the X shares carry unlimited rights to dividends and both classes carry unlimited rights to capital participation, these shares are "equity shares" as defined in section 1(1).

The applicant will create a third class of authorised but unissued share capital comprising of class Z shares (Z shares), the salient terms of which will be as follows –

- in aggregate, and as a class, they will carry an entitlement to up to 27% of the authorised A shares of Listco (as defined below) on a pre-determined basis;
- they will carry no voting rights, except as required by the Companies Act 71 of 2008 – i.e. if a resolution is proposed to amend any terms of the Z shares; and
- no right to any distributions.

In consequence of the fact that the Z shares do not carry any rights to distributions, they are not "equity shares" as defined in section 1(1).

The co-applicant, a South African incorporated and resident company, is a wholly owned subsidiary of the applicant with a single class of ordinary shares in issue.

Immediately prior to the proposed transaction, the co-applicant holds the entire issued share capital in Listco, comprised of two classes of shares – A shares and B shares. In the course of the proposed transaction, these shares will be unbundled to the applicant. The terms of Listco's A- and B shares take into account the proposed organisational structure after this unbundling. It is intended that the applicant will hold approximately 75% of Listco's A shares and 25% of the A shares will be widely held, primarily offshore. All of Listco's B shares will be held by the applicant's Y shareholders after the proposed transaction. Thus, the terms of Listco's A- and B shares are identical to those of the Applicant's X and Y shares, save that Listco's B shares –

- will have one vote until such time as the applicant's<sup>1</sup> shareholding in Listco's A shares falls below 50% plus (1) one share, whereafter the B shares in Listco will have 1,000 votes per share whilst the A shares continue to only have 1 vote per share; and
- will entitle the holder thereof to 20% of the dividends paid by Listco to its A shareholders, adjusted by a factor of the percentage of A shares held by the applicant at the time of the declaration of the dividend in question. Thus, the dividend rights of Listco B shareholders will be floating, based on the amount of Listco A Shares held by the applicant from time to time.

As the Listco A- and B shares carry unlimited rights to dividends and capital, these shares are "equity shares" as defined in section 1(1).

The proposed transaction aims to achieve the Applicant's following objectives –

- to achieve sufficient liquidity of the shares in Listco, with a targeted free float of approximately 25%;
- to maximise support from the applicant's shareholders;
- to minimise execution risk, including aftermarket trading volatility; and
- to provide the applicant's shareholders with the choice whether or not to participate in the proposed transaction.

The proposed transaction steps are as follows:

### **Step 1**

The applicant will offer Z shares to the X shareholders in accordance with their proportionate shareholding in the applicant (the Z capitalisation issue). In terms of the offer, the Z shares, once issued, will be contributed automatically to Listco in exchange for newly issued Listco A shares. Therefore, in consequence of step 1, Listco will acquire an entitlement to the Z shares.

X shareholders who do not want to participate in the Z capitalisation issue may opt out and will receive additional X shares (the X capitalisation issue), up to a specified maximum of authorised but unissued X shares, in aggregate.

Should the number of X shares to be issued under the X capitalisation issue exceed the maximum, then the number of X shares to which an X shareholder that opted out would have been entitled, if sufficient X shares were available, will be scaled down *pro rata* to the balance of the X shareholder's entitlement being issued in the form of Z shares, (and ultimately Listco A shares).

According to the expected timeline, the election closes at 12:00 on record date (as defined in the circular issued to X shareholders).

### **Step 2**

Listco will be listed on a foreign index (its primary listing) and the JSE (its secondary listing). This step is scheduled to occur two days prior to record date.

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<sup>1</sup> Reflecting the position post transaction step 4, subsequent to the unbundling of Listco to the applicant by the co-applicant.

**Step 3**

The co-applicant will distribute all its shares in Listco to the applicant as a dividend *in specie* under section 46. The unbundling is anticipated to take place on the day following record date.

**Step 4**

Listco will distribute its entitlement to the Z shares to the applicant as a dividend *in specie*. It is anticipated that this step will take place on the day following record date. It should be noted that at the time of the antecedent disposal by way of a dividend *in specie*, the Z shares will not yet be issued.

**Step 5**

The applicant will undertake the Z capitalisation issue and the X capitalisation issue, with the Z shares simultaneously and automatically being exchanged for newly issued A shares in Listco. This step should result in capital gains for most of the resident X shareholders who participated in the Z capitalisation issue. Pursuant to the antecedent distribution in step 4, the Z shares will be returned to the applicant, resulting in their cancellation.

Implementation (ie the issue of the additional X shares, the Z shares and the Listco A shares) is anticipated to occur on the third day after record date. It is noted that the applicant's share register will reflect the issue of the Z shares to its participating X shareholders, as well as the cancellation of the Z shares in consequence of the antecedent distribution of the entitlement to the Z shares by Listco to the applicant. Participating X shareholders, who are residents of South Africa, will hold their A shares in Listco under the secondary listing on the JSE.

**Step 6**

The applicant will undertake a capitalisation issue of up to a specified maximum of Y shares. The applicant's memorandum of incorporation requires that if there is a capitalisation issue of X shares, a proportionate number of Y shares must be issued to ensure that the voting ratio between X shares and Y shares is maintained. It is expected that this capitalisation issue will occur on the third day after record date.

**Step 7**

Listco B shares will be distributed by the applicant to the holders of Y shares in the applicant. This is expected to occur on the fourth day after record date.

**5. Conditions and assumptions**

This binding private ruling is subject to the additional condition and assumption that the transaction steps, as set out above, will occur in that stated order.

## 6. Ruling

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

- a) The distribution of the shares in Listco by the co-applicant to the applicant in step 3 will constitute an “unbundling transaction”, as defined in paragraph (b) of the definition of that term in section 46(1). Consequently, the applicant and co-applicant will qualify for the tax roll-over relief contemplated under section 46.
- b) Under paragraph 11(2)(b) none of the capitalisation issues of the X-, Y- and Z shares by the Applicant constitutes disposals as defined in paragraph 11. Consequently, no capital gains or losses will result from these capitalisation issues.
- c) None of the capitalisation issues of the X-, Y- and Z shares by the applicant will constitute a “transfer” of a security as contemplated in section 1 of the STT Act. Accordingly, no STT will arise as a result of these capitalisation issues.
- d) None of the capitalisation issues of the X-, Y- and Z shares by the applicant will give rise to any dividends tax liability, as the issue of shares is specifically excluded from the definition of a “dividend” in section 1(1).
- e) STT at a rate of 0.25% of the market value of the Z shares will result in consequence of the cancellation of these shares in step 5. The STT is a cost for the applicant. There shall be no other charge of STT under Steps 1 to 5, other than that already mentioned. The STT charge will be levied at a rate of 0.25% on the market value of the Z shares, provided that the market value must be determined as if the Z shares were never cancelled.

## 7. General Note

The proposed transaction has not been considered in the context of company law, or any general or specific anti-avoidance provisions or doctrines. Accordingly, this ruling does not address the validity or efficacy of the proposed transaction and any of its constituent steps under company law or any general anti-avoidance measure.

## 8. Period for which this ruling is valid

This binding private ruling is valid in respect of the applicants’ years of assessment during which the proposed transaction is implemented.