

BINDING PRIVATE RULING: BPR 380

DATE: 4 October 2022

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

**SECTION : SECTIONS 9D AND 64E OF THE ACT AND PARAGRAPHS 38, 39
AND 76B OF THE EIGHTH SCHEDULE TO THE ACT
SECTIONS 1 – DEFINITIONS OF “TRANSFER” AND “SECURITY”,
2(1), 6(2) and 7(2) OF THE STT ACT**

**SUBJECT : TRANSFER OF SHARES IN RESIDENT COMPANY TO
NON-RESIDENT HOLDING COMPANY**

Preamble

This binding private ruling is published with the consent of the applicant(s) to which it has been issued. It is binding 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 tax consequences of the transfer of ordinary and preference shares by a South African resident company (the applicant) to a non-resident, indirect subsidiary (Foreign Company) of the applicant.

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 on 29 July 2022. 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 9D;
 - section 64E;
 - paragraph 38;
 - paragraph 39; and
 - paragraph 76B of the Eighth Schedule to the Act.
- the STT Act –
 - section 1 – definition of “transfer” and “security”;
 - section 2(1);

- section 6(2); and
- section 7(2).

3. Parties to the proposed transaction

The applicant:	A listed resident company
Foreign Company:	A company incorporated in and a resident of a foreign country, that is an indirectly held subsidiary of the applicant
SA Holdco:	A resident private holding company
SA Opco:	A resident private operating company

4. Description of the proposed transaction

The applicant holds 90% of the ordinary shares in SA Holdco, which indirectly holds the ordinary shares of SA Opco. SA Opco issued two classes of redeemable, non-participating, no par value preference shares to the applicant. Together, the ordinary shares in SA Holdco and the preference shares in SA Opco are referred to as the sale shares. The sale shares will be transferred to the Foreign Company for a price determined with reference to a market valuation done in January 2022.

The financial position of the operating company is weak and as a result, the sale shares will be transferred for a significant discount, which will result in a capital loss for the applicant.

5. Conditions and assumptions

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

- a) The applicant holds the sale shares on capital account.
- b) The Foreign Company does not conduct any business in South Africa through a permanent establishment in South Africa.
- c) The effective rate of tax (taxes on income payable to all spheres of government) applicable in the country of residence of the Foreign Company is at least 18.225%.
- d) At all material times, the Foreign Company is the beneficial owner of the dividends in respect of the sale shares and complies with the evidentiary requirements under section 64G(3) to qualify for the reduced rate under the DTA referred to below.

6. Ruling

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

- a) Subject to the application of paragraphs 38 and 39, the applicant will be required to include any gains or losses realised on the transfer of the sale shares in the calculation of its net gains or losses for the relevant fiscal year.

- b) Under paragraph (d) of the first proviso to section 9D(2A), the exemption under section 10(1)(k) of future dividend income received by the Foreign Company in respect of the sale shares from SA Holdco and SA Opco will be limited and the dividend income must be attributed to the applicant in accordance with section 9D(2), subject to the application of the comparable tax exemption in the second proviso to section 9D(2A).
- c) On the basis that the Foreign Company will own at least 10% of the capital of SA Holdco and SA Opco, the reduced dividends tax rate of 5% will apply in respect of dividends received by the Foreign Company in respect of the sale shares (Article II of the Protocol to the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion between South Africa and the United Kingdom).
- d) Under section 2 read with section 6(1) of the STT Act, STT will be payable upon the transfer of the sale shares on the taxable amount.
- e) SA Holdco, as the issuer of the ordinary shares, is liable for the STT on the transfer of these shares to the Foreign Company under section 6(2) of the STT Act but may recover that amount from the Foreign Company under section 7(2).
- f) SA Opco, as the issuer of the preference shares, is liable for the STT on the transfer of these preference shares to the Foreign Company under section 6(2) of the STT Act but may recover that amount from the Foreign Company under section 7(2).

7. Period for which this ruling is valid

This binding private ruling is valid in respect of the year of assessment ending 28 February 2023.