

BINDING PRIVATE RULING: BPR 383

DATE: 27 October 2022

ACT : INCOME TAX ACT 58 OF 1962 (the Act)
SECTION : SECTIONS 9D(2A) AND 9D(9)
SUBJECT : TRANSFER OF PROFITS FOR GROUP TAX PURPOSES BETWEEN CONTROLLED FOREIGN COMPANIES

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 profits and assumption of losses amongst controlled foreign companies under the German fiscal unity regime.

2. Relevant tax laws

In this ruling references to sections are to sections of the Act applicable as at 3 October 2022. 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); and
- section 9D(9).

3. Parties to the proposed transaction

The applicant:	A resident company
Company A:	A resident company that is a wholly owned subsidiary of the applicant
Company B:	A controlled foreign company (CFC) and a resident of Germany that is a wholly owned subsidiary of the applicant
The subsidiaries:	Resident companies of Germany

4. Description of the proposed transaction

The applicant holds all the shares of Company A and all the issued ordinary shares of Company B. Company B is the parent company of the subsidiaries. The applicant will increase its interest in all the subsidiaries in excess of 70 per cent, by acquiring shares held by minority shareholders.

Company B and the subsidiaries each have a foreign business establishment, as defined in section 9D(1), located in Germany. The receipts and accruals of each of these companies are either attributable to a foreign business establishment and those amounts are not taken into account for purposes of determining their net income in terms of section 9D(9)(b), or are attributable to interest or rentals paid to the company by one of the other companies that form part of the same group of companies and not attributable to the net income in terms of section 9D(9)(fA)(i). As a result, the applicant does not impute any foreign amounts as contemplated in section 9D(2).

The proposed transaction entails that Company B, as the parent company of the subsidiaries, will elect to establish “fiscal unity” for income tax and trade tax purposes in Germany.

As a requirement for the establishment of a “fiscal unity”, Company B and each of the subsidiaries will conclude a Profit and Loss Pooling Agreement (PLPA) for a period of at least five years.

The relevant provisions of the PLPA will be as follows:

- a) The controlled company (a subsidiary) will agree to transfer its profit to Company B (the controlling company), except for certain transfers to the reserves as the controlling company may agree to. The amounts to be transferred in this manner are herein referred to as “allocated income”. The controlling company has a claim for the transfer of profits against the controlled company which arises on the last day of the financial year of the controlled company.
- b) The controlling company will assume any operating losses suffered by the controlled company. The obligation of the controlling company to assume such a loss is referred to herein as an “assumed loss”. The controlled company’s claim against the controlling company also arises on the last day of the controlled company’s financial year.

5. Conditions and assumptions

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

- a) All the subsidiaries and Company B are (or will be) CFCs as defined in section 9D(1) in relation to the applicant; and
- b) Company B and the subsidiaries will form part of the same “group of companies” as defined in section 1(1).

6. Ruling

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

- a) The allocated income that accrues to Company B must not be attributed to the net income of Company B in terms of section 9D(9)(b);
- b) The allocated income that the subsidiaries are liable to pay to Company B should not be deducted in determining the net income of the subsidiaries as contemplated in section 9D(2A);
- c) An assumed loss that Company B becomes liable to pay to a subsidiary should not be deducted in determining the net income of Company B as contemplated in section 9D(2A); and
- d) An assumed loss that accrues to a subsidiary must not be attributed to the net income of the subsidiary in terms of section 9D(9)(b).

7. Period for which this ruling is valid

This binding private ruling is valid for a period of five years from 3 October 2022.