BINDING PRIVATE RULING: BPR 234

DATE: 23 May 2016

ACT : INCOME TAX ACT NO. 58 OF 1962 (the Act)
SECURITIES TRANSFER TAX ACT NO. 25 OF 2007 (the STT Act)

SECTION : SECTIONS 1(1) – DEFINITION OF "CONTRIBUTED TAX CAPITAL", 42 AND 46 OF THE ACT AND PARAGRAPHS 11(2)(*b*), 39 AND 75 OF THE EIGHTH SCHEDULE TO THE ACT
SECTIONS 2 AND 8(1)(*a*) OF THE STT ACT

SUBJECT : ASSET-FOR-SHARE AND UNBUNDLING TRANSACTIONS NOT REGULATED BY SECTIONS 42 AND 46

1. Summary

This ruling determines the income tax and securities transfer tax (STT) consequences of an asset-for-share exchange and an unbundling of shares that will not qualify for relief under sections 42 and 46 respectively, of the Act.

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 No. 28 of 2011.

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 3 February 2016. 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 following provisions of –

- the Act –
  - section 1(1) – definition of "contributed tax capital";
  - section 42(1) – definition of "asset-for-share transaction";
  - section 46(1) – definition of "unbundling transaction"; and
  - paragraphs 11(2)(*b*), 39 and 75 of the Eighth Schedule.
- the STT Act –
  - section 2; and
  - section 8(1)(*a*).

3. Parties to the proposed transaction

The Applicant:	A listed company incorporated in and a resident of South Africa
First Co-Applicant:	A foreign unlisted company
Second Co-Applicant:	An unlisted company incorporated in and a resident of South Africa

4. Description of the proposed transaction

The Applicant holds 100% of the equity shares in the First Co-Applicant and the Second Co-Applicant. The latter being a dormant company.

The Applicant initially subscribed for shares in the First Co-Applicant constituting 100% of the initial share capital prior to 2013 (initial shares). During the 2013 to 2015 years of assessment the First Co-Applicant issued the Applicant with further shares (additional shares).

The parties propose to implement the following transactions:

a) The Applicant will dispose of its entire interest in the First Co-Applicant (the sale shares) to the Second Co-Applicant in return for the issue of shares in the Second Co-Applicant (the consideration shares).

   (i) The requirements of an "asset-for-share transaction" as defined in paragraph (*a*) of that term in section 42(1) are not met, as the market value of the sale shares disposed of will be less than the base cost of the sale shares on the date of the disposal. The disposal will result in a capital loss.

   (ii) The Applicant will hold 100% of the shares in the Second Co-Applicant indirectly, instead of directly.

b) Subsequent to the asset-for-share transaction, the Applicant proposes to enter into a transaction in terms of which the Applicant will unbundle approximately 20% of its total shareholding (unbundling shares) in the Second Co-Applicant to its shareholders.

   (i) The unbundling transaction will not be effected under section 46 of the Act, as the Applicant will distribute approximately 20% only of its total equity shares in the Second Co-Applicant to its shareholders. (Paragraph (*a*)(i) of the definition of "unbundling transaction" in section 46(1) requires that all the equity shares must be distributed to the shareholders).

   (ii) The transaction will be treated as a distribution of shares to its shareholders.

   (iii) The Applicant will elect that the distribution of the shares in the Second Co-Applicant will constitute a return of capital or a reduction of contributed tax capital in respect of the shares held by the shareholders in the Applicant.

   (iv) The unbundling transaction will be effected in accordance with the JSE's listings requirements and by applying the prescribed "standard rounding convention" method.

(v) As a result of the unbundling the Applicant's shareholding in the Second Co-Applicant will be diluted to approximately 80%.

(vi) The shares in the Second Co-Applicant will thereafter be listed on the JSE.

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:

a) The initial shares subscribed for in the First Co-Applicant by the Applicant and the additional shares issued to the Applicant as consideration for the recapitalisation of the First Co-Applicant will be regarded as capital assets in the hands of the Applicant.

b) Any capital loss on the disposal of the sale shares by the Applicant to the Second Co-Applicant will be ring-fenced under paragraph 39 of the Eighth Schedule to the Act.

c) The distribution of the equity shares in the Second Co-Applicant by the Applicant will constitute a reduction of the Applicant's contributed tax capital and not a dividend *in specie*, hence it will constitute a "return of capital" as defined in section 1(1) of the Act.

d) Paragraph 75 of the Eighth Schedule to the Act will apply to the distribution of the unbundling shares.

e) The STT Act does not apply to the transfer of the sale shares to the Second Co-Applicant, as the sale shares constitute shares in a foreign unlisted company.

f) Section 8(1)(*a*) of the STT Act will not apply to exempt the transfer of the unbundled shares to the Applicant's shareholders from STT.

g) There is no disposal by the Second Co-Applicant in respect of the issue of the consideration shares as contemplated in paragraph 11(2)(*b*) of the Eighth Schedule to the Act.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of 3 years from 3 February 2016

Legal and Policy Division: Advance Tax Rulings
SOUTH AFRICAN REVENUE SERVICE