

BINDING PRIVATE RULING: BPR 231

DATE: 10 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 42 AND 44 OF THE ACT AND PARAGRAPH 11(2)(b)(i) OF
THE EIGHTH SCHEDULE TO THE ACT
SECTION 8(1)(a)(ii) OF THE STT ACT**
**SUBJECT : CORPORATE RESTRUCTURING BY WAY OF ASSET-FOR-SHARE
AND AMALGAMATION TRANSACTIONS**

1. Summary

This ruling determines the income tax and securities transfer tax consequences resulting from a corporate restructuring by way of an asset-for-share and three amalgamation transactions.

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 31 March 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 provisions of –

- the Act –
 - section 42;
 - section 44; and
 - paragraph 11(2)(b)(i).
- the STT Act –
 - section 8(1)(a)(ii).

3. Parties to the proposed transaction

Holdco: A company incorporated outside of South Africa, and not a resident, the controlling company of a group of companies (the group) which includes the Applicant and some of the Co-Applicants

The Applicant: A company incorporated in and a resident of South Africa that is held 74% by Foreignco and 26% by black economic empowerment (BEE) shareholders

The Co-Applicants:

Foreignco: A company incorporated outside of South Africa, and not a resident, that is a wholly-owned subsidiary of Holdco

Mineco1: A company incorporated in and a resident of South Africa that is a wholly-owned subsidiary of Holdco

Mineco2: A company incorporated in and a resident of South Africa that is a wholly-owned subsidiary of Holdco

Beeco1: A company incorporated in and a resident of South Africa that is held 51% by BEE shareholders and 49% by Holdco

Beeco2: A company incorporated in and a resident of South Africa that is a wholly-owned subsidiary of Beeco1

Beeco3: A company incorporated in and a resident of South Africa that is held 87% by BEE shareholders and 13% by Mineco2

4. Description of the proposed transaction

The Applicant and the relevant subsidiary Co-Applicants intend to rationalise its South African group structure so as to simplify the structure by eliminating –

- a) unnecessary companies and structures; and
- b) complex BEE structures.

In two unincorporated joint ventures (UJVs) the BEE companies and the Holdco subsidiaries participate as follows –

- i) Mineco1 and Beeco2 jointly participate in the mining operation of Mine 1 in the ratio of 74:26; and
- ii) Mineco2 and Beeco3 jointly participate in the mining operation of Mine 2 in the ratio of 70:30. Mineco2 also holds 13,33% of the equity in Beeco3. It therefore effectively holds 73,99% (70% directly and 3,99% indirectly through Beeco3) in the UJV.

The group proposes to enter into the following transactions in order to eliminate these UJVs and unnecessary companies in its structure:

4.1 Transaction 1: Amalgamation transaction between the Applicant and Foreignco

The group wishes to eliminate the intermediate holding of the Applicant's shares by Foreignco as follows:

- a) Foreignco will dispose of its shares in the Applicant for a new issue of shares in the Applicant in terms of an "amalgamation transaction" as defined in section 44(1) of the Act.

- b) The new shares in the Applicant will be distributed by Foreignco to its sole shareholder, Holdco, in terms of the relevant amalgamation agreement.
- c) Foreignco will then be liquidated in terms of that amalgamation agreement.

4.2 Transaction 2: Amalgamation transaction between Beeco1 and Beeco2

- a) Beeco1 will dispose of its shares in Beeco2 for a new issue of shares in Beeco2 in terms of an “amalgamation transaction” as defined in section 44(1) of the Act.
- b) The new shares in Beeco2 will be distributed by Beeco1 to its shareholders in terms of the relevant amalgamation agreement.
- c) Beeco1 will then be liquidated in terms of that amalgamation agreement.

4.3 Transaction 3: Asset-for-share transaction between Beeco2 and Mineco1

- a) Beeco2 will dispose of its 26% stake in Mine 1 UJV to Mineco1 in exchange for (what will be after the share issue) 26% of the equity shares in Mineco1 in terms of an “asset-for-share transaction” as defined in section 42(1) of the Act.
- b) The UJV will consequently dissolve.

4.4 Transaction 4: Amalgamation between Beeco3 and Mineco2

- a) Beeco3 will dispose of its 30% stake in Mine 2 UJV to Mineco2 in exchange for (what will be after the share issue) 28.85% of the equity shares in Mineco2 in terms of an “amalgamation transaction” as defined in section 44(1) of the Act.
- b) Beeco3 will in terms of the relevant amalgamation agreement distribute the shares received in Mineco2 to its shareholders.
- c) Beeco3 will then be liquidated in terms of that amalgamation agreement.

The result of the above transactions is that Mineco1 and Mineco2 will exclusively operate the mining operations of Mine 1 and Mine 2 respectively, with Beeco2 and the previous BEE shareholders of Beeco3 respectively holding their BEE stake by way of shares in those companies.

5. Conditions and assumptions

This binding private ruling is made subject to the additional condition and assumption that the disposal of shares in the Applicant by Foreignco referred to in transaction 1 and the disposal of shares in Beeco2 by Beeco1 referred to in transaction 2 will be done in two tranches as provided for in the relevant amalgamation agreements.

6. Ruling

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

6.1 Transaction 1: Amalgamation transaction between the Applicant and Foreignco

The transfer by Foreignco of its shares to the Applicant (being its only remaining assets) under the amalgamation agreement between the two parties will constitute an “amalgamation transaction” as defined in paragraph (b) of the definition of that term in section 44(1) of the Act. Consequently:

- a) Foreignco will be deemed to have disposed of its shares in the Applicant for an amount equal to their base cost, as contemplated in section 44(2)(a)(i). The shares in the Applicant will be cancelled upon acquisition by the Applicant.
- b) No dividends tax will be payable on the distribution by Foreignco to its shareholder of its newly-acquired shares in the Applicant.
- c) No securities transfer tax (STT) will be payable by virtue of section 8(1)(a)(ii) of the STT Act on the transfer of the Applicant's shares from Foreignco to the Applicant or on the distribution by Foreignco of its newly-acquired shares in the Applicant to its shareholder.

6.2 Transaction 2: Amalgamation transaction between Beeco1 and Beeco2

The transfer of the assets by Beeco1 to Beeco2 under the amalgamation agreement between these two parties will constitute an “amalgamation transaction” as defined in paragraph (a) of the definition of that term in section 44(1) of the Act. Consequently:

- a) Beeco1 will be deemed to have disposed of its shares in Beeco2 for an amount equal to their base cost, as contemplated in section 44(2)(a)(i) of the Act, therefore, no capital gain or loss will arise on the disposal of Beeco2's shares by Beeco1. The shares in Beeco2 will be cancelled upon acquisition by Beeco2.
- b) Beeco1 must, when determining its taxable income, disregard any capital gain or loss on the disposal of its newly-acquired shares in Beeco2 when it distributes these shares to its shareholders, as contemplated in section 44(8) of the Act.
- c) No dividends tax will be payable on the distribution by Beeco1 to its shareholders of its newly-acquired shares in Beeco2 as the distribution is deemed not to be a dividend under section 44(6)(c) of the Act.
- d) No STT will be payable by virtue of section 8(1)(a)(ii) of the STT Act on the transfer of Beeco2 shares from Beeco1 to Beeco2 or on the distribution by Beeco1 of its newly-acquired shares in Beeco2 to its shareholders.

6.3 Transaction 3: Asset-for-share transaction between Beeco2 and Mineco1

The proposed transaction between Beeco2 and Mineco1 will be an “asset-for-share transaction” as defined in paragraph (a) of the definition of that term in section 42(1) of the Act. Therefore section 42 of the Act will be applicable to the transaction. Consequently:

- a) Beeco2 will not –
 - i) recover or recoup any allowances (including the allowance under section 15(a) of the Act read with section 36 of the Act) previously deducted by it in respect of the applicable allowance assets as contemplated in section 42(3)(a)(i) of the Act, nor
 - ii) realise a taxable capital gain as a result of the transfer of any capital assets as contemplated in section 42(2)(a)(i) of the Act.
- b) Mineco1 will be entitled to the same capital allowances in respect of the applicable allowance assets to which Beeco2 was previously entitled as contemplated in section 42(3)(a)(iii) of the Act.
- c) Trading stock to be disposed of by Beeco2 will be deemed to be disposed of at the cost determined under section 22(1) or (2) of the Act read with section 11(a) of the Act. Mineco1 will be deemed to acquire the trading stock at the said cost. Beeco2 and Mineco1 will be deemed to be one and the same person as envisaged in section 42(2)(b) of the Act.

6.4 Transaction 4: Amalgamation between Beeco3 and Mineco2

The transfer by Beeco3 of all its assets to Mineco2 under the amalgamation agreement will constitute an “amalgamation transaction” as defined in paragraph (a) of the definition of that term in section 44(1) of the Act. Consequently:

- a) Beeco3 will not –
 - i) recover or recoup any allowances (including the allowance under section 15(a) of the Act read with section 36 of the Act) previously deducted by it in respect of the applicable allowance assets as contemplated in section 44(3)(a)(i) of the Act, nor
 - ii) realise a capital gain as a result of the transfer of any capital assets as contemplated in section 44(2)(a)(i) of the Act.
- b) Mineco2 will be entitled to the same capital allowances in respect of the applicable allowance assets to which Beeco3 was previously entitled as contemplated in section 44(3)(a)(ii) of the Act.
- c) Trading stock to be disposed of by Beeco3 will be deemed to be disposed of at the cost determined under section 22(1) or (2) of the Act read with section 11(a) of the Act. Mineco2 will be deemed to acquire the trading stock at the said cost as contemplated in section 44(2)(b) of the Act.

- d) When Beeco3 distributes its newly-acquired shares in Mineco2 to its shareholders, Beeco3 must disregard any capital gain or loss on the disposal of the shares in Mineco2, in determining its taxable income as contemplated in section 44(8) of the Act.
- e) No dividends tax will be payable on the distribution by Beeco3 to its shareholders of its newly-acquired shares in Mineco2, as the distribution is deemed not to be a dividend under section 44(6)(c) of the Act.
- f) Mineco2 and Beeco3 will not be prejudiced by the fact that Mineco2 is a shareholder of the amalgamated company, Beeco3, and therefore receives shares in itself, which will be cancelled when Beeco3 distributes the resultant company's shares to its shareholders pursuant to the amalgamation. Section 44 of the Act will therefore still apply.
- g) Pursuant to the cancellation of the shares in Mineco2, there will be no disposal of an asset as provided for in paragraph 11(2)(b)(i) of the Eighth Schedule to the Act when Mineco2 receives shares in itself which are then cancelled. Consequently, no capital loss will arise on that cancellation.
- h) No STT will be payable on the transfer of the shares from Beeco3 to Mineco2 by virtue of section 8(1)(a)(ii) of the STT Act.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of 3 years from 31 March 2016.

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