

BINDING PRIVATE RULING: BPR 102

DATE: 04 May 2011

ACT : INCOME TAX ACT, NO. 58 OF 1962 (the Act)
SECTION : SECTIONS 1, DEFINITION OF “PERMANENT ESTABLISHMENT”, 10(1)(h) AND PARAGRAPH 2(1) OF THE EIGHTH SCHEDULE TO THE ACT
SUBJECT : REGISTRATION OF AN EXTERNAL COMPANY AND IDENTIFYING A PERMANENT ESTABLISHMENT

1. Summary

This ruling deals with the question as to whether the registration of an external company in South Africa will create a permanent establishment in South Africa for that external company.

2. Relevant tax laws

This is a binding private ruling issued in accordance with section 76Q of the Act.

In this ruling references to sections and paragraphs are to sections of the Act and paragraphs of the Eighth Schedule to the Act applicable as at 1 June 2010 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act.

This ruling has been requested under the provisions of –

- section 1, definition of “permanent establishment”;
- section 10(1)(h); and
- paragraph 2(1) of the Eighth Schedule.

3. Parties to the proposed transaction

The Applicant: A private company which is incorporated in and a resident of a specified foreign country

The External Company: A branch of the Applicant, which will be registered as an external company in South Africa

Foreign Investors: Investors who are resident in the specified foreign country (in which the Applicant is a resident) and investors of other foreign countries

4. Description of the proposed transaction

The Applicant intends to register an External Company in South Africa in accordance with section 322 of the Companies Act No. 61 of 1973. The registration will result in the External Company being a resident of South Africa for exchange control purposes.

The external company will advance subordinated interest bearing loans to companies incorporated in South African and will subscribe for preference shares in these companies.

Financial statements for the External Company will be prepared. In the balance sheet of the Applicant, its ownership of South African assets (loans and preference shares) as well as profits (interest, dividends and capital gains) will be reflected. The financial statements will be necessary to comply with the authorised dealer requirements of the South African Reserve Bank to facilitate cash repatriation.

Participation in the funding of the Applicant will be reserved for foreign investors only. South African investors will be precluded from participating in the funding of the Applicant, as such participation would constitute a “loop structure” for South African Exchange Control purposes.

The Applicant’s affairs will be managed by a board of directors (the board of the Applicant) in accordance with predefined investment objectives and strategies, as to be incorporated into its investment guidelines. The Applicant will hold all board meetings in the specified foreign country (in which the Applicant is a resident), to carry out its activities.

In addition, the board of the Applicant will appoint another company that is incorporated and resident in the specified foreign country in which the Applicant is a resident (the Investment Advisor) to provide the External Company with investment advice and recommendations.

The Investment Advisor will conduct research on targets and industries in Africa, which includes South Africa.

The Investment Advisor will do research and obtain information in respect of South Africa *via* an investment advisory arrangement with a company that is incorporated and resident in South Africa.

Information obtained in respect of targets in Africa will enable the Investment Committee, which will be a subcommittee of the board of the Investment Advisor, to evaluate and make recommendations regarding investment opportunities to the directors of the Applicant for its approval in the specified foreign country in which the Applicant is a resident and for the drawdown of funds.

This ruling has been applied for on the basis that the Applicant will not be resident in South Africa, as its place of effective management will be located in the specified foreign country in which the Applicant is a resident.

5. Conditions and assumptions

This ruling is made subject to the conditions and assumptions that –

- the Applicant's place of effective management will be located in the specified foreign country in which the Applicant is a resident;
- the Applicant will not have any employees or conduct any business activities in South Africa, other than the maintenance of its External Company status for exchange control purposes; and
- the Applicant will not have a dependent agent operating on its behalf in South Africa.

6. Ruling

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

- The registration of the External Company will not create a permanent establishment for the Applicant in South Africa.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of five (5) years as from June 2010.

Issued by:

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