BINDING PRIVATE RULING: BPR 308

DATE: 8 August 2018

ACT	**:**	**INCOME TAX ACT 58 OF 1962 (the Act)**
SECTION	**:**	**SECTIONS 1(1) – DEFINITION OF "GROSS INCOME", 37 AND PARAGRAPH 35 OF THE EIGHTH SCHEDULE**
SUBJECT	**:**	**ASSUMPTION OF CONTINGENT LIABILITIES AND THE CESSION OF A RIGHT OF RECOVERY**

Preamble

This binding private ruling is published by consent of the applicant(s) to which it has been issued. It is binding as 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 resulting from the sale of a mine in exchange for the assumption of liabilities by the purchaser, and the tax implications arising from the cession of a right of recovery.

2. Relevant tax laws

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 2 July 2018. 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 1(1) – definition of "gross income"; and the inclusion in paragraph (*j*);
- section 37; and
- paragraph 35.

3. Parties to the proposed transaction

The applicant:	A resident company
Co-applicant 1:	A resident listed company
Co-applicant 2:	A resident company that is a wholly-owned subsidiary of co-applicant 1

4. Description of the proposed transaction

The applicant is the owner of and has been conducting mining operations at a mine which is one of several owned by the applicant. The applicant and co-applicant 1 had some years ago entered into an arrangement in terms of which the mine's product was sold exclusively to co-applicant 1 (the captive mine arrangement) who undertook in exchange to, amongst others, refund the bulk of the applicant's expenditure incurred in respect of any rehabilitation the applicant was liable to undertake in respect of the mine. The terms of the supply arrangement were subsequently renegotiated to enable the applicant to supply the commodity concerned also to persons other than co-applicant 1 but the undertaking to refund the rehabilitation expenditure remained in force.

Due to unfavourable circumstances, the applicant's board resolved to close the mine. Mining activities ceased, but existing stockpiles continued to be treated and the product stockpiles continued to be dispatched until the end of August 2016.

During April 2016, the applicant was approached by the co-applicants to consider the transfer of the mine. Co-applicant 2 intends to acquire the mine in order to attempt to revive it but also to take full management control of the processes and costs related to the rehabilitation liability at the mine.

It was calculated in terms of the captive mine arrangement that co-applicant 1 is accountable for 97% of the mine's current rehabilitation liability, while the applicant is responsible for the execution and management of all of the rehabilitation activities in accordance with the approved rehabilitation plan. The transfer would simplify matters by making the co-applicants solely responsible for the closure and rehabilitation of the mine.

The proposed transfer will take the form of a sale of assets and liabilities. Co-applicant 2 will purchase all of the assets pertaining to the mine at a nominal price of one rand, and assume all of the liabilities pertaining to the mine, including the environmental rehabilitation obligations, in one indivisible transaction (the purchase and sale agreement).

Co-applicant 2 will acquire by way of cession from the applicant, the right of recovery against co-applicant 1 that it had in terms of the supply agreement. Co-applicant 2 will be entitled to claim payment from co-applicant 1 upon the requisite payment of the respective rehabilitation and closure costs by co-applicant 2.

The contingent liabilities assumed by co-applicant 2 in terms of the purchase and sale agreement (that constitute the embedded contingent liabilities for the purpose of this binding private ruling) will be –

- the environmental liabilities;
- the rehabilitation obligation;
- all statutory liability (including any historic liability) for the rehabilitation and closure of the mine, including the social closure obligations;
- all of the other obligations in terms of the mining rights, whether by virtue of the terms and conditions attaching to the mining rights, the Mineral and Petroleum Resources Development Act 28 of 2002, the regulations promulgated thereunder or any other applicable law; and

- the applicant's liabilities to the employees which arose on or after 1 October 2015.

For the avoidance of doubt, the liabilities to be assumed by co-applicant 2 will specifically exclude taxes, inter-company and treasury loans payable, deferred tax liabilities and trade payables or creditors of the applicant relating to so-called interim period costs already paid by co-applicant 2.

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 market value of the contingent liabilities comprising –

   - the environmental liabilities;
   - the rehabilitation obligation;
   - all statutory liability (including any historic liability) for the rehabilitation and closure of the mine, including the social closure obligations;
   - all of the other obligations in terms of the mining rights, whether by virtue of the terms and conditions of the mining rights themselves, the Mineral and Petroleum Resources Development Act, the regulations promulgated thereunder or any other applicable law; and
   - the applicant's liabilities to the employees that arose on or after 1 October 2015,

   assumed by co-applicant 2 in terms of the purchase and sale agreement, are not required to be included in the applicant's consideration for purposes of –

   - the definition of "gross income" in section 1(1);
   - the inclusion under paragraph (*j*) of that definition;
   - section 37; or
   - paragraph 35.

b) No amount will be received by or accrue to the applicant upon the rehabilitation right of recovery becoming unenforceable by the applicant.

c) No amount will be received by or accrue to the applicant as a result of the applicant ceding the right of recovery to co-applicant 2, for purposes of the definition of "gross income" or the Eighth Schedule to the Act.

d) The cession of the right of recovery will not result in a capital gain or loss for the applicant as no expenditure will be incurred in relation to the right of recovery and no consideration will be received in respect of the cession.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of three years from 2 July 2018.

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