

SOUTH AFRICAN REVENUE SERVICE

BINDING PRIVATE RULING: BPR 049

DATE: 16 October 2009

ACT : INCOME TAX ACT, NO. 58 OF 1962 (the Act)
SECTION : SECTION 1 AND PARAGRAPH 2 OF THE EIGHTH SCHEDULE TO THE ACT
SUBJECT : NATURE OF PROCEEDS RECEIVED FOR THE LEASE OF PROPERTY IN TERMS OF A 99 YEAR LEASE

1. Summary

This ruling deals with a 99 year lease granted in respect of property that is in the market for sale and whether the granting of the lease constitutes a 'scheme of profit making', the proceeds of which will be taxable in the hands of the participants.

2. Relevant tax laws

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

In this ruling legislative references to sections and paragraphs are to sections of the Act and paragraphs of the Eighth Schedule to the Act applicable as at 31 July 2007 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, the definition of "gross income": and
- paragraph 2 of the Eighth Schedule.

3. Parties to the transaction

The Applicants: The trustees of four family trusts

Newco: A special purpose resident company to be formed to facilitate the proposed transaction

4. Description of the proposed transaction

The Applicants are co-owners of three properties situated in Botswana. These properties were acquired by way of inheritance some years ago. The

Applicants were appointed to administer the properties which constitute capital assets of the Applicants in their own right. It is well documented that it has been the Applicants' intention to dispose of the properties for the past nine years by disposing the right of use. After various unsuccessful attempts to sell the properties, the Applicants were advised by property agents specialising in wildlife properties that the most likely method of selling the properties would be to sell shares in the properties as it would make the properties more marketable. The owners of two adjoining properties indicated that they would like to be party to such a transaction as all parties were in agreement that the consolidated properties would greatly improve the saleability of shares in the properties.

The proposed transaction would then be as follows:

- The Applicants and the neighbouring land owners will form Newco and subscribe for all the shares in Newco.
- The Applicants and the neighbouring land owners will grant Newco 99 year leases (renewable for another 99 years at the option of Newco) in respect of the properties.
- The shares in Newco to be received by the Applicants and the neighbouring land owners will constitute the payment by Newco for the 99 year leases in respect of the five properties. In other words, the initial shareholders in Newco will effectively be capitalising Newco with the value of these leases.
- The shares in Newco will confer certain rights of use of the properties and of the facilities on the properties. This will be regulated in a Shareholder and Use agreement to be drawn up including Rules of Use.

5. Conditions and assumptions

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

- apart from certain loans, the properties are the only assets of the Applicants;
- the Applicants are not in the business of hiring or letting immovable properties;
- the Applicants have tried to dispose of the right of use of the properties for the past nine years;
- the Applicants will obtain a single payment, in the form of the shares to be subscribed for in Newco, in respect of the granting of the 99 year leases rather than recurring rental payments;
- the Applicants will not be liable for the cost of running or maintaining the properties in any way except to the extent that they do not dispose of shares in Newco;

- the Applicants will have no control over who is permitted to occupy or use the properties; and
- the renewability of the lease for another 99 years will be at the option of the lessee.

6. Ruling

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

- The proceeds, in the form of the shares to be subscribed for in Newco, to be received by the Applicants in terms of the 99 year lease to Newco will be of a capital nature and will accordingly be subject to capital gains tax in the hands of the Applicants. Specifically, the leasing of property or the right of use thereof will be regarded as a part-disposal of an asset as contemplated in paragraph 33 of the Eighth Schedule.

7. Period for which this ruling is valid

This binding private ruling is valid as from the date this ruling is issued until such time that the Applicants have disposed of their shares in Newco or for a period of three (3) years as from 3 May 2007, whichever is the earliest.

Issued by:

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