BINDING PRIVATE RULING: BPR 148

DATE : 19 June 2013

ACT	**:**	**INCOME TAX ACT NO. 58 OF 1962 (the Act)**
SECTION	**:**	**SECTION 64G(3)*(b)*(i), READ WITH ARTICLES 10(2) AND 10(4) OF THE CONVENTION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF JAPAN FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME (SOUTH AFRICA/JAPAN DTA)**
SUBJECT	**:**	**DIVIDENDS TAX RATE – PERMANENT ESTABLISHMENT IN SOUTH AFRICA**

1. Summary

This ruling deals with the appropriate dividends tax rate applicable to a permanent establishment in South Africa of a company which is not a resident of South Africa having regard to the application of Article 10(2) and the non-application of Article 10(4) of the South Africa/Japan DTA.

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 Articles are to sections of the Act and Articles of the South Africa/Japan DTA applicable as at 7 March 2013 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the Act or the South Africa/Japan DTA, as the case may be.

This is a ruling on the interpretation and application of the provisions of –

- section 64G(3)*(b)*(i) of the Act; and
- Articles 10(2) and 10(4) of the South Africa/Japan DTA, and in particular the phrase “effectively connected with such permanent establishment” used in Article 10(4).

3. Parties to the proposed transaction

The Applicant:	A corporation established in and a resident of Japan
The Branch:	A South African branch of the Applicant
The Head Office:	The head office of the Applicant, located in Japan
The Investee:	A private company incorporated in and a resident of South Africa, in which the Applicant holds 49% of the equity shares

4. Description of the proposed transaction

The Applicant forms part of a group of companies headquartered in Japan. The group is an international conglomerate operating across continents through businesses that are a combination of incorporated subsidiaries and branches.

The Applicant conducts business in South Africa through the Branch, which constitutes a permanent establishment for purposes of the South Africa/Japan DTA. The Branch acts primarily as agent between the Applicant and potential buyers/sellers of commodities, including metals, both locally and internationally. In this respect, the bulk of the Branch's income is commission earned.

In relation to its business as buying agent of metals on behalf of the Applicant, the Branch's responsibilities include:

- transmission of proposals;
- delivery of contract sheets;
- delivery of transportation documents;
- communication with carriers in respect to a vessel's schedule, cargo readiness, loading and unloading;
- assistance in relation to a principal's travelling;
- providing notice of claims, if any, and suggesting possible resolutions thereof;
- handling all related communication; and
- providing other services necessary or appropriate to be rendered by the Branch as buying agent on behalf of the principal.

In consideration for the rendering of these services, the Branch earns commission, calculated at a percentage of the free on board value of the metals sourced.

The Investee holds a significant stake in a major supplier of metals to the Applicant. The Applicant, in turn, holds 49% of the equity in the Investee as follows:

- 47% is held by the Head Office; and
- 2% is held by the Branch.

The Branch enjoys the right to dividends and capital gains in relation to the 2% investment in the Investee. Funding expenditure in relation to the acquisition of the 2% investment is allocated to the Branch.

In terms of its shareholding in the Investee, dividends will be declared to the Branch from time to time, attracting dividends tax.

5. Conditions and assumptions

This ruling is subject to the following additional conditions and assumptions:

- Both the declaration and the written undertaking, required in terms of section 64G(3), have been submitted to the Investee prior to the date specified by the Investee; or, if no such date has been specified, by the date of payment of the first dividend after the issue of this ruling.

- The shares in the Investee are held as a passive investment by the Applicant.

6. Ruling

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

- Based on the facts, the 2% share investment held in the Investee via the Branch is not effectively connected to the Branch and Article 10(4) of the South Africa/Japan DTA is therefore not applicable.
- In terms of Article 10(2) of the South Africa/Japan DTA, the appropriate rate of dividends tax to be withheld by the Investee on dividends payable to the Applicant through the Branch, will not exceed 5% of the gross amount of the dividends.

7. Period for which this ruling is valid

This binding private ruling is valid in relation to dividends payable to the Branch whilst the Applicant’s current 49% shareholding in the Investee (2% via the Branch and 47% via the Head Office) continues without change.

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