

SOUTH AFRICAN REVENUE SERVICE

BINDING CLASS RULING: BCR 009

DATE: 16 October 2009

ACT : INCOME TAX ACT, NO. 58 OF 1962 (the Act)
**SECTION : SECTION 1, DEFINITION OF “DIVIDEND” AND “FOREIGN DIVIDEND”
AND SECTION 10(1)(k)(ii)(dd)**
SUBJECT : FOREIGN SHARE BUY-BACKS

1. Summary

This ruling deals with whether a controlled foreign company CFC distributes a “dividend” as defined in section 1 of the Act, when undertaking a share buy-back without cancelling the shares repurchased but continuing to hold them as treasury stock.

If it is held that it is a dividend, an attendant issue is whether the dividend qualifies for the foreign dividend participation exemption contained in section 10(1)(k)(ii)(dd).

2. Relevant tax laws

This is a binding class ruling issued in accordance with section 76R of the Act.

In this ruling legislative references to sections are to sections of the Act applicable as at 8 January 2009 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 “dividend” and “foreign dividend”; and
- section 10(1)(k)(ii)(dd).

3. Class

The class members to whom this ruling will apply are the indirect shareholders of two CFC’s. Each shareholder is a “resident” as defined in section 1.

4. Parties to the proposed transaction

The Applicant: A trust which is a “resident” as defined in section 1 and which is the indirect ultimate majority shareholder in CFC1

The Class Members: Indirect shareholders of CFC1 who are not natural persons and each shareholder is a “resident” as defined in section 1

CFC1:	A company incorporated in foreign country A and tax resident in foreign country B that holds 100% of the equity shares and voting rights in CFC2
CFC2:	A limited-liability partnership registered and tax resident in foreign country B that holds investments in HoldcoA and OpcoA
HoldcoA:	A group investment holding company registered and tax resident in foreign country C
OpcoA:	A listed company registered and tax resident in foreign country D

5. Description of the proposed transaction

Pursuant to an off-shore restructuring initiative embarked upon by an off-shore group aimed at eliminating economic inefficiencies, CFC2 will be eliminated from the group structure in relation to its investments in certain other group entities (which are not CFCs in relation to the class members). The intention is however not to eliminate CFC2 entirely from the group but rather for CFC2 to divest itself of its no longer core divisional interests and to retain its investment in another specific division of the group.

To this end, CFC2 will be divesting itself of its investments in HoldcoA and OpcoA and intends to buy back some of its shares held by CFC1 in a few tranches.

The buy-back is regulated by Swiss legal and accounting principles and CFC2 is entitled to reflect the shares purchased from CFC1 in its balance sheet at market value, that is, as treasury stock. CFC2 does not intend cancelling the shares bought back from CFC1 and will sell the shares so held to a newly incorporated subsidiary of CFC1 at market value shortly after the buy-back.

6. Conditions and assumptions

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

- CFC1 and CFC2 will remain CFC's in relation to the Applicant and Class Members subsequent to the proposed transaction;
- CFC2 will ensure the transfer of an amount equal to the market value of the shares bought back from CFC1 from free earnings to a non-distributable reserve;
- any non-distributable reserve created in terms of the Swiss legal requirements may not be distributed to shareholders and will not be a profit available for distributions in terms of the applicable Swiss legal and accounting provisions;
- the dividend to be distributed by CFC2 under each buy-back will be limited to the purchase price payable to CFC1 less the nominal value of the shares;
- the dividend distribution, which will be the amount in excess of the nominal value of the shares, to be undertaken by CFC2 under each buy-back will not be funded from share capital or share premium; and

- this ruling will only apply to share buy-backs relating to the disinvestment by CFC2 of its shareholding in HoldcoA and OpcoA.

7. Ruling

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

- The amount payable by CFC2 to CFC1 for the acquisition of its own shares will, with reference to paragraph (c) of the definition of “dividend” in section 1, constitute a dividend distributed by CFC2 to CFC1.
- The dividend distributed by CFC2 to CFC1 as a result of the proposed transaction will constitute an exempt foreign dividend as envisaged by section 10(1)(k)(ii)(*dd*) in the hands of the Applicant and the Class Members.

8. Period for which this ruling is valid

This binding class ruling, issued in March 2009, is valid for the years of assessment of the Applicant and Class Members when the net income of CFC1, inclusive of the exempt foreign dividends received from CFC2 pursuant to the buy-backs, will be included in the income of the Applicant and the Class Members under section 9D.

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