

BINDING PRIVATE RULING: BPR 126

DATE : 08 November 2012

ACT : **INCOME TAX ACT NO. 58 OF 1962 (the Act)**
VALUE-ADDED TAX ACT NO. 89 OF 1991 (the VAT Act)
SECURITIES TRANSFER TAX ACT NO. 25 OF 2007 (the STT Act)

SECTIONS : **SECTIONS 42 AND 46 OF THE ACT**
SECTION 8(25) OF THE VAT ACT
SECTION 8(1)(a) OF THE STT ACT

SUBJECT : **DISPOSAL OF A BUSINESS AND INVESTMENT SHARES, AS A RESULT OF RESTRUCTURING, AND THE DISTRIBUTION OF CERTAIN SHARES TO SHAREHOLDERS**

1. Summary

This ruling deals with the question as to whether –

- restructuring, which leads to the disposal of a business (as a going concern) and investment shares by a company to another company at book value, in exchange for shares in that other company (NEWCO), will comply with section 42 of the Act with the result that –
 - no capital gains tax will be payable in respect of the disposal of the assets;
 - no allowances or deductions will be recouped by the transferor as a result of the disposal;
 - the company and Newco will be deemed to be one and the same person under section 8(25) of the VAT Act in respect of the disposal of the going concern and accordingly, no value added tax will be due in respect of the supply of the above-mentioned going concern; and
 - the transfer of investment shares will be exempt from securities transfer tax under section 8(1)(a)(i) of the STT Act; and
- the distribution of Newco's shares by the company to its holding company will be an unbundling transaction under section 46(1) of the Act, with the result that –
 - the anti-avoidance provisions in section 42(5), (6) and (8) will not be applicable to the unbundling transaction;
 - no secondary tax on companies will be payable by the companies in respect of the distribution of the shares;

- no capital gains tax will be payable in respect of the disposal of the shares; and
- no securities transfer tax will be payable in respect of the transfer of Newco shares by the company to its holding company under section 8(1)(a)(iv) of the STT Act.

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 are to sections of the relevant Acts applicable as at 2 February 2011 and unless the context indicates otherwise, any word or expression in this ruling bears the meaning ascribed to it in the relevant Act.

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

- sections 42 and 46 of the Act;
- section 8(25) of the VAT Act; and
- section 8(1)(a) of the STT Act.

3. Parties to the proposed transaction

The Applicant: A wholly owned subsidiary of the Holding Company mentioned as Co-Applicant 1

Co-Applicant 1: The Holding Company of the Applicant

Co-Applicant 2: A private company in which the Applicant holds shares

4. Description of the proposed transaction

The Applicant and its Holding Company form a group of companies (the Group). The Applicant owns three businesses, (A, B and C) in South Africa. The Applicant intends to incorporate a company (Newco) as a wholly owned subsidiary of the Applicant and to move the business of C as a going concern (including all assets and liabilities of C) to Newco in exchange for additional shares in Newco.

The businesses of A and B are neighbouring operations and have the same operational methods and standards. The business of C is located a few hundred kilometres away from A and B. C adopts different operational methods and support standards from those tailored to A and B and its productivity is generally higher.

Given the particular requirements of C and the operation of the business, it is envisaged that it will be necessary to address the requirements of C separately from those of A and B. In particular, it is highlighted that –

- from an operational perspective, C will require a specific skill set and management aligned with the operational requirements of C;
- from a geographic perspective, C will require regional services appropriate to its specific needs; and
- from a commercial perspective, there is significant potential for C to grow production through the acquisition of businesses of a similar nature to that of C and undeveloped business properties in the area in which it is located.

Based on the above information it is clear C will commercially be in a better position as a separate entity.

The introduction of a Black Economic Empowerment (BEE) consortium will further benefit both C and the rest of the Group. It is proposed that a BEE consortium will subscribe for a certain percentage shareholding in Newco.

From the perspective of C and Newco the introduction of a BEE consortium will –

- introduce capital of hundreds of millions of rands into C; and
- provide a BEE shareholder which will significantly enhance the ability of C to do further transactions in its business area and will enhance the relationship between C and other stakeholders.

The following steps are envisaged in order to execute the proposed transaction:

- Step 1: The Applicant will incorporate Newco as its wholly owned subsidiary.
- Step 2: The Applicant will transfer the business of C as a going concern (including all assets and liabilities of C) at book value, in exchange for additional shares in Newco, under section 42 of the Act.
- Step 3: The Applicant will transfer all ancillary assets comprising 100% of the shares held by the Applicant in Co-Applicant 2 at book value, in exchange for additional shares in Newco, under section 42 of the Act.
- Step 4: The BEE partner will subscribe for a certain percentage shareholding in Newco for a cash consideration.
- Step 5: Newco will issue an effective percentage of its issued share capital to a newly incorporated C Management Trust.
- Step 6: The Applicant will distribute its shareholding in Newco to its Holding Company under section 46 of the Act.

5. Conditions and assumptions

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

- The public officer of Newco will state on oath that the acquisition of the investment shares complies with the provisions of section 8(1)(a) of the STT Act.
- Newco will be registered as a vendor for VAT purposes.

6. Ruling

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

- The disposal by the Applicant of business C and its shares in Co-Applicant 2 to Newco at book value will constitute an asset-for-share transaction under section 42 of the Act.
- The Applicant and Newco will be deemed to be one and the same person in respect of the supply of the business of C as a going concern under section 8(25) of the VAT Act.
- The transfer by the Applicant of its shares in Co-Applicant 2 will be exempt from securities transfer tax under section 8(1)(a)(i) of the STT Act.
- The distribution of Newco's shares by the Applicant to Co-Applicant 1 will constitute an unbundling transaction under section 46(1) of the Act and will fall outside the scope of section 42(5) and (6) of the Act.
- Section 42(8) of the Act will not be applicable to the distribution of Newco's shares by the Applicant to Co-Applicant 1.

7. Period for which this letter is valid

This binding private ruling is valid in respect of the proposed transaction, provided the transaction is concluded within a period of 3 years from 2 February 2011.

Issued by:

Legal and Policy Division: Advance Tax Rulings
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