

## **BINDING PRIVATE RULING: BPR 223**

DATE: 19 February 2016

**ACT : INCOME TAX ACT NO. 58 OF 1962 (the Act)**  
**SECTION : SECTIONS 8FA, 9I(2)(b) AND (c), 20C(2) AND 31(5)**  
**SUBJECT : HEADQUARTER COMPANIES: ACQUISITIONS OF SHARES AND LOANS**

### **1. Summary**

This ruling determines the income tax consequences resulting from the acquisition by a company, that is a resident of South Africa, of shares in and loans of a foreign company for purposes of the headquarter company regime.

### **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 Act applicable as at 29 January 2016. 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 the provisions of –

- section 8FA;
- section 9I(2)(b) and (c);
- section 20C(2); and
- section 31(5).

### **3. Parties to the proposed transaction**

The Applicant: A private company incorporated in and a resident of South Africa

ForeignCo: A non-resident holding company

### **4. Description of the proposed transaction**

The Applicant is a wholly-owned subsidiary of ForeignCo. ForeignCo serves as the holding company for a large number of foreign companies located in Africa and Latin American countries. Some of the foreign subsidiaries are wholly-owned while others are majority owned, with minority shareholders in their local countries.

ForeignCo intends to establish the Applicant as a headquarter company in South Africa, both for the purposes of the Act and under the exchange control Regulations.

In terms of the proposed transaction the Applicant will, wherever possible, acquire 100% of the equity interest currently held by ForeignCo in the latter's foreign subsidiaries. In certain cases in which, for either fiscal or regulatory reasons, it is not possible to transfer the entire shareholding to the Applicant, ForeignCo will transfer one share in the relevant subsidiary to the Applicant.

ForeignCo will also transfer all of its facility loans owing by the foreign subsidiaries to the Applicant (including loans owed by subsidiaries of which only one share in the subsidiary will be transferred to the Applicant). In terms of the facility loans, the foreign subsidiaries may draw down on the credit facility granted under the loans from time to time as required. Under the proposed structure whenever there is a draw down request, ForeignCo will grant the Applicant an increase in the loan created under the proposed transaction in order for it to meet the obligation under the facility loans.

The shares will be transferred in exchange for shares in the Applicant, and the loans will be transferred on interest bearing loan account owed to ForeignCo.

The interest payable to ForeignCo will be an amalgam of the interest payable on the various loans that were previously owed to ForeignCo by the various foreign companies and which will now be owed to the Applicant. The interest rate on the loan will be the weighted average interest rate based on the interest payable by the foreign subsidiaries.

The foreign subsidiaries required specialised software given the nature of their business. The group, using an associated service provider, contracted with a third party software developer to produce the software, which is being used by all of the various subsidiaries in the different countries. The copyright remained with the software developer, but the associated service provider (and after the assignment of the contracts, the Applicant) will be granted an unlimited number of licenses to authorise the use of the software, though only by companies within the group.

The software development fees charged to the associated service provider by the third party developer was on-billed to the various subsidiaries on a cost recovery basis.

As the development is essentially complete, it is proposed that the agreements with the operational companies and the third party developer be assigned to the Applicant for no consideration as revenues will always merely cover costs. The Applicant will, therefore, grant the subsidiaries the licenses to use the software and will recover any charges related to the use thereof.

## **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:

- The interest paid by the Applicant to ForeignCo on the interest-bearing loan from ForeignCo, which finances the acquisition of the loans owing by the relevant foreign subsidiaries, will not be “hybrid interest” as defined in section 8FA.
- In respect of a foreign subsidiary in which only one share will be acquired and held by the Applicant, which, together with the remaining shares held by ForeignCo, represent more than 10% of the equity shares and voting rights in the relevant foreign subsidiary:
  - The cost of the relevant share and any loan owing by the relevant foreign subsidiary to the Applicant will be included in the cost of the Applicant’s qualifying assets, as contemplated in section 9I(2)(b). The one share plus the loan will form part of the cost of 80% of total assets of the company which, amongst others, qualify the Applicant as a headquarter company.
  - Income from the relevant share and any loan owing by the relevant foreign subsidiary to the Applicant will be taken into account in determining whether the minimum 50% of the gross income threshold contemplated in section 9I(2)(c) has been met.
- The amount of interest that is allowed as a deduction for the interest expenditure incurred by the Applicant in respect of the loan received from ForeignCo will be limited, under section 20C(2), to the interest income received in respect of the loans advanced to the foreign subsidiaries.
- Section 31(5)(a), (b) and (d) will apply to the Applicant in respect of the loan provided by ForeignCo to the Applicant, the loans owing by the foreign subsidiaries to the Applicant and the granting of software licenses to the foreign subsidiaries.

## 7. Period for which this ruling is valid

This binding private ruling is valid for a period of 5 years from 29 January 2016.