

*SOUTH AFRICAN REVENUE SERVICE*

**BINDING PRIVATE RULING: BPR 048**

DATE: 16 October 2009

**ACT : INCOME TAX ACT, NO. 58 OF 1962 (the Act)**

**SECTION : SECTION 9D(1) AND (10)(a)(i)**

**SUBJECT : DEEMING A PLACE OF BUSINESS TO BE A “FOREIGN BUSINESS ESTABLISHMENT” AS ENVISAGED IN SECTION 9D(1)**

**1. Summary**

This ruling deals with the question as to whether the place of business of a controlled foreign company (CFC) will fulfil the requirements of subparagraphs (a)(i) and (ii) of the definition of “foreign business establishment” in section 9D(1) of the Act when taking into account the CFC’s use of employees, equipment and facilities of any other CFC that has the same country of residence and where that other CFC forms part of the same group of companies as the CFC.

**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 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 9D(1), definition of “foreign business establishment”; and
- section 9D(10)(a)(i).

**3. Parties to the proposed transaction**

The Applicant: A holding company, which is a “resident” as defined in section 1, with subsidiaries, that is, CFCs in Country Z

Company A: An indirectly-held wholly owned subsidiary of the Applicant, located in Country Z

Company B: A wholly owned subsidiary of Company A, located in Country Z.

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

Company A carries on a business as an investment holding and financing company with its primary operations being conducted in Country Z. Company A does not employ any permanent employees but relies on Company B's employees. Company B currently has five permanent employees as well as a number of part-time employees. Company A and Company B have entered into a Shared Services Agreement (the Agreement) with each other.

In terms of the Agreement Company B's employees will render the following services to Company A as may be requested from time to time: administration, accounting, company secretarial, finance, foreign exchange, taxation, insurance, employment practices, public relations, computer services, special project work, legal advice, mining, geology, metallurgy, surveying, and other technical and engineering matters. The powers and authorities of Company B under the Agreement are subject to the overall discretion, supervision, strategy and policies of Company A's board of directors.

The services provided by Company B's employees to Company A constitute the execution and implementation of managerial decisions taken at Company A board level. The five Company B employees who regularly perform activities for the benefit of Company A are regarded by Company A as its representatives to the outside world.

Company A and Company B board meetings are held in Country Z. There is an overlap between the directors of Company A and Company B, who also serve as board members of these respective companies. Company A's board members also sit on the board of its other subsidiaries in Country Z (Z Group).

Company A's directors regularly discuss and review the affairs of each subsidiary in detail, including the affairs of Company B. These discussions and reviews entail, for example, discussing and where appropriate taking or recommending actions to be taken in relation to operational, safety, health, environment and financial issues pertaining to the Z Group businesses.

Company A's and Company B's business premises are located in the capital of Country Z, in a building that is owned by a wholly owned subsidiary of Company A. Company B has entered into a lease agreement with the said subsidiary. Company A and Company B have occupied these premises since late 2004.

Company A and Company B share, amongst other things, the following equipment and facilities: IT server, telephone exchange, facsimile machines, network printers, laptops, PCs, scanners, company vehicles, catering equipment, meeting facilities, kitchen reception area, scullery and bathrooms.

#### **5. Conditions and assumptions**

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

- this ruling applies exclusively to whether or not Company A has a foreign business establishment and does not in anyway determine or ascertain any

amount of net income that can be attributable to the said foreign business establishment;

- Company A and Company B continue to be “controlled foreign companies” as defined in section 9D(1) of the Act, in relation to the Applicant;
- Company A and Company B continue to have Country Z as “country of residence” as defined in section 9D(1) of the Act; and
- Company A and Company B continue to form part of the same “group of companies” as defined in section 1 of the Act.

## **6. Ruling**

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

- The place of business of Company A is deemed to be fulfilling the requirements of sub-paragraphs (a)(i) and (ii) of the definition of “foreign business establishment” as contemplated in section 9D(1) read with section 9D(10)(a)(i).

## **7. Period for which this ruling is valid**

This binding private ruling is valid from the date of this ruling until 30 September 2011.

Issued by:

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