

## **BINDING PRIVATE RULING: BPR 254**

DATE: 30 November 2016

**ACT : INCOME TAX ACT 58 OF 1962 (the Act)  
SECURITIES TRANSFER TAX ACT 25 OF 2007 (STT Act)**  
**SECTION : SECTIONS 24BA, 42 AND 64FA OF THE ACT  
SECTION 8(1)(a)(i) AND(vi) OF THE STT ACT**  
**SUBJECT : CONSEQUENCES OF CROSS-BORDER AND DOMESTIC ASSET-  
FOR-SHARE TRANSACTIONS**

### **1. Summary**

This ruling determines, amongst other things, the interpretation and application of section 24BA of the Act in the context of three simultaneous asset-for-share transactions between a domestic company and its three prospective shareholders, two of whom are non-residents for tax purposes.

### **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 28 of 2011.

In this ruling references to sections are to sections of the relevant Act applicable as at 16 September 2016. 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 –

- the Act –
  - section 24BA;
  - section 42; and
  - section 64FA.
- the STT Act –
  - section 8(1)(a)(i) and (vi).

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

The Applicant: A private company incorporated in and a resident of South Africa, with none of its share capital issued as yet

Company A: A private company incorporated in and a resident of South Africa, holding approximately 32% of the shares in Company C

Company B:	A company established and effectively managed in Mauritius and a non-resident of South Africa, holding approximately 14.3% of the shares in Company C
Company C:	A private company incorporated in and a resident of South Africa
Individual 1:	An individual that is a non-resident of South Africa, holding approximately 20.1% of the shares in Company C
Individual 2:	An individual that is a resident of South Africa, holding approximately 20.5% of the shares in Company C

The balance of the share capital of Company C is held by various employees of the company.

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

Individual 1, Company A and Company B (Co-Applicants) intend to become three equal shareholders in the Applicant (each holding one third of the share capital) by transferring their respective interests in Company C to the Applicant, in exchange for shares in the Applicant (the proposed share exchange transactions). Company A and the Applicant intend to apply the provisions of section 42 of the Act to their proposed transaction.

At the same time, these Co-Applicants will subscribe for further shares in the Applicant, paying the subscription price in cash, in order to provide the Applicant with sufficient capital to acquire the shares in Company C of Individual 2. These cash subscriptions will not be equal to the value of the Co-Applicants' investments in the Applicant *inter se*. This is due to the pricing to be used for each proposed transaction (see below).

A series of transactions that occurred outside South Africa culminated in Company B acquiring its interest in Company C at a premium price if compared to a discounted cash flow valuation performed by a third party a few months prior to the acquisition.

Approximately a year later, Company A (a black economic empowerment investor) acquired shares through the efforts of Individual 1 and Company B in Company C from several individuals, separately. The purchase price for these shares represented a significant discount, if compared to the price paid by Company B a year before, and if compared to the third party valuation.

The agreed strategy amongst the Co-Applicants was that they would pool their investments into a controlling vehicle (the Applicant) in order to hold the controlling stake in Company C. The pricing of the proposed share exchange transaction between the Applicant and Company A will reflect the discounted price at which Company A acquired its shares in Company C. Similarly, the proposed share exchange transaction between Company B and the Applicant will occur at a price equal to Company B's historical premium acquisition price. The Co-Applicants agreed that the proposed share exchange transaction between Individual 1 and the Applicant will reflect the same premium pricing that will be used for Company B's transaction. Therefore, having had the benefit of acquiring its shares

in Company C at a discount, Company A proposes to give up value in favour of Company B and Individual 1.

The Co-Applicants consider their past dealings prior to the proposed transaction, that is to say, those dealings that resulted in Company A acquiring its shares in Company C, to be dealings undertaken between parties who were independent of each other and at arm's length. SARS has not given any consideration to this fact, and does not express any view in this regard.

## **5. Conditions and assumptions**

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

- a) Company C does not own immovable property, situated in South Africa.
- b) Less than 80% of the market value of Individual 1's and Company B's interests in Company C is attributable to South African immovable property, held directly, or indirectly, as capital assets by Company C.
- c) The shares in Company C, owned by Company B, are not effectively connected with a permanent establishment of Company B in South Africa.
- d) Immediately prior to the proposed transaction, the market value of Company A's interest in Company C will exceed the base cost thereof.
- e) The shares to be issued by the Applicant in exchange for the shares in Company C to each of the Co-Applicants carry voting rights in the same proportion as the relevant share interests. In other words, 10% of the shares in the Applicant will entitle the holder to 10% of the voting rights.
- f) Company A holds its interest in Company C as a capital asset and will hold the interest in the Applicant as a capital asset.
- g) The market value of the shares in Company C to be sold to the Applicant, will immediately before that disposal exceed the market value of the consideration shares to be issued to Company A in exchange therefor, immediately after that issue. (excess asset value)
- h) The market value of the consideration shares to be issued by the Applicant, will immediately after their issue to Company B and Individual 1, exceed the market value of the shares in Company C to be sold by them to the Applicant, immediately before that disposal (excess consideration).

## **6. Ruling**

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

- a) Section 24BA of the Act will apply to the proposed transaction.
- b) Under section 24BA(3) of the Act, the following consequences will arise –
  - (i) Company A's base cost of the consideration shares will be reduced by the excess asset value, whilst the Applicant will be deemed to have realised a corresponding capital gain equal to

the excess asset value in respect of a disposal of the shares;  
and

- (ii) the excess consideration will be deemed to be a dividend, that is, the distribution of an asset *in specie*, paid by the Applicant on the issue date of the consideration shares to Company B and Individual 1.
- c) In relation to the proposed transaction between Company B and the Applicant, as well as the proposed transaction between Individual 1 and the Applicant, the dividends tax rate reduction in section 64FA(2) of the Act will not apply. Dividends tax at the rate of 15% will be payable by the Applicant under section 64EA(b) of the Act in relation to the excess consideration. The amount of the excess consideration will be deemed to be a dividend, that is, a distribution of an asset *in specie* and paid by the Applicant on the issue date of the consideration shares, under section 24BA(3) of the Act.
- d) Section 42 of the Act will apply to the proposed transfer by Company A of its shares in Company C to the Applicant only to the extent that section 24BA of the Act does not create deemed consequences for these parties.
- e) The proposed transfer of the shares in Company C by Company B and Individual 1 to the Applicant will be exempt from STT under section 8(1)(a)(vi)(B) and (C), read with section 8(1)(a)(i) of the STT Act.

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

This binding private ruling is valid for a period of five years from 16 September 2016.

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