

BINDING PRIVATE RULING: BPR 185

DATE: 11 December 2014

ACT : INCOME TAX ACT NO. 58 OF 1962 (the Act)
SECTION : SECTIONS 7B, 11(a), 23(g), 37A and 42
SUBJECT : CORPORATE RULES: DISPOSAL OF ASSETS AND LIABILITIES AS PART OF A GROUP RESTRUCTURE

1. Summary

This ruling deals with the disposal of assets (including the equity shares held in various subsidiaries) and liabilities (including contingent liabilities) from one company to another company under section 42 of the 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 Act applicable as at 3 June 2013 and 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 11(a) read with sections 7B and 23(g);
- section 37A; and
- section 42.

3. Parties to the proposed transaction

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

NewCo: A company incorporated in and a resident of South Africa and a wholly-owned subsidiary of the Applicant

SubCos: Various companies incorporated in and residents of South Africa and wholly-owned subsidiaries of the Applicant

4. Description of the proposed transaction

The Applicant currently owns 100% of the share capital in each of the SubCos and holds a major portion of the group's operating assets. In order to streamline the group operations, the Applicant has identified the need to restructure its South African operations with the objective that the Applicant becomes a true holding company.

In order to restructure the South African group, a newly incorporated company, NewCo, has been established as a wholly-owned subsidiary of the Applicant.

The proposed steps for implementing the restructure are as follows:

(a) The Applicant will transfer to NewCo:

- (i) All of its assets at book value (including the shares held in the SubCos but excluding a specified list of excluded assets) under sections 42 or 40CA, as the case may be, depending on the relative base cost and market value of each asset.
- (ii) All of its liabilities (other than a specified list of excluded liabilities). Included in the delegation of the liabilities are loans granted by financial institutions which are secured by specific assets that were acquired with the loans. The assets acquired are used in the Applicant's income-producing business and will also be transferred to NewCo. As a necessary consequence of the transfer of such assets, the financial institution loans will be assumed by NewCo.
- (iii) Contingent liabilities which include provision for the following:
 - (aa) Leave pay
 - (bb) Incentives/bonuses
 - (cc) Environmental rehabilitation
 - (dd) Share incentive scheme
 - (ee) Post-retirement medical aid benefits

(b) As consideration for the disposal of the assets by the Applicant to NewCo, NewCo will assume the liabilities (including contingent liabilities) and issue equity shares in the amount of the net asset value of the assets and liabilities transferred.

5. Conditions and assumptions

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

- The disposal of the assets by the Applicant to NewCo under section 42 will be at book value and will be structured in such a way that the only consideration given by NewCo in exchange for the assets will consist of the shares issued by NewCo and the assumption of the Applicant's liabilities, including the contingent liabilities.
- The Applicant will transfer to NewCo all the assets and liabilities (including contingent liabilities) that are attributable to and arose in the normal course of the business undertaking that is being disposed of to and acquired by NewCo, as a going concern.
- Section 197(2)(a) to (d) of the Labour Relations Act No. 66 of 1995 applies to the proposed transaction in which a business undertaking is transferred as a going concern and the parties have not agreed otherwise under section 197(6) of that Act. Furthermore, NewCo will not have recourse to the Applicant for the contingent liabilities assumed.

6. Ruling

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

- The disposal by the Applicant of its assets to NewCo at net book value will constitute an “asset-for-share transaction” under section 42.
- Expenditure incurred in relation to the contingent liabilities transferred to NewCo from the Applicant (excluding the expenditure related to environmental rehabilitation to which section 37A may apply), will be deductible in the hands of NewCo provided that the requirements of section 11(a) read with sections 7B and 23(g) are met at the time when the contingent liabilities materialise. In assessing whether or not the requirements of the above-mentioned sections are met, expenditure must be evaluated within the context of the nature of the going concern business as carried on by the Applicant prior to the transfer and by NewCo subsequent to the transfer, without regard to the fact that the assumption of that obligation by NewCo was part of the consideration for the acquisition of the assets. The circumstances under which the contingent liability arose in the hands of the Applicant are therefore relevant.
- In the context of the environmental rehabilitation provision assumed as part of the transactions conducted under section 42, the expenditure incurred by Newco in making future payments to the rehabilitation trust will be deductible, provided that the requirements of section 37A are met at the time of making the payments. In evaluating whether or not the requirements of section 37A are met, no regard must be had to the fact that the assumption of that obligation by NewCo was part of the consideration for the acquisition of the assets.

7. Period for which this ruling is valid

This binding private ruling was issued for a period of 5 years from 3 June 2013.