

BINDING PRIVATE RULING: BPR 349

DATE: 25 August 2020

ACT : INCOME TAX ACT 58 OF 1962 (the Act)
SECTION : SECTIONS 1(1) – DEFINITIONS OF “FOREIGN DIVIDEND” AND “FOREIGN PARTNERSHIP”, 10B(2) AND (4), 64D – DEFINITION OF “BENEFICIAL OWNER”, 64F(1)(a); AND 64G(2)
SUBJECT : ACQUISITION OF EQUITY SHARES IN NON-RESIDENT REIT

Preamble

This binding private ruling is published with the consent of the applicant and the co-applicants to which it has been issued. It is binding between SARS, the applicant and co-applicants only and published for general information. It does not constitute a practice generally prevailing.

1. Summary

This ruling determines the income tax and dividends tax consequences of property income distributions to be made by a foreign REIT.

2. Relevant tax laws

In this ruling references to sections are to sections of the Act applicable as at 14 February 2020. 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 –

- section 1(1) – definitions of “foreign dividend” and “foreign partnership”;
- section 10B(2) and (4);
- section 64D – definition of “beneficial owner”;
- section 64F(1)(a); and
- section 64G(2).

3. Parties to the proposed transaction

The applicant: A resident REIT listed on the JSE

The co-applicants: Ten companies incorporated outside South Africa (SA) but which will be SA residents

4. Description of the proposed transaction

The co-applicants are wholly-owned subsidiaries of the applicant.

The co-applicants propose to acquire together the majority of the total equity shares in a REIT resident outside SA (the Foreign REIT).

The Foreign REIT will make distributions to its investors from time to time. The only distributions relevant to this ruling are the property income distributions.

For the proposed transaction to comply with the laws of the country of registration of the Foreign REIT, the transaction must comply with local regulatory requirements.

The foreign tax authority will permit the proposed investment if the applicant has no beneficial entitlement to the property income distributions made by the Foreign REIT and each co-applicant's entitlement to property income distributions is individually below a certain percentage. In that event certain of the regulatory constraints will not apply.

Also for regulatory reasons, the Foreign REIT will structure the proposed transaction so that the shareholding in the Foreign REIT is held by a person acting on behalf of a limited partnership which is a collective investment scheme in the country of registration of the Foreign REIT.

The Foreign REIT is obliged to distribute a large percentage of its profits from its property rental business within 12 months of an accounting year end.

The applicant therefore proposes to implement the proposed transaction as follows:

- A limited partnership will be established in the country in which the Foreign REIT is registered (the Limited Partnership). The co-applicants will be the limited partners of the Limited Partnership and their liability for debts and obligations of the Limited Partnership will be limited to their respective capital contributions. They will not take part in the management of the partnership's business. The general partner (the GP) of the Limited Partnership will be a non-resident company that is not part of the same group of companies as the applicant.
- The Limited Partnership will be structured as a foreign collective investment scheme.
- The GP will appoint the applicant to exercise all rights, powers and privileges attaching to the Foreign REIT's shares in the name and on behalf of the GP, including voting the Foreign REIT's shares and attending its general meetings.
- The Limited Partnership will therefore constitute a "foreign partnership" as defined in section 1(1).

The post-transaction structure will be as follows:

- The applicant will hold 100% of the shares in all the co-applicants.
- The co-applicants will be the limited partners in the Limited Partnership and the GP will be a non-resident company.
- The GP will appoint the applicant to exercise all rights, powers and privileges attaching to the Foreign REIT's shares in the name and on behalf of the GP, including voting the Foreign REIT's shares and attending its general meetings.

- The Limited Partnership will hold the majority of the equity shares in the Foreign REIT. The Foreign REIT will make property income distributions to, amongst others, the Limited Partnership from time to time.

5. Conditions and assumptions

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

- a) The tax authority of the country in which the Foreign REIT is resident is satisfied that the applicant may split the holding of shares in the Foreign REIT between the co-applicants so as not to fall foul of its regulatory requirements.
- b) The Limited Partnership will constitute a collective investment scheme in accordance with the laws of the country in which it is established.
- c) The co-applicants have the right to use and enjoy the property income distributions made by the Foreign REIT unconstrained by any contractual or legal obligation to pass on the payment to another person and they assume the risk and control of the distributions received or accrued.
- d) The foreign dividend will not be paid out of any amounts as envisaged in section 10B(4)(a)(i) and (ii).

6. Ruling

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

- a) A property income distribution made by the Foreign REIT will constitute a “foreign dividend” as defined in section 1(1).
- b) The foreign dividend so paid will be exempt from SA normal tax under section 10B(2)(a).

7. Period for which this ruling is valid

This binding private ruling is valid for a period of five years from 14 February 2020.