BINDING PRIVATE RULING: BPR 122

DATE: 11 October 2012

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

: SECURITIES TRANSFER TAX ACT NO. 25 of 2007 (the STT Act)

SECTION : SECTIONS 11(*a*), 23(*g*), 45, 47 AND 64FA(1)(*b*), PARAGRAPH 38 OF THE EIGHTH SCHEDULE TO THE ACT AND SECTION 2 OF THE STT ACT

SUBJECT : TRANSFER OF A BUSINESS OF A COMPANY AS A GOING CONCERN TO ITS HOLDING COMPANY AS A RESULT OF AN AMALGAMATION OR MERGER TRANSACTION

1. Summary

This ruling deals with whether –

- the transfer of a business of a company as a going concern to its holding company as a result of an amalgamation or merger will constitute an "intra-group transaction" as defined in section 45(1) of the Act;
- the dissolution of the amalgamating company will be governed by section 45(4)(*c*) of the Act;
- the cancellation of the amalgamating company's shares as a result of the amalgamation will –
  - constitute a disposal "between connected persons not at arm's length price" as provided for under paragraph 38 of the Eighth Schedule to the Act; and
  - result in the imposition of securities transfer tax (STT) under section 2 of the STT Act;
- the transfer of a business of a company as a going concern to its holding company as a result of an amalgamation transaction will be governed by the provisions of section 47 of the Act;
- dividends tax will be payable in respect of the dividend *in specie* that will be declared and distributed by the amalgamating company as a result of the amalgamation;
- the holding company will be entitled to deduct the contingent liabilities taken over from the amalgamating company, as and when the

liabilities are actually incurred by the holding company under section 11(*a*) read with section 23(*g*) 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 and paragraphs are to sections of the Act and paragraphs of the Eighth Schedule to the Act applicable as at 18 April 2012 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*)*;*
- section 23(*g*);
- section 45;
- section 47;
- section 64FA(1)(*b*);
- paragraph 38 of the Eighth Schedule; and
- section 2 of the STT Act.

3. Parties to the proposed transaction

The Applicant:	A company incorporated in and a resident of South Africa that holds 100% of the shares in the Co-Applicant
The Co-Applicant:	A company incorporated in and a resident of South Africa

4. Description of the proposed transaction

The Co-Applicant intends to amalgamate or merge with the Applicant under section 113 of the Companies Act, No. 71 of 2008 (the Companies Act).

The Applicant will be the remaining company and will continue with the merged operations of the Co-Applicant.

The Co-Applicant will declare a dividend to the Applicant in an amount equal to the difference between the assets and liabilities that vest in the Co-Applicant. The intention is not for the dividend to be declared in cash, but *in*

specie by merging the rights and obligations of the parties to the proposed transaction.

The securities of the Co-Applicant that are held by the Applicant will thereafter be cancelled, as soon as practically possible, under section 113(3) of the Companies Act.

5. Conditions and assumptions

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

- the Applicant and the Co-Applicant form part of the same group of companies at the time of the declaration and payment of the dividend;
- the contingent liabilities to be assumed by the Applicant in the amalgamation or merger transaction will be as follows –
    - provision for leave pay;
    - bonus provision;
    - long-term incentive provision for when an executive leaves the company;
    - deferred bonus incentive provision; and
    - incentive provision where conditions for paying the incentive have not been satisfied;
- the Co-Applicant will be prohibited from claiming a section 11(*a*) deduction for the contingent liabilities to be assumed by the Applicant in the amalgamation or merger transaction; and
- the provisions of section 23E will apply in relation to any leave provision.

6. Ruling

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

- The amalgamation or merger transaction will not be governed by the provisions of section 45.
- The dissolution of the Co-Applicant will not be governed by section 45(4)(*c*).
- The amalgamation or merger transaction will be governed by the provisions of section 47.
- The cancellation of the shares in the Co-Applicant will have no tax consequences under section 47(5)(*a*).

- The dividend *in specie* that will be declared and paid by the Co-Applicant to the Applicant will be exempt from dividends tax under section 64FA(1)(*b*).
- The Applicant will be entitled to deduct expenditure actually incurred which relates to the contingent liabilities under section 11(*a*) read with section 23(*g*), provided that the provisions of section 23E are also complied with in respect of any leave pay.
- There will be no securities transfer tax consequences pursuant to the cancellation of the shares in the Co-Applicant.

7. Period for which this ruling is valid

This binding private ruling is valid for a period of 5 years from 18 April 2012.

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