

The underlying principles confirmed in this ruling are currently under review. This ruling is only binding in respect of the specific applicant to whom it was issued and may not be relied upon by a third party.

BINDING PRIVATE RULING: BPR 219

DATE: 9 February 2016

**ACT : INCOME TAX ACT NO. 58 OF 1962 (the Act)
SECURITIES TRANSFER TAX ACT NO. 25 OF 2007 (the STT Act)**

**SECTION : SECTIONS 25BB, 42, 44 AND 56(1)(r) OF THE ACT
SECTION 8 OF THE STT ACT**

**SUBJECT : CORPORATISATION OF A COLLECTIVE INVESTMENT SCHEME IN
PROPERTY AND AN AMALGAMATION FOLLOWED BY AN ASSET-
FOR-SHARE TRANSACTION**

1. Summary

This ruling determines the income tax and securities transfer tax (STT) consequences for the parties to the corporatisation of the Applicant and an amalgamation of the Applicant followed by an asset-for-share transaction in respect of the minority unitholders.

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 relevant Act applicable as at 15 December 2015. 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 following provisions of –

- the Act –
 - section 25BB;
 - section 42;
 - section 44; and
 - section 56(1)(r).
- the STT Act –
 - section 8.

3. Parties to the proposed transaction

The Applicant: A collective investment scheme in property, listed as a REIT on the JSE and a resident of South Africa

PropCo: A company, incorporated in and a resident of South Africa, which is a subsidiary of the Applicant

- Company A: A company, incorporated in and a resident of South Africa, which is listed as a REIT on the JSE and the holder of the majority of the units of the Applicant
- Company B: A company, incorporated in and a resident of South Africa, which is a subsidiary of Company A

4. Description of the proposed transaction

The Applicant currently owns letting enterprises conducted in respect of properties directly, and certain shares in property companies. The Applicant holds the properties on capital account. The letting enterprises include certain loans, owing by the Applicant, which are secured by the properties. The Applicant's business accordingly comprises letting enterprises, shares in property companies and loans, and properties.

The Applicant does not derive any imputed income from any controlled foreign companies under section 9D of the Act. At least 75% of the gross income received by or accrued to the Applicant or a subsidiary (as defined in the International Financial Reporting Standards) of the Applicant, in the previous year of assessment and in the first year of assessment that the Applicant qualified as a REIT, consists of "rental income", as defined in section 25BB(1) of the Act.

The Applicant will declare a final distribution to its unitholders for the period ending on the date on which the last suspensive condition to the amalgamation agreement is fulfilled. This declaration will take place prior to the Applicant ceasing to be a REIT and its deemed last financial year-end, even though the amount of this distribution will not be finally quantified, albeit quantifiable, at the time of the declaration.

PropCo will assume the payment obligations in relation to the final distribution under a separate assignment for no consideration, other than the payment of the amounts necessary to enable PropCo to discharge the assigned liabilities to pay this distribution in cash.

The Applicant intends to transfer its business to PropCo in terms of an "asset-for-share transaction" as contemplated in section 42 of the Act, in return for the issuing of equity shares in PropCo. The business will be transferred as a going concern and the obligations under the loans will be assumed by PropCo (the first S42 transaction).

The first S42 transaction will become unconditional on the date on which the last outstanding suspensive condition is fulfilled. Transfer of ownership of the properties by registration in the Deeds Office may only occur subsequent to this date.

The loans to be transferred to PropCo in terms of the first S42 transaction were either incurred earlier than 18 months before the first S42 transaction, or, if incurred more recently than that, either –

- were incurred at the same time as the asset that secured the relevant debt was acquired; or
- constitute the refinancing of any debt incurred earlier than 18 months before the first S42 transaction.

Immediately before the first S42 transaction, trading stock and allowance assets will comprise less than 50% of the market value of all of the Applicant's assets. Immediately after the first S42 transaction, the Applicant will hold all of the equity shares in PropCo.

After the first S42 transaction, the Applicant will transfer all of its assets, being its entire shareholding in PropCo, to Company B in terms of an amalgamation transaction as contemplated in section 44 of the Act (S44 transaction), in return for the issuing of equity shares in Company B.

The market value of the shares in Company B will be equal to or exceed the base cost thereof (which, insofar as the equity shares issued by Company B are concerned, equals the base costs of all the assets comprising the business of the Applicant transferred in terms of the first S42 transaction) on the date on which the last suspensive condition to the S44 transaction is fulfilled.

The Applicant will distribute all of its shares in Company B, received in terms of the S44 transaction, to its unitholders approximately 10 business days after the date of issue of these shares. These shares will be kept in escrow for the benefit of the unitholders. The Applicant will still be a REIT at the time of this distribution.

Subsequent to the S44 transaction and the above mentioned distribution, the minority unitholders in the Applicant will dispose of their portion of the equity shares in Company B (held in escrow) in return for the issuing of equity shares in Company A in terms of an "asset-for-share transaction" as contemplated in section 42 of the Act (second S42 transaction).

The second S42 transaction is expected to occur one day after the S44 transaction, when the suspensive conditions will be fulfilled.

5. Conditions and assumptions

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

- The chronology of the transactions and transaction steps, as set out in point 4, is adhered to during the implementation of the proposed transaction.
- The market values of the capital assets comprising the business to be transferred under the first S42 transaction are equal to or exceed the base cost of these assets.
- The amount of the Applicant's final distribution as a REIT is determined with reference to the financial results of the Applicant as reflected in financial statements prepared for the current year of assessment, which is deemed to end on the date on which the Applicant ceases to be a REIT for tax purposes.
- The existence of the Applicant is terminated in consequence of the S44 transaction.

6. Ruling

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

- In respect of the first S42 transaction, the disposal of the properties will occur for income tax purposes on the date on which the last outstanding suspensive condition is satisfied and the equity shares to be issued by PropCo constitute a “qualifying interest” as defined for purposes of section 42 of the Act.
- Any amount that is derived in respect of the use of immovable property, including any penalty or interest in respect of late payment of such amount, during the period from the date on which the first S42 agreement becomes unconditional and the actual date of registration of the transfer of the immovable properties to PropCo in the Deeds Office, will be regarded as being derived for the benefit of PropCo and will be regarded as PropCo’s “rental income”, as defined in section 25BB(1) of the Act.
- To the extent that the obligations under the loans will be assumed by PropCo in terms of the first S42 transaction, the proceeds on the disposal of the equity shares in PropCo in terms of the S44 transaction will include an amount equal to the face value of the loans in accordance with section 42(8) of the Act, so that for capital gains tax purposes the Applicant’s proceeds are equal to its base cost for the equity shares in PropCo, upon their disposal to Company B.
- In respect of the S44 transaction –
 - as the properties have been disposed of to PropCo in terms of the first S42 transaction, irrespective of whether the transfer of ownership in those properties have been registered in the Deeds Office, the Applicant will be regarded as having disposed of all of its assets (being the shares in PropCo) to Company B, irrespective of the fact that the Applicant may still retain legal ownership of those properties;
 - the Applicant will have disposed of the shareholding in PropCo in terms of the S44 transaction on the date on which the last outstanding suspensive condition is fulfilled; and
 - in accordance with section 44(8) the Applicant must disregard the disposal of the equity shares in Company B to its unitholders for purposes of determining its taxable income or assessed loss.
- On the basis that the Applicant declares its final distribution prior to its ceasing to be a REIT, the Applicant will be able to deduct such distribution from its income for that year of assessment, to the extent that all the requirements of the definition of “qualifying distribution” in section 25BB(1) of the Act are met, even though the amount will only be quantified later and payment in respect of the distribution will be made by PropCo in consequence of the proposed assignment of the liability.
- The assignment of the obligation to make payment of the final distribution to PropCo will be exempt from any donations tax under section 56(1)(r) of the Act.
- The payment to the unitholders of the Applicant’s final distribution by PropCo will not qualify as a deductible expense for PropCo.

- No STT will be payable in respect of the transfer of the Applicant's shares in PropCo to Company B in terms of the S44 transaction and to the distribution of the equity shares in Company B by the Applicant to the unitholders under section 44 of the Act.
- No STT will be payable in respect of the transfer of the minority unitholders' portion of the equity shares in Company B to Company A under section 42 of the Act.

7. Period for which this ruling is valid

This binding private ruling is valid for the year(s) of assessment during which the proposed transaction is implemented.

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