

TAX

NEW BINDING PRIVATE RULING ISSUED IN RESPECT OF RENUNCIATION OF A USUFRUCT OVER SHARES

On 17 August 2015 the South African Revenue Service (SARS) issued Binding Private Ruling 203 (Ruling) relating to the question as to whether securities transfer tax (STT) would be payable on the renunciation of a usufruct over shares.

The Ruling specifically dealt with the interpretation of sections 1, 2 and 5 of the Securities Transfer Tax Act No. 25 of 2007 (STT Act).

In respect of s1 of the STT Act, the Ruling pertained to the definitions of "security" and "transfer". Section 1 of the STT Act defines a "security" as:

- any share or depository receipt in a company; or
- any members interest in a close corporation, excluding the debt portion in respect of a share linked to a debenture.

Section 1 of the STT Act defines the term "transfer" as including the "transfer, sale, assignment or cession, or disposal in any other manner, of a security or the cancellation or redemption of that security", but excluding:

- any event that does not result in a change in beneficial ownership;
- any issue of a security; or
- a cancellation or redemption of a security if the company which issued the security is being wound up, liquidated or deregistered or its corporate existence is being finally terminated.

The facts in the Ruling were as follows:

- The applicant was a natural person and a South African tax resident (the Applicant).
- The co-applicants were three separate trusts formed in South Africa, and therefore South African tax residents (the Co-Applicants).

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- The Applicant was married to N, who is deceased.
- The last will and testament of N bequeathed a share portfolio (the Shares) to the three children of the Applicant and N (the Children), with a life-long usufruct in favour of the Applicant.
- The Children each transferred their bare dominium in the Shares to the respective Co-Applicants.
- The Shares were administered by a broker in one account in the Applicant's name.

The following transaction was proposed by the applicants:

- The Applicant would renounce the usufruct over the Shares.
- Full ownership of the Shares would vest in the respective Co-Applicants.
- The Shares would be transferred by the broker into accounts in the names of each of the Co-Applicants.

It should be noted that the Ruling does not set out the arguments on which the applicants relied in their application for the Ruling. However, it was ruled that STT would not be payable by the Applicant on the renunciation of the usufruct over the Shares.

Mareli Treurnicht

PUBLIC BENEFIT ORGANISATIONS – PROVISION OF FUNDS, ASSETS OR OTHER RESOURCES TO ASSOCIATIONS OF PERSONS

On 18 August 2015, the South African Revenue Service (SARS) released a draft Interpretation Note (Draft IN) on Public Benefit Organisations (PBOs) that provide funds, assets or resources to other associations that use such funds, assets or resources to carry on qualifying public benefit activities (PBAs).

PBOs play an important role in society as they relieve the financial burden on the State in respect of undertaking PBAs. Tax exemptions and deductions are available to assist PBO's in conducting the said PBAs and achieving their objectives. The PBA conducted by a PBO must, in accordance with s30 of the Income Tax Act, No 58 of 1962 (Act), be carried out in a non-profit manner and with an altruistic or philanthropic intent.

A PBO can either conduct PBAs on its own accord, or provide funds, assets or resources to, *inter alia*, an association of persons carrying on one or more PBA, in accordance with paragraph 10 of Part I of the Ninth Schedule (Ninth Schedule) to the Act. The Draft IN seeks to provide guidance, *inter alia*, on:

- the interpretation of 'association of persons' as contemplated in paragraph 10(iii) of the Ninth Schedule; and
- the monitoring requirement imposed under s30(3)(f) of the Act on a PBO providing funds, resources or assets to an association of persons contemplated in paragraph 10(iii) of the Ninth Schedule.

Association of persons

The term 'association of persons' is not defined in the Act, but appears in s30(1) of the Act and paragraph 10(iii) of the Ninth Schedule respectively. The Draft IN states that the association of persons contemplated in s30(1) of the Act '*refers to a formal association of persons established by adopting a legal founding document and which may qualify for approval as a PBO*', whereas the association of persons contemplated in paragraph 10(iii) of the Ninth Schedule refers to a '*voluntary informal association of group of persons which carries on one or more PBAs in South Africa [which] will not qualify for approval as a PBO because it does not have a founding document.*'

In other words, the separate identification of an association of persons as contemplated in s30(1) of the Act and an association of persons in paragraph 10(iii) of the Ninth Schedule means that the respective associations of persons differ, the former being a formally approved PBO and the latter an informal voluntary association of persons.

Monitoring requirement

Section 30(3)(f) of the Act states that any PBO that provides funds to an association of persons contemplated in paragraph 10(iii) of the Ninth Schedule, must take reasonable steps to ensure that the funds are used for the purpose for which they were provided.

The Draft IN states that due to the fact that an association of persons (as contemplated in paragraph 10(iii) of the Ninth Schedule) is not approved as a PBO and does not have to comply with reporting requirements, it is difficult for SARS to monitor compliance and to ensure that the funds, assets or other resources received by an association of persons from a conduit PBO are used for the purpose of carrying on PBAs. As a result, the responsibility has been placed on the conduit PBO that provides the funds, assets or other resources to associations of persons, to prove that reasonable steps have been taken to ensure that the funds, assets and other resources have been used to carry on a PBA in South Africa. The Draft IN further states that the steps taken by the conduit PBO will vary depending on the particular facts and circumstances and each case will be considered on its own merits.

It is important to note that the Draft IN provides that while an association of persons contemplated in paragraph 10(iii) of the Ninth Schedule is not itself a PBO, the conduit PBO providing funds to it, must monitor how the funds are spent to ensure that the association of persons is using the funds for carrying on qualifying PBAs. The monitoring requirement imposed on the conduit PBO is a prerequisite for its continued approval as a PBO.

Comments on the Draft IN are to be submitted by 18 September 2015

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