TAX

IN THIS ISSUE

DISTRIBUTION OF A DEBIT LOAN ACCOUNT IN ANTICIPATION OF DEREGISTRATION OF A COMPANY

SECURITIES TRANSFER TAX EXEMPTION WHERE PARTIES OPT OUT OF ROLL-OVER RELIEF

DISTRIBUTION OF A DEBIT LOAN ACCOUNT IN ANTICIPATION OF DEREGISTRATION OF A COMPANY

The South African Revenue Service (SARS) published Binding Private Ruling No. 198 on 7 July 2015 (Ruling). The Ruling deals with the distribution by a South African resident company (Subsidiary) of its loan account to its South African holding company (Holding Company) in anticipation of the Subsidiary's deregistration.

The applicable provisions in the Income Tax Act, No 58 of 1962 (Act) are s10(1)(k), s47, s64D and s64FA(1)(b).

The relevant facts relating to the Ruling are as follows:

- the Holding Company wished to simplify its group structure by deregistering dormant companies within its group;
- the Subsidiary, being wholly-owned by the Holding Company, was one of the dormant companies in the group;
- the Subsidiary's only asset was a loan owed to it by the Holding Company (Loan);
- the Loan represented the Subsidiary's share capital and distributable reserves in its books of account; and
- the Subsidiary had no liabilities.

It was proposed that the Subsidiary distribute the Loan to Holding Company in accordance with s47 of the Act as a "liquidation distributions". It would constitute a distribution of all of the Subsidiary's accumulated profits and a return of its share capital. The distribution would be effected in anticipation of the Subsidiary's deregistration.

The Ruling was made subject to the following additional conditions and assumptions:

- The Subsidiary would, in accordance with s47(6)(c)(i) of the Act, within a period of 36 months from the date of the "liquidation distribution" comply with the steps contemplated in s41(4) of the Act to liquidate, wind up or deregister and would at no stage withdraw any steps to liquidate, wind up or deregister.
- The parties would not agree in writing to opt out of the provisions of s47 of the Act.
- The Subsidiary would notify the Holding Company in writing as to what amount of the "liquidation distribution" constitutes a return of capital, as contemplated in paragraph 76(4) of the Eighth Schedule to the Act.

Subject to the above conditions and assumptions, SARS ruled that:

- The distribution of the Loan by the Subsidiary to the Holding Company would qualify as a "liquidation distribution" as defined in s47(1)(a) of the Act. The disposal would accordingly fall within the ambit of s47(2)(a) of the Act (ie a disposal of a capital asset).
- The distribution of the Loan would be a dividend *in specie* to the extent that it is not a "return of capital" as defined in s1(1) of the Act.
- The dividend amount would be exempt from dividends tax under s64FA(1)(b) of the Act.
- To the extent that the distribution of the Loan is a "return of capital" as defined in s1(1) of the Act, the return of capital would be disregarded under s47(5)(b) in determining the Holding Company's taxable income, assessed loss, aggregate capital gain or aggregate capital loss.
- The subsequent disposal by the Holding Company of the equity shares held by it in the Subsidiary as a result of the liquidation, winding up or deregistration must be disregarded under s47(5)(a) of the Act for the purposes of determining the Holding Company's taxable income, assessed loss, aggregate capital gain or aggregate capital loss.
- The dividend received by the Holding Company as a dividend *in specie* will be exempt from normal tax under s10(1)(k)(i) of the Act.

The Ruling is valid for a period of one year from 16 May 2014.

Mareli Treurnicht

DLA CLIFFE DEKKER HOFMEYR

SECURITIES TRANSFER TAX EXEMPTION WHERE PARTIES OPT OUT OF ROLL-OVER RELIEF

The South African Revenue Service (SARS) released Binding Private Ruling No 195 (Ruling) on 26 June 2015. The Ruling deals with the application of the exemption provision contained in s8(1)(a) of the Securities Transfer Tax Act, No 25 of 2007 (STT Act) in circumstances where parties have entered into an asset-for-share transaction as defined in s42 of the Income Tax Act, No 58 of 1962 (Act), but elected that any relief provided for in s42 of the Act should not apply.

The Applicant, a company incorporated and resident in South Africa, was a wholly-owned subsidiary of HoldCo, a non-resident company incorporated in a foreign jurisdiction.

HoldCo also held all of the shares in Company X, and 90% of the shares in Company Y, both being private companies incorporated and resident in South Africa. Through its subsidiaries, HoldCo also held 57% of the shares in Company A, a public company incorporated and resident in South Africa. Company X and Company Y each held 30% of the shares in Company A.

For regulatory purposes, HoldCo sought to consolidate its stake in Company A by creating a "significant owner" of Company A's shares in South Africa.

It was proposed that the Applicant would purchase HoldCo's shares in Company X and Company Y. In exchange, the Applicant would issue further shares to HoldCo.

However, HoldCo and the Applicant would agree in terms of s42(8A) of the Act that the roll-over relief provided for in s42 of the Act would not apply to the transaction.

It appears that, even though the transaction would constitute an asset-for-share transaction for purposes of s42 of the Act, the parties did not require the capital gains tax relief provided for in that section because HoldCo was a non-resident, and the shares were not assets as contemplated in paragraph 2(1)(b) of the Eighth Schedule to the Act.

In fact, if s42 of the Act were to apply to the transaction, the base cost of the shares in the hands of the Applicant going forward would have been much lower than had the relief not applied.

The main concern seems to have been that, if the parties elected out of s42 of the Act, they would not qualify for the exemption from securities transfer tax contained in s8(1)(a) of the STT Act, and that the tax would be payable on the transfer of the shares in Company X and Company Y.

However, SARS ruled that the exemption in s8(1)(a) of the STT Act would apply to the transfer of the shares. Although SARS did not provide reasons for its Ruling, it appears that the wording of s8(1)(a) of the STT Act is such that it only requires the transaction to constitute an "asset-for-share transaction" as defined, and does not require that the actual relief provided for in s42 applies to the parties.

Additionally, SARS confirmed that:

- the shares in Company X and Company Y would not be regarded as assets contemplated in paragraph 2(1)(b) of the Eighth Schedule to the Act;
- the Applicant would get a step-up in its base cost in the shares of Company X and Company Y, as the base cost would be equal the market value of the Applicant's shares issued to HoldCo; and
- the Applicant would have a contributed tax capital in respect of the shares issued to HoldCo equal to the market value of the shares acquired in Company X and Company Y.

The Ruling is valid for a period of two years.

Heinrich Louw

CONTACT US

For more information about our Tax practice and services, please contact:

Emil Brincker
National Practice Head
Director
T +27 (0)11 562 1063
E emil.brincker@dlacdh.com

Andrew Lewis
Director
T + 27 (0)11 562 1500
E andrew.lewis@dlacdh.com

Ben Strauss
Director
T +27 (0)21 405 6063
E ben.strauss@dlacdh.com

Ruaan van Eeden
Director
T +27 (0)11 562 1086
E ruaan.vaneeden@dlacdh.com

Lisa Brunton
Senior Associate
T + 27 (0)21 481 6390
E lisa.brunton@dlacdh.com

Heinrich Louw
Senior Associate
T +27 (0)11 562 1187
E heinrich.louw@dlacdh.com

Tessmerica Moodley
Senior Associate
T +27 (0)21 481 6397
E tessmerica.moodley@dlacdh.com

Mareli Treurnicht
Senior Associate
T + 27 (0)11 562 1103
E mareli.treurnicht@dlacdh.com

Gigi Nyanin
Associate
T + 27 (0)11 562 1120
E gigi.nyanin@dlacdh.com

Nicole Paulsen
Associate
T + 27 (0)11 562 1386
E nicole.paulsen@dlacdh.com

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

JOHANNESBURG
1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN
11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

cliffedekkerhofmeyr.com
Cliffe Dekker Hofmeyr is a member of DLA Piper Group, an alliance of legal practices.

©2015 0582/JULY

DLA CLIFFE DEKKER HOFMEYR