South African Revenue Service

BINDING PRIVATE RULING: BPR 382

DATE: 5 October 2022

ACT	**:**	**INCOME TAX ACT 58 OF 1962 (the Act)**
SECTION	**:**	**SECTION *6quat* AND PARAGRAPHS 2 AND 35 OF THE EIGHTH SCHEDULE TO THE ACT**
TREATY	**:**	**A TREATY FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME**
SUBJECT	**:**	**REBATE IN RESPECT OF FOREIGN TAXES**

Preamble

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

1. Summary

This ruling determines the tax consequences of a capital gain arising from the disposal of shares in a resident company, which shares derive their value principally from immovable property situated in a foreign jurisdiction.

2. Relevant tax laws

In this ruling references to sections are to sections of the Act applicable as at 15 June 2022. 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 6*quat* and paragraphs 2 and 35 of the Eighth Schedule to the Act; and
- the treaty between South Africa and Country X for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

3. Parties to the proposed transaction

The applicant:	A resident company
Company B:	A resident company
The purchasers:	A resident company and a non-resident company

4. Description of the proposed transaction

The applicant owns 50% of the shares in Company B and proposes to sell a portion of the shares it holds to the purchasers. Company B holds, *inter alia*, immovable property in Country X.

In terms of Country X's domestic law any capital gain derived from the direct or indirect transfer of shares by a non-resident in a company with assets located in Country X, is regarded as income sourced in Country X, and consequently subject to tax in Country X.

In addition, as provided for in the treaty between South Africa and Country X, because the shares in Company B principally derive their value from immovable property situated in Country X, the capital gain on the disposal of the shares may be taxed in Country X. Immovable property for treaty purposes is determined with reference to the domestic laws in which the property is situated.

The domestic tax laws of Country X prescribe that capital gains will be taxed by applying a specific inclusion rate based on source principles. The inclusion rate is calculated by determining the total value of Company B's assets located in Country X, in relation to its total asset value. The inclusion rate which Country X will apply in respect of the sale of the shares has been calculated at 60%.

The applicant will dispose of the shares for a purchase price equal to a determined amount plus, if applicable, a deferred amount which will be determined at a date in the future.

The fixed amount is determinable according to a formula, whereas the deferred amount consists of additional proceeds which may accrue in a future tax year, depending on whether or not certain specified conditions for payment of the deferred amount are met. It is uncertain whether any part of the deferred amount will ever accrue to the applicant.

5. Conditions and assumptions

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

a) Asset A located in Country X is immovable property in terms of the law of Country X.

b) Company B's assets, including Asset A, "principally" consist of immovable property as contemplated in the treaty at the date of the disposal.

c) The market values attributed to Company B's assets at the date of the disposal reflect that more than 50% of the market value is attributable to immovable property situated in Country X.

d) Country X has a legitimate right to tax the capital gain on the sale of the shares under its domestic law.

6. Ruling

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

a) The applicant will qualify for a rebate under the provisions of section 6*quat*(1) in respect of the disposal of shares.

b) The rebate, to be determined under the provisions of section 6*quat*, will be subject to the provisions of subsection (1A) and (1B), but will not be limited by reason of the fact that Country X applies an inclusion rate which is lower than the South African inclusion rate.

c) The foreign taxes will not qualify for a rebate to the extent that any capital losses for the year of assessment, or an assessed capital loss for the previous year of assessment, is set off against the foreign capital gain under consideration.

d) The proceeds, for purposes of paragraph 35, will be the purchase price finally determined and agreed on, which amount excludes any amount not received by or accrued to the applicant in respect of that disposal during that year of assessment.

e) Any deferred amounts, which are not received and do not accrue in respect of the disposal during the year of disposal, but that are received or accrue in a subsequent year of assessment, will be a capital gain in that subsequent year.

f) If Country X includes in its tax calculation any element of proceeds that has not accrued to or been received by the applicant, no foreign tax attributable to the inclusion of those proceeds will qualify for a tax rebate under section 6*quat*(1), read with section 6*quat*(1A).

7. Period for which this ruling is valid

This binding private ruling is valid for a period of two years from 15 June 2022.

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