



DAVEY'S Locker



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Foreign insurance policy wrappers

BPR 105 (née BPR 038)—Part I

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As much promised (97 *TSH* 2011; 100 *TSH* 2011), I examine at last the Binding Private Ruling (BPR 105; 100 *TSH* 2011) recently published on the SARS website pertaining to the tax treatment of an offshore investment policy issued by a foreign long-term insurer not governed by s 29A of the Income Tax Act.

I acted for the prospective investor-applicant in this matter.

The effect of the BPR is that SARS will adopt a see-through approach by ignoring the wrapper and tax the policyholder on annual receipts and accruals.

As I have often mentioned, I am, generally speaking, a proponent of advance tax rulings, and have a high regard for the SARS staff in this division. While I remain of this view, suffice it to say that on this occasion SARS and I agree to disagree.

Some general principles merit comment in this context:

- BPRs, although published, are only at best an indicator of SARS's view on a matter, and carry no legal authority *vis-à-vis* the taxpaying public. A positive ruling is nevertheless binding on SARS, as between SARS and the applicant.
- BPRs can be withdrawn in appropriate circumstances. In fact, this BPR effectively replaces a previous ruling, BPR 038.

- This BPR pertains to a specific product, and it does not necessarily follow that other foreign insurers' products are to be treated similarly. If tax certainty is required however, I suggest an investor choose a South African registered insurer's foreign products.

A reader has asked that I address the position of policyholders already invested in the product upon which SARS has issued the BPR. My views are:

First, that such policyholders are not legally bound by the BPR, since it represents merely an indicator of SARS's view.

Secondly, if ever challenged, such policyholders could raise the argument that, at inception of the investment policy, they acted *bona fide* under SARS's prevailing practice, with special reference to the previous BPR 038 and the SARS *Comprehensive Guide to on Capital Gains Tax*, issue 2 para 12.4.4.5 at page 349, which effectively then stated that policies issued by foreign insurers are subject only to CGT.

In the next issue, I shall consider the technical merits of the BPR, which effectively turned on the vexed issue of beneficial ownership of the policy wrapper's underlying investment portfolio.

