



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

N\$2.00

WINDHOEK - 14 May 2005

No.3428

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Government Notice

OFFICE OF THE PRIME MINISTER

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PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 4 of 2005: Income Tax Amendment Act, 2005.

EXPLANATORY NOTE:

_____ Words underlined with a solid line indicate insertions in existing provisions.

[] Words in bold type in square brackets indicate omissions from existing provisions.

ACT

To amend the Income Tax Act, 1981, so as to define the expression “Commissioner”; to further provide for the recoupment of deductions allowed in respect of assets acquired by means of certain allowances and then subsequently disposed of and to empower the Minister to determine a lesser value than the market value for recoupment purposes; to provide for the exemption from tax of certain income of non-citizens stationed in Namibia by virtue of a technical assistance agreement; to provide that no amount paid as land tax be allowed as a deduction in the determination of taxable income; to provide for the establishment of a tax tribunal to expedite lower value tax appeals; to make provision for transfer pricing and thin capitalization rules to combat tax avoidance schemes; and to provide for matters connected therewith.

(Signed by the President on 19 April 2005)

BE IT ENACTED by the Parliament of the Republic of Namibia, as follows:-

Amendment of section 1 of Act No. 24 of 1981, as amended by section 1 of Proclamation AG. No. 10 of 1985, section 1 of Act No. 8 of 1987, section 1 of Act No. 1 of 1989, section 24 of Act No. 3 of 1991, section 1 of Act No. 8 of 1991, section 1 of Act No. 12 of 1991, section 1 of Act No. 25 of 1992, section 1 of Act No. 10 of 1993, section 1 of Act No. 17 of 1994, section 1 of Act No. 22 of 1995, section 1 of Act No. 12 of 1996, section 1 of Act No. 5 of 1997, section 1 of Act No. 21 of 1999 and section 1 of Act No. 7 of 2002

1. Section 1 of the Income Tax Act, 1981 (hereinafter referred to as the principal Act), is amended by the insertion after the definition of “capitalization shares” of the following definition:

“‘Commissioner’ means the Commissioner of Inland Revenue;”.

Amendment of section 14 of Act No. 24 of 1981, as amended by section 6 of Act No. 12 of 1996, section 2 of Act No. 5 of 1997, section 3 of Act No. 21 of 1999 and section 4 of Act No. 7 of 2002

2. Section 14 of the principal Act is amended by the substitution for subsection (4) of the following subsection:

“(4) There shall be included in the taxpayer’s income all amounts allowed to be deducted or set off under the provisions of subsection (1) of this section and of sections 17 to 21, inclusive, except section 17(1)(n), (qA) and (r) and section 18(1)(a), or under the corresponding provisions of any previous income tax law, whether in the current or any previous year of assessment, which have been recovered or recouped during the current year of assessment, including recovery or recoupment by means of the disposal, withdrawal from trade for use for non-trade purposes or removal from Namibia of any item in respect of which deductions

were allowed against the income from the trade of such taxpayer in respect of such item: Provided that any item so disposed of, withdrawn from trade or removed from Namibia shall be valued at market value for the purpose of calculating the amount of any deduction recouped or recovered: Provided further that the Minister may, upon request in writing by a taxpayer, determine a lesser value than the market value, for the purposes of this subsection, if the circumstances of the case warrant a concession.”.

Amendment of section 16 of Act No. 24 of 1981, as amended by section 5 of Proclamation AG. No. 10 of 1985, section 5 of Act No. 8 of 1987, section 5 of Act No. 12 of 1991, section 1 of Act No. 33 of 1991, section 6 of Act No. 25 of 1992, section 6 of Act No. 10 of 1993, section 4 of Act No. 17 of 1994, section 5 of Act No. 22 of 1995, section 8 of Act No. 12 of 1996 and section 5 of Act No. 21 of 1999

3. Section 16 of the principal Act is amended by the deletion of the word “and” at the end of paragraph (ad) of subsection (1) and the addition to that subsection of the following paragraph:

“(af) the salaries and emoluments payable to any person who is stationed in Namibia by virtue of a technical assistance agreement entered into between the Government of Namibia and any organisation or the government of any other country: Provided that such person is not a Namibian citizen or ordinarily resident in Namibia and the salaries and emoluments concerned are paid from a source outside Namibia.”.

Amendment of section 24 of Act No. 24 of 1981, as amended by section 8 of Act No. 21 of 1999

4. Section 24 of the principal Act is amended by the addition of the following paragraph:

“(i) any amount paid in respect of land tax referred to in section 76 of the Agricultural (Commercial) Land Reform Act, 1995 (Act No. 6 of 1995).”.

Amendment of section 73 of Act No. 24 of 1981, as amended by section 10 of Act No. 8 of 1987, section 8 of Act No. 12 of 1991 and sections 20 and 29 of Act No. 12 of 1996

5. Section 73 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“(1) Any person entitled to make an objection who is dissatisfied with any decision of the Minister as notified to him or her in terms of section 71(4) may, subject to the provisions of section 73A, appeal therefrom to a special court for hearing income tax appeals, constituted in accordance with the provisions of this section.”.

Insertion of section 73A in Act No. 24 of 1981

6. The following section is inserted in the principal Act after section 73:

“Appeals to tax tribunal

73A. (1) Any appeal referred to in section 73(1) shall in the first instance be heard by the tax tribunal established by subsection (2), where -

- (a) the amount of the tax in dispute does not exceed such amount which the Minister may from time to time fix by notice in the *Gazette*, or, having regard to any assessed loss which may be carried forward, will probably not in total exceed such amount; or

- (b) the Commissioner and the appellant agree thereto; or
- (c) no objection to the jurisdiction of the tribunal to hear the appeal is made at or before the commencement of the hearing of the appeal:

Provided that where the Commissioner, at any time before the hearing of such appeal, or the chairperson of the tribunal, at any time before or during the hearing of such appeal, is of the opinion that on the ground of the disputes or legal principles arising or that may arise out of such appeal, the appeal should rather be heard by the special court for hearing income tax appeals referred to in section 73 (hereinafter referred to as the special court), such appeal shall be set down for hearing anew before the special court.

(2) A tribunal to be known as the tax tribunal is hereby established for the hearing of any appeal referred to in subsection (1).

(3) The tribunal shall consist of a legal practitioner referred to in subsection (4), who shall be the chairperson of the tribunal, and, if the chairperson or the Commissioner or the taxpayer considers it necessary, an accountant or representative of the commercial community referred to in section 73(2).

- (4) (a) The Minister shall, in consultation with the Judge-President of the High Court, appoint by notice in the *Gazette* as many legal practitioners to a panel as may be necessary, from which panel a chairperson of the tribunal shall be nominated by the Minister from time to time or as required, and the persons so appointed shall hold office for five years from the date of the relevant notice: Provided that the appointment of any such person may at any time, after such person has been given an opportunity to be heard, be terminated by the Minister for any reason which the Minister considers good and sufficient.
- (b) A person appointed in terms of paragraph (a) shall be eligible for reappointment for such further period or periods as the Minister may think fit.

(5) The Commissioner shall appoint a staff member from his or her office as clerk of the tribunal.

(6) The Commissioner shall determine the places for the hearing of appeals by the tribunal, and the tribunal shall hear an appeal at whichever place is closest to the appellant's residence: Provided that the appellant and the Commissioner may agree that the appeal be heard at another place.

(7) The clerk of the tribunal appointed in terms of subsection (5) shall -

- (a) act as convenor of the tribunal;
- (b) within 30 days before the date of hearing of the appeal, furnish the members of the tribunal and the appellant with a written notice of the time and place of the hearing of the appeal and a dossier containing copies of -
 - (i) the assessment against which the appeal has been lodged;
 - (ii) the notice of objection and appeal;

- (iii) the relevant return of income; and
- (iv) any correspondence between the Commissioner and the appellant as well as any other documents which are, in the opinion of the Commissioner, relevant to the appeal.

(8) The Commissioner shall designate a staff member from his or her office to appear in support of the assessment at the hearing of the appeal.

(9) The appellant shall -

- (a) in the case of a natural person who has the capacity to act, appear in person; or
- (b) in any other case, be represented by his or her representative taxpayer,

at the hearing of the appeal: Provided that -

- (i) the appellant or his or her representative taxpayer may, together with the notice of appeal under section 73(7)(a) or within such further period as the chairperson of the tribunal may allow, request permission to present his or her case otherwise than as contemplated in this subsection;
 - (ii) the chairperson of the tribunal may as he or she deems fit permit the appellant to present his or her case in such manner as the chairperson thinks fit;
 - (iii) where the appellant's return of income for the relevant year of assessment was prepared by any other person, such other person may appear on the appellant's behalf.
- (10) (a) During the hearing of the appeal the chairperson of the tribunal shall determine the procedures as the chairperson thinks fit, subject to each party having the opportunity to put his or her case to the tribunal in a reasonable manner.
- (b) The tribunal shall not be required to record its proceedings, but the decision of the tribunal shall be recorded in writing by the chairperson of the tribunal, with a short statement of the facts of the case as found by the tribunal and the reasons for its decision.
 - (c) The hearing of an appeal may be adjourned by the chairperson of the tribunal to any time and place that may seem convenient.
 - (d) The clerk of the tribunal shall by notice in writing furnish the Commissioner and the appellant with a copy of the tribunal's decision.
 - (e) (i) If neither the appellant nor anyone authorised to appear on his or her behalf appears before the tribunal at the time and place appointed for that purpose, the tribunal may, at the request of the Commissioner's representative and on proof that the prescribed notice of the sitting of the tribunal had been submitted to the appellant, confirm the assessment in respect of which the appeal has been lodged, and thereafter such appellant shall not be entitled to request that the appeal be referred to the special court in terms of subsection (13)(a) for hearing.

- (ii) If the Commissioner's representative fails to appear before the tribunal at the time and place appointed for that purpose, the tribunal may, at the request of the appellant, allow the appellant's appeal, and thereafter the Commissioner shall not be entitled to refer the appeal to the special court in terms of subsection (13)(b) for hearing.
- (f) The provisions of paragraph (e) shall not apply where the chairperson of the tribunal is satisfied that sound reasons exist for the non-appearance and such reasons are advanced by the appellant or the Commissioner, as the case may be, within seven days after the date on which the appeal was set down for hearing.
- (g) If the appellant has failed to state the grounds of his or her objection and appeal in definite terms, the tribunal may, upon the opening of the proceedings, decide what shall be considered to constitute the grounds of the objection and appeal.
- (11) For the purposes of this section, the provisions of sections 72, 73(7), (8), (11), (13) and (15), 77 and 78 shall apply with the necessary changes.
- (12) Subject to the provisions of subsection (13), any decision of the tribunal in terms of this section shall be final and conclusive.
- (13) (a) Where an appellant is not satisfied with the decision of the tribunal, he or she may, within 30 days (or within such further period as the chairperson of the tribunal may on good cause shown allow) after the date of the notice referred to in subsection (10)(d), require that the appeal be referred to the special court for hearing.
- (b) Where the Commissioner is not satisfied with the decision of the tribunal, the Commissioner may refer the appeal to the special court for hearing, and in such event the Commissioner shall notify the appellant thereof within 30 days (or within such further period as the chairperson of the tribunal may on good cause shown allow) after the date of the notice referred to in subsection (10)(d).
- (14) An appeal which has been heard by the tribunal and has been referred to the special court under subsection (13)(a) or (b), shall be heard anew by the special court."

Insertion of section 95A in Act No. 24 of 1981

7. The following section is inserted in the principal Act after section 95:

“Determination of taxable income of certain persons in respect of international transactions

95A. (1) For the purposes of this section -

‘goods’ means any goods, whether tangible or intangible, and includes, without limiting the generality of the foregoing, any corporeal movable thing, fixed property and any real right in any such thing or fixed property;

‘international transaction’ means a transaction, operation or scheme entered into between -

- (a) (i) a person who is a resident; and

- (ii) any other person who is not a resident; or
- (b) (i) a person who is not a resident; and
 - (ii) any other person who is not a resident,
for the supply of goods or services to or by a permanent establishment of either of such persons in Namibia; or
- (c) (i) a person who is a resident; and
 - (ii) any other person who is a resident,
for the supply of goods or services to or by a permanent establishment of either of such persons outside Namibia; or
- (d) (i) a person who is a resident; and
 - (ii) any other person who is a resident,
where either of such persons is as a result of the application of the provisions of any agreement entered into by Namibia for the prevention of double taxation, not subject to tax in Namibia;

‘resident’ means -

- (a) any natural person who is ordinarily resident in Namibia; or
- (b) any person (other than a natural person) which is incorporated, established or formed in Namibia or which has its place of effective management in Namibia;

‘services’ includes anything done or to be done, including, without limiting the generality of the foregoing -

- (a) the granting, assignment, cession or surrender of any right, benefit or privilege;
- (b) the making available of any facility or advantage;
- (c) the granting of financial assistance, including a loan, advance or debt, and the provision of any security or guarantee;
- (d) the performance of any work;
- (e) an agreement of insurance; or
- (f) the conferring of rights to incorporeal property.

(2) Where any goods or services are supplied or acquired in terms of an international transaction and -

- (a) the acquiror is a connected person in relation to the supplier; and
- (b) the goods or services are supplied or acquired at a price which is either -

- (i) less than the price which such goods or services might have been expected to fetch if the parties to the international transaction had been independent persons dealing at arm's length (such price being the arm's length price); or
- (ii) greater than the arm's length price,

then, for the purposes of this Act in relation to either the acquiror or supplier, the Minister may, in the determination of the taxable income of either the acquiror or supplier, adjust the consideration in respect of the international transaction to reflect an arm's length price for the goods or services.

- (3) (a) Where any person who is not a resident (hereinafter referred to as the investor) has granted financial assistance contemplated in paragraph (c) of the definition of 'services' in subsection (1), whether directly or indirectly, to -
 - (i) any connected person (in relation to the investor) who is a resident; or
 - (ii) any other person (in whom the investor has a direct or indirect interest) other than a natural person, which is a resident (hereinafter referred to as the recipient) and, by virtue of such interest, is entitled to participate in not less than 25 per cent of the dividends, profits or capital of the recipient, or is entitled, directly or indirectly, to exercise not less than 25 per cent of the votes of the recipient,

and the Minister is, having regard to the circumstances of the case, of the opinion that the value of the aggregate of all such financial assistance is excessive in relation to the fixed capital (being share capital, share premium, accumulated profits, whether of a capital nature or not, or any other permanent owners' capital, other than permanent capital in the form of financial assistance as so contemplated) of such connected person or recipient, any interest, finance charge or other consideration payable for or in relation to or in respect of the financial assistance shall, to the extent to which it relates to the amount which is excessive as contemplated in this paragraph, be disallowed as a deduction for the purposes of this Act.

- (b) For the purposes of paragraph (a), financial assistance granted indirectly shall be deemed to include any financial assistance granted by any third person who is not a connected person in relation to the investor, a connected person contemplated in paragraph (a) or the recipient, where such financial assistance has been granted by arrangement, directly or indirectly, with the investor and on the strength of any financial assistance granted, directly or indirectly, by the investor or any connected person in relation to the investor, to such third person."

Short title and commencement

8. (1) This Act is called the Income Tax Amendment Act, 2005, and comes, subject to subsections (2) and (3), into operation on the date of publication of this Act in the *Gazette*.

(2) Sections 2 and 3 are deemed to have come into operation on 1 March 2004.

(3) Section 4 is deemed to have come into operation -

- (a) in the case of any taxpayer other than a company, at the beginning of the year of assessment commencing on or after 1 March 2004; and
 - (b) in the case of any taxpayer which is a company, at the beginning of the year of assessment of such company commencing on or after 1 January 2004.
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