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Government Notice

OFFICE OF THE PRIME MINISTER

No. 311

2015

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. 13 of 2015: Income Tax Amendment Act, 2015.

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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 amend the definition of “gross income” with regard to the specific inclusions of restraint of trade payments and the sale of petroleum licences or rights; to provide for withholding tax on interest paid to non-residents; to amend the withholding tax rate on management fees and consultancy fees paid to non-residents; to provide for a definition of “Namibia”; to amend the royalty rate; to provide for the allocation of tax payments and collection of tax; and to provide for incidental matters.

(Signed by the President on 11 December 2015)

BE IT ENACTED as passed by the Parliament, and assented to by the President, 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, section 1 of Act No. 7 of 2002, section 1 of Act No. 4 of 2005, section 1 of Act No. 5 of 2007, section 1 of Act No. 5 of 2010 and section 1 of Act No. 15 of 2011

1. Section 1 of the Income Tax Act, 1981 (in this Act referred to as the “principal Act”) is amended -

(a) by the substitution for paragraph (o) of the definition of “gross income” of the following paragraph:

“(o) any amount received or accrued, whether in money or in kind, as consideration (or payment of like nature) or the open market value by way of a sale, donation, expropriation, cession, grant or other alienation or transfer of ownership of a mineral licence, or right to mine minerals in Namibia, and includes a sale, donation, expropriation, cession, grant or any other alienation or transfer of ownership of any share or member’s interest in a company that holds a mineral licence or mineral right whether directly, or indirectly, less the acquisition cost of the mineral licence or mineral right, but the acquisition cost of the licence or right may not create a loss;”;

(b) by the addition after paragraph (o) of the definition of “gross income” of the following paragraphs:

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“(p) any amount (whether in money or in kind) received by or accrued to any person or company as compensation for any restraint of trade imposed on such person or company;

(q) any amount received or accrued, whether in money or in kind, as consideration (or payment of like nature) or the open market value by way of a sale, donation, expropriation, cession, grant or other alienation or transfer of ownership of a petroleum licence, or right to mine petroleum in Namibia, and includes a sale, donation, expropriation, cession, grant or any other alienation or transfer of ownership of any share or member’s interest in a company that holds a petroleum licence or petroleum right, whether directly, or indirectly, less any -

(i) acquisition costs and exploration expenditure relating to the petroleum licence or right; and

(ii) costs of improving the value of the petroleum licence or right,

but the acquisition costs, exploration expenditure and cost of improvement of the value of the licence or right may not create a loss.”.

(c) by the insertion after the definition of “Master” of the following definition:

“mineral licence” means any mineral licence as defined in the Minerals (Prospecting and Mining) Act, 1992 (Act No 33 of 1992);”;

(d) by the insertion after the definition of “petroleum” of the following definition:

“petroleum licence”, includes exploration licence, reconnaissance licence and production licence as defined in the Petroleum (Exploration and Production) Act, 1991 (Act No. 2 of 1991);

(e) by the insertion after the definition of “retirement annuity fund” of the following definition:

“right”, in relation to paragraph (o) or paragraph (q) of the definition of “gross income”, means a contingent right to any licence or share or member’s interest contemplated in paragraph (o) or paragraph (q) of that definition, held by a trust, the acquisition of which is -

(a) a consequence of or attendant upon the conclusion of any agreement for consideration with regard to a licence held by such trust;

(b) accompanied by the substitution or variation of the loan creditor of such trust; or

(c) accompanied by the change of any trustee of such trust;”;

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- (f) by the insertion after the definition of “Minister” of the following definition:

“Namibia” means the Republic of Namibia and, when used in geographical sense, includes the territorial sea as well as the exclusive economic zone and the continental shelf over which Namibia exercises sovereign rights in accordance with its national and international laws concerning the exploration and exploitation of the natural resources of the sea-bed and its subsoil and the superjacent waters as defined in sections 2, 4, and 6 of the Territorial Sea and Exclusive Economic Zone of Namibia Act, 1990 (Act No. 3 of 1990);”

Amendment of section 17 of Act No. 24 of 1981, section 2 of Act No. 12 of 1982, section 6 of Proc. AG 10 of 1985, section 6(c) of Act No. 8 of 1987, section 7 of Act No. 25 of 1992, section 7 of Act No. 10 of 1993, section 6 of Act No. 22 of 1995, section 11 of Act No. 12 of 1996, section 3 of Act No. 5 of 1997, section 7 of Act No. 21 of 1999, section 5 of Act 7 No. of 2002, section 4 of Act No. 5 of 2007, section 5 of Act No. 15 of 2011

2. Section 17 of the principal Act is amended by the addition after paragraph (w) of the following paragraph:

- “(x) an allowance in respect of any amount actually incurred by such person or company in the course of carrying on his or her trade, as compensation in respect of any restraint of trade imposed on any other person or company to the extent that such amount constitutes or will constitute income of the person or company to whom it is paid, but the amount allowed to be deducted under this paragraph shall not exceed for any one year the lesser of -
- (i) so much of such amount so incurred as is equal to such amount divided by the number of years, or part thereof, during which the restraint of trade applies; or
- (ii) one-third of such amount so incurred.”

Substitution of section 35 of Act No. 24 of 1981

3. The principal Act is amended by the substitution for section 35 of the following section:

“Assessment of persons not ordinarily resident or registered, managed or controlled in Namibia who derive income from royalties or similar payments

35. (1) There must be levied for the benefit of the State Revenue Fund a tax, to be known as the withholding tax on royalties calculated at the rate of 10 percent of any amount referred to in paragraph (b) or (c) of subsection (1) of section 15 including the right to use industrial, commercial or scientific equipment, received by or accrued to a person not being ordinarily resident in Namibia or a domestic company.

(2) Any person who incurs liability to pay any other person (not being a person who is ordinarily resident in Namibia or a domestic company) any amount referred to in paragraph (b) or (c) of subsection (1) of section 15

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including the right to use industrial, commercial or scientific equipment, shall withhold tax in accordance with subsection (1) and within 20 days after the end of the month during which the said liability is incurred or the said payment is made, make payment (which shall be a final payment made on behalf of such other person) to the Minister and shall submit such payment in such form as the Minister may prescribe.

(3) Every person who is required to make a payment to the Minister in terms of subsection (2) shall be personally liable for making such payment, and the amount so payable shall be deemed to be a tax due by such person and shall be recoverable from him in the manner prescribed in section 83.

(4) If a person fails to pay an amount for which he is liable under this section which the period allowable for payment thereof, in addition to any other penalty or charge for which he may be liable under this Act, shall be liable for a penalty equal to ten per cent of the amount of withholding tax for each month or part thereof reckoned from the first day after the due date to the date of payment of such unpaid amount.

(5) The penalty imposed under subsection (4) shall not exceed the amount of withholding tax.

(6) A penalty imposed under subsection (4) shall be in addition to interest payable in terms of subsection (7).

(7) If a person fails to pay an amount for which he is liable under this section which the period allowable for payment thereof, in addition to any other penalty or charge for which he may be liable under this Act, shall be liable for interest on the outstanding withholding tax at the rate of 20 per cent per annum calculated as from the day immediately following such due date for payment until the day of payment."

Amendment of section 35A of Act No. 24 of 1981

4. Section 35A is amended -

(a) by the substitution for the definition of "resident person" of the following definition:

"resident person" means -

- (a) the State, a regional council or a local authority in Namibia;
- (b) a natural person ordinarily resident in Namibia;
- (c) a company which is doing business in Namibia, and includes a branch of such company; or
- (d) partnership, board or trust which is formed or established or incorporated under the laws of Namibia or which is doing business in Namibia, and includes a branch of such partnership, board or trust.";

(b) by the substitution for subsections (2), (3), (4) and (6) of the following subsections:

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“(2) A resident person who pays or becomes liable to pay, whether directly or indirectly, any management fee, consultancy fee, director’s fee or entertainment fee to a non-resident must deduct or withhold tax from such payment in accordance with subsection (3).

(3) The rate of tax is [25] 10 per cent of any fees specified in subsection (1).

(4) For the purposes of this section and section 35B, “non-resident” means a person, company, partnership, board or trust that is not a resident person.[-

(a) **a person, other than a company, not ordinarily resident or carrying on business in Namibia; or**

(b) **a company neither managed nor controlled in Namibia.]**

(6) Where a resident person pays withholding tax under subsection (2) at the rate specified in subsection (3), it is a final charge to tax and does not form part of the assessable income or tax payable of the resident person.”.

Insertion of section 35B of Act No. 24 of 1981

5. The principal Act is amended by the insertion after section 35A of the following section:

“Withholding tax on interest received by or accrued to non-residents

35B. (1) For the purposes of this section -

“interest”, includes the -

- (a) gross amount of any interest or related finance charges, discount or premium payable or receivable in terms of or in respect of a financial arrangement;
- (b) amount (or portion thereof) payable by a borrower to a lender in terms of any lending arrangement as represents compensation for any amount to which the lender would, but for such lending arrangement, have been entitled; and
- (c) deferred interest,

irrespective of whether such amount is -

- (i) calculated with reference to a fixed rate of interest or a variable rate of interest; or
- (ii) payable or receivable as a lump sum or in unequal installments during the term of the financial arrangement;

“deferred interest”, includes -

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- (a) any interest where such interest or any portion thereof, calculated in respect of any accrual period falling within the term of any instrument by applying a constant interest rate throughout the term of such instrument, is not payable or receivable in terms of such instrument within one year from the date of the commencement of such accrual period; and
- (b) any interest payable or receivable in terms of any instrument where such interest is not calculated by applying a constant interest rate throughout the term of such instrument;

(2) There shall be paid for the benefit of the State Revenue Fund a tax (*in this Act referred to as withholding tax on foreign interest*) equal to 10 percent of any amount of any interest that is paid by any person or company to or for the benefit of any non-resident.

(3) Any person who makes payment of any amount of interest for the benefit of a non-resident shall withhold an amount equal to 10 per cent of that amount of interest from that payment.

(4) The tax withheld in terms of subsection (3) is a final tax.

(5) The withholding tax on foreign interest is payable on the 20th of the month following the month during which the withholding tax was so deducted.

(6) For the purposes of this section, interest is deemed to be paid on the earlier of the date on which the interest is paid or becomes due and payable.

(7) There shall be exempt from the withholding tax on interest any amount of interest, if such amount of interest is paid by -

- (a) the State to any person; or
- (b) any bank in Namibia to a foreign bank.

(8) In determining whether or not tax on foreign interest should be withheld, the question as to whether or not the payee is or is not a non-resident in Namibia shall be decided by reference to the date on which the interest is paid.

(9) Any person liable to withhold tax for the purposes of this section who fails to withhold an amount of tax in terms of subsection (2) or withholds an amount of tax but fails to pay that amount over, is personally liable for the payment to the Minister.

(10) A person paying the withholding tax on foreign interest shall, together with the payment contemplated in subsection (2), submit to the Minister a return in the manner and form and containing the information prescribed by the Minister.

(11) If a person fails to pay an amount for which he is liable under this section which the period allowable for payment thereof, in addition to any

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other penalty or charge for which he may be liable under this Act, shall be liable for a penalty equal to 10 per cent of the amount of withholding tax for each month or part thereof reckoned from the first day after the due date to the date of payment of such unpaid amount.

(12) The penalty imposed under subsection (11) shall not exceed the amount of withholding tax.

(13) A penalty imposed under subsection (11) shall be in addition to interest payable in terms of subsection (14).

(14) If a person fails to pay an amount for which he is liable under this section which the period allowable for payment thereof, in addition to any other penalty or charge for which he may be liable under this Act, shall be liable for interest on the outstanding withholding tax at the rate of 20 per cent per annum calculated as from the day immediately following such due date for payment until the day of payment, but the interest levied shall not exceed the amount of the withholding tax.

(15) A foreign person or company from whom an amount has been deducted or withheld in terms of this section is deemed to have received the amount so deducted or withheld.”.

Substitution of section 43 of Act No. 24 of 1981

6. The principal Act is amended by the substitution for section 43 of the following section:

“Person liable for tax and date when tax is payable and penalties

43. (1) The person liable for the tax shall be the person to whom or in whose favour the amounts described in section 42 accrue or are deemed to accrue.

(2) The tax payable in terms of section 41 shall be paid on the 20th of the month following the month during which the tax was so deducted.

(3) If a person fails to pay an amount for which he is liable under section 41 which the period allowable for payment thereof, in addition to any other penalty or charge for which he may be liable under this Act, shall be liable for a penalty equal to ten per cent of the amount of tax for each month or part thereof reckoned from the first day after the due date to the date of payment of such unpaid amount.

(4) The penalty imposed under sub section (10) shall not exceed the amount of tax.

(5) A penalty imposed under this section shall be in addition to interest payable in terms of subsection (6).

(6) If a person fails to pay an amount for which he is liable under this section which the period allowable for payment thereof, in addition to any other penalty or charge for which he may be liable under this Act, shall be liable for interest on the outstanding withholding tax at the rate of 20 per cent

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per annum calculated as from the day immediately following such due date for payment until the day of payment. The interest levied shall not exceed the amount of the withholding tax."

Amendment of section 81 of Act No. 24 of 1981

7. Section 81 of the principal Act is amended by the addition after subsection (3) of the following subsections:

"(4) Where, in addition to any amount of tax which is due and payable by any person under this Act, any amount of interest or penalty is payable, any payment made by that person in respect of such tax, interest or penalty which is less than the total amount due shall be dealt with as paid -

- (a) in respect of such tax;
- (b) to the extent that such payment exceeds the amount of such tax, in respect of such penalty; and
- (c) to the extent that such payment exceeds the sum of such tax and penalty, in respect of such interest.

(5) Where the Minister has reasonable grounds to believe that a person may leave Namibia permanently without paying all tax due or which may become due under this Act, the Minister may issue a certificate to the Permanent Secretary: Ministry responsible for immigration containing particulars of the tax due and request that Permanent Secretary to prevent such person from leaving Namibia until such person makes -

- (a) payment in full; or
- (b) an arrangement satisfactory to the Minister for the payment of the tax.

(6) A copy of the certificate issued under subsection (5) shall be served by the Minister on the person named in the certificate, if it is practicable to do so.

(7) Payment of the tax specified in a certificate issued under subsection (5) to a person employed in the Directorate of Customs and Excise or to an immigration officer as defined in section 1 of the Immigration Control Act, 1993 (Act 7 of 1993), or the production of a certificate purporting to be signed by the Minister stating that the tax has been paid or that satisfactory arrangements for the payment thereof have been made, shall be sufficient authority for allowing the person to leave Namibia."

Insertion of section 83B in Act No. 24 of 1981

8. The principal Act is amended by the insertion after section 83A of the following section:

Liability of third party appointed to satisfy tax debts

83B. (1) For the purposes of this Act, "tax debt" means the amount of tax due and payable, including penalties and interest charged.

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(2) The Minister or any official so designated by the Minister may by notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, require the person to pay the money to Inland Revenue in satisfaction of the taxpayer's tax debt.

(3) A person that is unable to comply with a requirement of the notice, must advise the Minister of the reasons for the inability to comply within the period specified in the notice and Minister may withdraw or amend the notice as is appropriate under the circumstances.

(4) A person receiving the notice must pay the money in accordance with the notice and, if the person parts with the money contrary to the notice, the person is personally liable for the money.

Liability of financial management for tax debts

83C. A person is personally liable for any tax debt of the taxpayer to the extent that the negligence or fraud of the person resulted in the failure to pay the tax debt if -

- (a) the person controls or is regularly involved in the management of the overall financial affairs of a taxpayer; and
- (b) the Minister is satisfied that the person is or was negligent or fraudulent in respect of the payment of the tax debt of the taxpayer.

Liability of shareholders for tax debts

83D. A person who is a shareholder of a company or member of a close corporation is liable to pay the unpaid tax to the extent that the tax debt arose during the time the person so served as such shareholder or such member, and in case of more than one person, such persons are liable jointly and severally to pay the unpaid tax to the extent that the tax debt arose during the time the persons so served as such shareholders or such members.

Recovery of tax debts from responsible third parties

83E. (1) The Minister has the same powers of recovery against the assets of a person referred to in sections 83B, 83C and 83D as the Minister has against the assets of the taxpayer and the person has the same rights and remedies as the taxpayer has against such powers of recovery.

(2) The Minister must provide a responsible third party with an opportunity to make representations -

- (a) before the responsible third party is held liable for the tax debt of the taxpayer, if such opportunity does not place the collection of tax debt in jeopardy; or
- (b) as soon as practical after the responsible third party is held liable for the tax debt of the taxpayer.

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Liability of transferee for tax debts

83F. (1) A person (*referred to as a transferee*) who receives an asset from a taxpayer who is a connected person in relation to the transferee without consideration or for consideration below the fair market value of the asset is liable for the tax debt of the taxpayer.

(2) The liability is limited to the lesser of -

- (a) the tax debt that existed at the time of the receipt of the asset or would have existed had the transferor complied with the obligations of the transferor under a tax Act; and
- (b) the fair market value of the asset at the time of the transfer, reduced by the fair market value of any consideration paid, at the time of payment.

Liability of person assisting in dissipation of assets

83G. If a person knowingly assists in dissipating an asset of a taxpayer in order to obstruct the collection of a tax debt of the taxpayer, the person is jointly and severally liable with the taxpayer for the tax debt to the extent such assistance reduces the assets available to pay the tax debt of the taxpayer.”.

Insertion of section 98A of Act No. 24 of 1981

9. The principal Act is amended by the insertion after section 98 of the following section:

“Rules for electronic communication

98A. (1) The Minister may make rules prescribing -

- (a) the procedures for submitting a return in electronic format, and for other electronic communications between Commissioner and other persons; and
- (b) requirements for an electronic digital signature of a return or communication.

(2) The Minister may, in the case of a return or other document submitted in electronic format, accept an electronic or digital signature as a valid signature for the purposes of this Act if a signature is required.

(3) If in any proceedings under this Act, the question arises whether an electronic or digital signature of a person referred to in subsection (2) was used with the authority of the person, it must be assumed, in the absence of proof to the contrary, that the signature was so used.”.

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Amendment of Schedule 2 to Act No. 24 of 1981, as amended by section 11 (a) and (b) of Act No. 8 of 1987, section 13 of Act No. 10 of 1993 and section 27 (a), (b) and (c) of Act No. 12 of 1996

10. Schedule 2 to the principal Act is amended by the deletion of subparagraphs (iv) and (vii) of the definition of "remuneration".

Amendment of Schedule 4 to Act No. 24 of 1981, added by section 21 of Act No. 25 of 1992 and amended by section 14 of Act No. 10 of 1993, section 10 of Act No. 17 of 1994, section 13 of Act No. 22 of 1995, section 28 of Act No. 12 of 1996, section 1 of Act No. 13 of 1998, section 1 of Act No. 7 of 1999, section 13 of Act No. 7 of 2002, section 1 of Act No. 11 of 2003, section 11 of Act No. 5 of 2007 and section 8 of Act No. 5 of 2010 and section 1 of Act No. 4 of 2013

11. Schedule 4 to the principal Act is amended by the substitution for item (a) of subparagraph (1) of paragraph 3 of the following item:

"(a) on each N\$ of taxable income derived from a source other than mining, [33] 32 cents;"

Short title and commencement

12. (1) This Act is called the Income Tax Amendment Act, 2015, and subject to subsection (2), commences on the date of its publication in the *Gazette*.

(2) Section 11 commences at the beginning of the year of assessment of such company on or after 1 January 2015.
