



# **Tax First**

## **Namibia Newsletter**

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# **New Tax Legislation**

*On 29 and 30 December 2015 the proposed amendments to the VAT Act and the Income Tax Act respectively were enacted and published in the Government Gazette.*

*The following is a detailed summary of the new legislation:*

## **Value Added Tax Amendment Act**

*On 29 December 2015 the VAT Amendment Bill (Act 12 of 2015) was published in the Government Gazette and thus making the previously proposed changes effective on 1 January 2016.*

### **1. Increase the VAT threshold from N\$ 200,000 to N\$ 500,000**

This long awaited amendment is welcomed by taxpayers. Not only does the increase provide for inflationary effects, but would assist in easing the administrative burden of both tax authorities in Namibia and smaller enterprises. It means that if a person does not meet the N\$500 000 threshold, VAT registration is not required but more importantly that persons with taxable supplies less than N\$500 000 during the current or next 12 month period should apply for deregistration with all the effects associated.

### **2. Security for VAT on the importation of goods by a VAT import account holder**

The VAT Act was amended to give authority to the tax authority to require security for the payment of import VAT by import VAT number holders.

Note as from 1 January 2016 the Commissioner for Inland Revenue by notice may require that security be provided prior to clearing of goods on importation by Customs Namibia and on such further conditions as the Commissioner for Inland Revenue may prescribe.

Not much information is available in this regard, but we speculate that such security may be recorded on the Customs Asycuda World System and be controlled in such a manner that if any import would lead to the amount of security being exceeded by import VAT due, the import will be blocked until additional security has been provided and registered on the Customs system or an additional payment made to Inland Revenue has been recognized on the Customs system.

Importers will have to monitor the use of their import VAT account facility and available credit on the security provided at any stage to avoid any unnecessary and costly delays at point of entry into Namibia.

As more information becomes available on the modalities and procedures in this regard, we shall inform you more comprehensively.

### **3. Set a threshold for voluntary VAT registration of N\$200,000**

The amendment provides certainty as to when application can be made for VAT registration should a person not be eligible for VAT registration under the normal rules, e.g. during start-up of a smaller enterprise with taxable supplies less than N\$200 000 per annum.

## ***Value Added Tax Amendment Act (continued)***

### ***4. Criteria for eligibility for registration of an import VAT account at Inland Revenue***

This amendment seems to be necessary to alleviate the current administrative burden on Inland Revenue to control the continued existence of numerous import VAT account numbers on its system.

Many importers registered and had goods cleared on import VAT account numbers without any proper reconciliation and even correct payment of import VAT due to Inland Revenue. The Commissioner would be enabled to cancel a person's import VAT number due to the following reasons:

- When the VAT registration threshold could not be met (i.e. forced deregistration of VAT and subsequent import VAT accounts)
- When a person did not comply with the conditions of eligibility for an import VAT account, e.g. continuous underpayments of import VAT.

### ***5. Delete the current provision that application for VAT deregistration may only be submitted after a period of two years following the date of VAT registration***

Many enterprises in the anticipation of winning a large tender, applied for and obtained VAT registration, but had to wait two years before their VAT accounts could be closed effectively at Inland Revenue Namibia. They will now be relieved from filing NIL VAT returns.

### ***6. Shareholders of companies and members of close corporations held liable for VAT debts***

The amendments state that shareholders of companies and members of close corporations will be required to pay any VAT, penalties and interest personally or jointly and severally where any tax remained unpaid.

### ***7. Impose criminal penalties for the misuse of import VAT account numbers***

Any person, including a clearing agent, who knowingly uses a false import VAT account number (including a VAT registration number of another person) may be criminally prosecuted and liable to a fine of N\$8,000 or imprisonment of up to 2 years, or both such fine or imprisonment, in terms of the VAT amendments.

The same penalties would be imposed on a person who misuse a VAT import account of a person for consideration or to otherwise evade the payment of import VAT .

### ***8. Electronic filing of VAT returns and e-signatures***

The initiative that VAT returns may be submitted electronically with electronic and digital signature will now be acceptable by the Minister.

What is not clear is whether electronic submission of tax invoices from business to business are acceptable for VAT purposes and a further amendment might be necessary to provide for this issue.

### ***9. Provision of financial services rendered to non-residents who are outside Namibia at the time such services are supplied***

Financial services rendered by an institution to a person outside Namibia will now be an exempt supply in terms of Schedule 4 of the VAT Act and such services (including interest) will be exempt from VAT.

This could have far reaching consequences for local financial institutions. It is however not clear how interest earned from a foreign source (i.e. where financial services are rendered wholly outside Namibia) will be affected.

## Income Tax Amendment Act

*On 30 December 2015 the Income Tax Amendment Bill (Act 13 of 2015) was published in the Government Gazette. The changes to the Income Tax Act are effective for all transactions occurring on 30 December 2015 and thereafter. One exception to this is the change in the corporate tax rate from 33% to 32% which is effective for tax years commencing 1 January 2015 and thereafter.*

### 1. Amendment to the gross income definition for the sale of a mining right/license

Change to existing par(o) of gross income - This paragraph was amended to include 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 license or mineral right, *whether directly or indirectly*. Previously it only stipulated that it includes a sale of shares in a company owning a mineral license or right to mine minerals. Therefore the ambit was widened in order to close potential loop-holes. One significant change is that it seems to levy tax even on the indirect change in shareholding of a company that owns a mining right or mineral license.

This paragraph was also amended to make provision for a deduction against the money received or accrued.

The amount that is allowed as an deduction is the acquisition costs of the mineral license or mineral right, but the acquisition cost may not create a loss.

A mineral license is also now defined as "*any mineral license as defined in the Minerals (Prospecting and Mining) Act, 1992 (Act No 33 of 1992)*".

Currently the meaning of "open market value" is not clear and may create issues around the interpretation thereof.

### 2. New inclusion to gross income made for receipts of the sale of petroleum licenses/ rights and shares in company holding petroleum licenses/rights

Paragraph (q) was introduced - This is a new paragraph which includes payments received for petroleum licenses / rights and shares in a company which hold petroleum licenses/rights. It reads as follows:

*"Any amount received or accrued, whether in money or in kind, as consideration or the open market value by way of sale, donation, expropriation, cession, grant or other alienation or transfer of ownership of a petroleum license, or right to mine petroleum in Namibia, and includes a sale, donation, expropriation, cession, grant or member's interest in a company that holds a petroleum license or petroleum right, whether directly or indirectly, less any -*

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

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

*but (i) and (ii) may not create a loss"*

This is basically the same tax provision as par (o) but relates specifically to the oil and gas industry.

A petroleum license is defined as "*includes exploration license, reconnaissance license and production license as defined in the Petroleum (Exploration and Production) Act, 1991 (Act No.2 of 1991)*"

Therefore it seems that the aim is to tax the direct and indirect transfer of any license in the oil and gas industry.

When one looks at the new proposed paragraph (q), which deals with the petroleum licenses, it gives the license holders in the oil and gas industry a bigger variety of costs to be deducted, for e.g. exploration costs and costs to improve the value of the license/right. This is however not included in paragraph (o) which deals with ordinary mining activities.

## Income Tax Amendment Act

### 3. Definition of "right" was introduced for purposes of par (o) and par (q)

A right is now defined as *"in relation to paragraph (o) and (q) of the definition of gross income, to mean a contingent right to any license or share or member's interest. If it is 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 license 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"*

This is an anti-avoidance provision. The situation that it is designed to counter is one in which the license is held by a trust and a person obtains the contingent right to benefit from the license for a consideration. If the consideration is accompanied by a change in beneficiaries, a change in creditors or a change in trustees, then the benefit concerned is classified as a mineral right or petroleum right. Change in the beneficiaries, creditors or trustees in a trust for consideration will be regarded as the alienation of a mineral or petroleum right where the trust holds a mineral or petroleum license, and the amount of the consideration will be subject to tax under either paragraph (o) or paragraph (q).

### 4. New paragraph added to the gross income definition for restraint of payments

Paragraph(p) of gross income - This is a new paragraph which includes restraint of trade payments into gross income. It reads as follows:

*"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"*

Previously the amounts were generally considered to be capital in nature and therefore not subject to tax in the hands of the person receiving it.

### 5. A new deduction subsection was introduced which will make provision for a deduction for restraint of trade payments made

Paragraph (x) was added to Section 17 of the Act dealing with deductions. This makes provision for a deduction for restraint of trade payments made. The deductible amount is as follows:

Any amount actually incurred by such a 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.

The amount allowed as a deduction shall not exceed in any year the lesser of -

(i) the restraint of trade payment divided by the number of years which the restraint of trade applies; or

(ii) one-third of such amount so incurred.

*E.g. if company X pays Mr X N\$900,000 to prevent him from working for the next 6 years, the amount that will be deductible is as follows: N\$900,000 / 6 = N\$150,000 in each of the following 6 years.*

### 6. The term Namibia has been defined for the first time in the Income Tax Act.

It is aligned with what is in the VAT Act of Namibia. This will have serious tax implications specifically for the fishing industry and the oil and gas exploration industry.

It reads as follows:

*"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 resource 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 3 of 1990)".*

The impact of this is that Namibia is for income tax purposes now extended from 12 nautical miles to 200 nautical miles from the low watermark. This gives the Revenue Authorities an increased right to Namibian source income. Furthermore it will result in a lot of expat workers that are working offshore to become taxable on their remuneration, and would most likely end up as a cost to Namibian businesses.

# Income Tax Amendment Act

## 7. Withholding Tax on Royalties amendment

S35(1) was amended to include withholding tax on royalties on the payment for the “*right to use industrial, commercial or scientific equipment*” which is received/accrues to a person not being ordinarily resident in Namibia or a domestic company. This is a new addition to the existing legislation that may result in the levying of withholding tax on royalties on the rental of industrial, commercial or scientific equipment.

Previously, the rate was 9.9% (being the product of 30% multiplied by the corporate tax rate of 33%) which is now fixed at 10%.

The new amendments as per S35(2) also require WTR to be paid within 20 days after the month during which the said liability was incurred or when the payment is made. This was previously 14 days.

Prior to the amendments, there were no specific sub-sections in S35 that levied penalties and interest on late payment. The new legislation allows the Receiver of Revenue to levy a penalty of 10% per month and interest of 20% per annum on any late payments. Penalties imposed may not exceed the amount of withholding tax due.

It however seems that there is an omission in S35(7) as the interest is not capped to the amount of tax, as is the case with all the other interest provisions in the Income Tax Act.

## 8. Withholding Tax on Services Amendment

The definition of a “*resident person*” was amended to widen the ambit thereof. Specific mention is made to companies doing business in Namibia (irrespective of where they are registered) and it specifically includes a branch of any company, board or trust.

The rate of 25% is reduced to **10%**

More emphasis was placed in the legislation on the fact that “payment” date seems to be the trigger for withholding the withholding tax on services, by specifically including the words “any resident person who pays or becomes liable to pay..”

The definition of “*non-resident*” was changed to indicate that a non-resident is a person that is not a resident person. This new definition will also apply to the new withholding tax on interest rules introduced (see below).

## 9. Withholding tax on interest paid to a non-resident was introduced

A new section 35B was introduced that obliges any person or company paying interest to a non-resident to withhold WTI at a rate of 10% which is payable on the 20th of the month following the month in which the withholding tax was deducted. The previous section 34A WTI paid to non-residents was only applicable to interest paid by banks or unit trusts.

The trigger for withholding the 10% is when payment takes place. Payment in terms of this article means the earlier of actual payment or when interest becomes due and payable.

The following exemptions exist:

- Payment of interest by the State to any person; or
- Payment of interest by any bank in Namibia to a foreign bank

It further allows the Receiver of Revenue to levy a penalty of 10% per month and interest of 20% per annum on any late payments. Penalties and interest imposed may not exceed the amount of withholding tax due.

We are unsure whether a new form will be available on which the withholding tax on interest would be declared or whether the existing forms will be used.

# *Income Tax Amendment Act*

## *9. Withholding tax on interest paid to non-resident was introduced (continued)*

We are concerned that the wording used in the definition of interest as per the new sections is not defined in section 35B or in section 1 of the Income Tax Act therefore making interpretation of the terms a challenge.

It also seems as if there is an omission in section 35B(2), as the term “any person or company” should be a reference to any resident person or company. A similar omission seems to be present under 35B(3).

There are also a number of other issues we foresee with the new legislation, specifically with regards to the language used that is not defined, but also because there now seems to be a double taxation of some interest paid, as banks and unit trusts are also obliged to withhold tax on interest in terms of Section 34A.

Section 35B does not exclude interest paid by such institutions from its ambit, except to the limited extent that the interest is paid from a Namibian bank to a “foreign bank”.

## *10. Non-Residents Shareholders Tax Amendment*

Amendments was made to include section 43(2) which obliged a person liable for NRST to pay the amount on the **20th** of the month following the month during which the tax was so deducted.

A new addition also includes the ability of the Receiver of Revenue to levy a penalty of 10% per month and interest of 20% per annum on any late payments. Penalties and interest imposed may not exceed the amount of withholding tax due.

The new provision is in conflict with the existing section 47, which has not been repealed and which specifies that the tax must be paid within 30 days from the date that the dividend becomes payable, or within 30 days of the date the dividend warrant or cheque is received by an agent in Namibia of the non-resident shareholder.

It is considered that it could not have been an intention that section 47 should remain in effect, regarding the date of payment of the tax.

## *11. Section 81 Amendments*

If a taxpayer has a liability for tax, interest and penalties and pays an amount that is less than the total amount due, the payment shall be allocated first to the outstanding tax, then to the penalties, and then to interest.

Where Inland Revenue has reasonable ground to believe a person who has outstanding taxes (including penalties and interest) is going to permanently leave Namibia, the Minister of Finance may issue a certificate to the Permanent Secretary of the Ministry of Home Affairs and Immigration. The certificate may request that the PS prevents the person from leaving the country without paying the outstanding taxes in full, or making satisfactory payment arrangements with Inland Revenue for the settlement of the outstanding taxes.

## *12. Section 83B - Liability of a third party appointed by Inland Revenue to satisfy tax debt of a taxpayer*

The Minister may appoint any person by way of notice for the debt of a taxpayer, where that person holds or owes the taxpayer any money, including pension, salary, wage, or other remuneration. The notice will require that person to pay the money to Inland Revenue. If the person is unable to comply with the requirements of the notice, reasons for inability to comply should be provided to the Minister. The Minister may withdraw or amend the notice as would be appropriate under the circumstances. If the person receives the notice and does not comply with it, that person may become personally liable to pay the money.

In practice this means it can apply, for example, to banks holding client accounts, employers and pension funds.

This provision may be considered harsh and we proposed to the Minister that further research on the matter is done to ensure the constitutionality thereof.

## ***Income Tax Amendment Act***

### ***13. Section 83C - Liability of financial management for tax debts***

Where a person controls or is regularly involved in the management of the financial affairs of a taxpayer, and if that person acted negligently or fraudulently in respect of payment of tax debt of the said taxpayer, that person (i.e. the one that acted as negligently or fraudulently) can be personally held liable for any tax debt of the taxpayer.

### ***14. Section 83D - Liability of shareholders for tax debts***

The shareholder(s) of a company or a member(s) of a CC will be held jointly and severally liable for any unpaid taxes of the company or CC to the extent that the tax debt arose during the time the person(s) served as shareholders or members.

The effect of Section 83D is far reaching. A shareholder who has no influence over a company and who has derived no benefit from the company by way of a distribution can nevertheless be made liable for the company's tax debts.

The purpose of the provision should be to enable Inland Revenue to pursue shareholders or members who deliberately strip assets or cash from a company in order to defeat a claim against the company by Inland Revenue for unpaid taxes.

In its present form, a shareholder who has never received a dividend from a company that has gone insolvent may be made personally liable for the company's tax debts.

We are concerned about this provision and proposed to the Minister to consider the implications of the new provision and urged further research on the matter to ensure the constitutionality thereof.

### ***15. Section 83E - Recovery of tax debts from responsible 3rd parties***

The Minister now also has the power of recovery against the assets of the person referred to in S83B, S83C and S83D above similar to what they have against the assets of a taxpayer. The person will also have the same rights and remedies as the taxpayer has against the powers of recovery.

The Minister must provide the responsible 3rd party with an opportunity for representation:

- before they can be held liable, if the opportunity does not place the collection of debt in jeopardy; or
- as soon as is practically possible once the 3rd party has been held liable for the tax of the taxpayer.

### ***16. Section 83F - Liability of transferee of tax debts***

If a person receives an asset without consideration or a consideration below market value from a taxpayer, and they are connected persons, the person receiving the asset will be liable for the tax debts of the taxpayer giving him/her the asset.

The liability for tax would be the lesser of either:

- the tax debt at the time of the receipt of the asset; or
- the fair market value of the asset at the time of the transfer, reduced by the amount paid for the asset

One issue we have is that the Income Tax Act does not define who is a "connected person".

This can have far reaching implications especially where assets are inherited by beneficiaries of an estate, as they could be held liable for the tax thereon.

### ***17. Section 83G - Liability of person assisting in dissipation of assets***

If a person knowingly assist a taxpayer to dissipate an asset in order to obstruct the collection of the taxpayer's tax debt, that person may be held jointly and severally liable with the taxpayer for the tax debt where such assistance has reduced the assets that are available to pay the tax debt that was due.

# Income Tax Amendment Act

## 18. Section 98A - Rules for Electronic communication

The Minister now has the authority to make rules prescribing:

- the procedures for submitting tax returns in electronic format
- electronic communication between the Commissioner and other persons;
- requirements for electronic digital signatures of a return or communication;

The Minister may now accept a return or any document submitted with an electronic or digital signature as a valid signature. No proof of authority given to use a signature will be required, but rather such authority is assumed to have been given.

## 19. Amendment to Schedule 2 - "remuneration" definition amendment

The following subsection of the definition of "remuneration" was deleted from Schedule 2:

(iv) any amount paid or payable to any director referred to in paragraph (b) of the definition of "provisional taxpayer" in respect of services rendered or to be rendered by such director to a company referred to in that paragraph, unless the Minister in the particular case otherwise directs;

(vii) any amount of directors' fees paid or payable by a public company to any person who is ordinarily resident in Namibia, if no other amounts constituting remuneration in terms of this definition have been paid or become payable to such person by such company;

This has the effect that all directors fees and remuneration now forms part of "remuneration" as defined and is thus subject to PAYE. Previously, PAYE was not due on the above two items.

In practice one will have to consider at what rate are you deducting PAYE from directors fees paid.

## 20 The income tax rate for companies (other than mining companies) will be amended to 32% effective for years of assessment starting 1 January 2015.

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