



Tax First

Namibia Newsletter

September 2012

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No trading income - no expense claims allowed

Practice of Inland Revenue

The prevailing practice relating to income tax assessments is to disallow the expenditure incurred during the current year in the event that no taxable income was generated. Once the expenditure for the current year is disallowed, any balance of assessed loss (loss brought forward) is forfeited.

Inland Revenue's rationale, as argued, is based on the premise that a deduction of expenditure shall only be allowed if such expenditure derived income from trade.

A person that derives no income from trade will have to discharge the onus that he did in fact trade during the year of assessment, albeit not yielding income. A critical factor is that expenditure incurred in trade should be sufficiently closely linked to its potential to produce income.

Taxpayers affected by this action of Inland Revenue are informed of the disallowance of expenditure only through a notice of assessment issued by Inland Revenue (which is sometimes delayed due to processing backlogs).

The legislation

In perusing the Income Tax Act, Act 24 of 1981 ("the Act") to comprehend the intention of the legislature, two sections appear apparent in this imperative. Section 17(1)a of "the Act" provides for the deduction of expenditure as follows:

"17. General deductions allowed in determination of taxable income. – (1) For the purpose of determining the taxable income derived by any person from carrying on any trade within Namibia, there shall be allowed as deductions from the income of such person so derived-

(a) expenditure and losses actually incurred in Namibia in the production of the income, provided such expenditure and losses are not of a capital nature;"

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No trading income - no expense claims allowed (continued)

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In addition, Section 21(1)a of the Act there are two requirements which must be met in order for a taxpayer to set off an assessed loss against taxable income, namely:

- the taxpayer must be carrying on a trade; and
- the assessed loss may only be set-off against income derived from that trade.

In terms of the Act '*trade*' includes every profession, trade, business, employment, calling, occupation or venture, including the letting of any property, and the use of or the grant of permission to use any patent or design.¹

Case Law

Generally, the courts held that if the expenditure is concomitant with the production of income then such expenditure qualifies as admissible in the determination of the taxable income and subsequently tax payable^a.

For a person to carry forward an assessed loss from the

preceding tax year, the courts confirmed that a person must have carried on a 'trade' during the current tax year^b.

Conclusion

In terms of Section 72 of the Act, The burden of proof that any amount is subject to any deduction, or set-off in terms of the Act, shall be upon the person claiming such deduction, or set-off.

A pragmatic approach would be to demonstrate in writing, with the submission of the return of income to Inland Revenue, that expenditure incurred is an 'inevitable concomitant' in the production of income. And in the absence of any explanatory notes the assessment outcome is essentially predetermined. ■

a. *CIR v Nemojim (Pty) Ltd and Sub-Nigel Ltd v CIR (95)*

b. *SA Bazaars (Pty) Ltd v CIR 1952 (4)*

Withholding Tax on Services update

Inland Revenue has not yet responded to Ruling requests to clarify the application of Double Tax Agreements ("DTA's") in respect of WTS payments. Indications are that the Directorate is still in consultation with the Attorney General regarding DTA relief.

It is advised that Namibian residents who apply such relief when making payments to foreign suppliers should confirm and retain evidence that these suppliers qualify for DTA relief; and that relief claimed should be disclosed on WTS returns.



Government Gazettes

Government Gazettes for the period for August 2012 is included in this edition. This is not an exhaustive list of Acts/Notices/Proclamations published.

Government Notice

169 - 2012 Determinations of amendments under the Banking Institutions Act, No 2 of 1998;

191 - 2012 Notification of the re-appointment of the board of directors: Agribank Act, 2003

193 - 2012 Commencement of Labour Amendment Act, 2012 (Act No. 2 of 2012) except the provisions contained in section 10, where it relates to section 26(2)(a)(ii) and 26(2)(a)(iii) of the Employment Services Act, 2011 (Act No. 8 of 2011), comes into operation on the 1 August 2012.

194 - 2012 Commencement of the Employment Services Act, 2011 (Act No. 8 of 2011), Part 1, 4 and 5 of the Act come into operation on 1 September 2012

252 - 2012 Bank of Namibia: Statement of Assets and Liabilities as at close of business on 30 June 2012

Paying Non-Residents Shareholder's Tax

In terms of section 41 to 48 of the Income Tax Act, Non-resident shareholders' tax ("NRST") is payable on any dividend declared by a Namibian company to a shareholder of a company that is "*neither managed nor controlled in Namibia*".

An NRST exemption, as stipulated in section 46, applies where the profits from which the dividend is declared, is not from a Namibian source (e.g. where a foreign company, registered as an external company in Namibia also generates profits in another tax jurisdiction). When the company declares dividends from income arising from sources within and outside Namibia, the NRST in respect of the dividend shall be apportioned in the same ratio as the sum of the net profits of the Company derived from sources in Namibia in relation to the total net profits (income from all sources).

The standard rate for NRST will be 10% of the dividend declared where more than 25% shareholding is held. Where less than 25% shareholding, the rate of NRST is 20%. A Double Taxation Agreement may reduce the tax rate, depending on which country the dividends are paid to.

The table below summarising the NRST rates in the different Double Taxation Agreements:

<i>Country where the Holding Company receiving a dividend is resident</i>	<i>% Shareholding in Namibian subsidiary</i>	<i>Reduced NRST rate</i>
<i>Botswana</i>	<i>N/A</i>	<i>10%</i>
<i>France</i>	<i><10%</i>	<i>15%</i>
	<i>>10%</i>	<i>5%</i>
<i>Germany</i>	<i><10%</i>	<i>15%</i>
	<i>>10%</i>	<i>10%</i>
<i>India</i>	<i>N/A</i>	<i>10%</i>
<i>Mauritius</i>	<i><25%</i>	<i>10%</i>
	<i>>25%</i>	<i>5%</i>
<i>Romania</i>	<i>N/A</i>	<i>10% - 15% depending on shareholding</i>
<i>Russian Federation</i>	<i><25% or >25% and have directly invested less than USD100,000 in the equity capital of the company paying the dividend</i>	<i>10%</i>
	<i>>25% and have directly invested USD100,000 or more in the equity capital of the company paying the dividend</i>	<i>5%</i>
<i>South Africa</i>	<i><25%</i>	<i>15%</i>
	<i>>25%</i>	<i>5%</i>
<i>Sweden</i>	<i><10%</i>	<i>15%</i>
	<i>>10%</i>	<i>5%</i>
<i>United Kingdom</i>	<i><50%</i>	<i>15% (1-24% interest) 10% (25%- 49%)</i>
	<i>>50%</i>	<i>5%</i>
<i>Malaysia</i>	<i><25%</i>	<i>10%</i>
	<i>>25%</i>	<i>5%</i>

The company declaring the dividend is required to withhold the NRST on such dividend, and then pay it over to Inland Revenue within thirty days of the date on which the dividend is payable. ■

Tax Calendar - September 2012

Monday	Tuesday	Wednesday	Thursday	Friday
10	11	12	13	14
17	18	19	20 <ul style="list-style-type: none"> • Import VAT return • PAYE return • Withholding Tax on Services return 	21
24	25 <ul style="list-style-type: none"> • VAT return (Category B) 	26	27	28
1 Oct <ul style="list-style-type: none"> • Social Security payment • Tax return - companies with 28 February YE • Business individuals tax returns • 2nd provisional returns - companies with 30 September YE. 				

Bills in progress*

- B1-2011 Unit trust control Amendment Bill
- B2-2011 Long-term Insurance Bill
- B3-2011 Pension Fund Amendment Bill
- B 4-2011 Inspection of Financial Institutions Bill
- B 14-2011 Stamp Duty Amendment Bill
- B 7-2011 Conferment of National Honours Bill

Source: Parliament of Namibia www.parliament.gov.na/bills

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