

INCOME TAX (AMENDMENT) ACT, 2018

No. 38



of 2018

ARRANGEMENT OF SECTIONS

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An Act to amend the Income Tax Act.

Date of Assent: 21.12.18

Date of Commencement: ON NOTICE

ENACTED by the Parliament of Botswana.

1. This Act may be cited as the Income Tax (Amendment) Act, 2018, and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Short title and commencement

2. Section 36 of the Income Tax Act (hereinafter referred to as “the Act”) is amended by substituting for that section, the following new section —

Amendment of section 36 of Cap. 52:01

“Transactions designed to avoid liability to tax

36. (1) Where the Commissioner General is of the opinion that a transaction, operation or scheme, in this section referred to as a “transaction”, including a transaction for the alienation of property, is fictitious or artificial and that such transaction has the effect of avoiding, reducing or postponing the liability to tax of any person for any tax year, he or she may disregard such transaction for the purposes of this Act and determine the liability for the tax chargeable under this Act as if the transaction had not been entered into or carried out, or in such manner as in the circumstances he or she deems appropriate to counteract such avoidance, reduction or postponement.

(2) Where any agreement in relation to, or any change in, the shareholding in any company has been entered into or effected, whether before or after the commencement of this Act, and the Commissioner General is of the opinion that the purpose, or one of the purposes, of such agreement or change was to utilise an assessed loss or any balance of an assessed loss incurred by the company, in order to avoid or reduce the liability to tax of the company or any other person for any tax year, a deduction in respect of such assessed loss or balance of assessed loss shall not be allowed.”.

3. The Act is amended by inserting, immediately after section 36, the following new section —

“Transfer pricing 36A. (1) For the purposes of this section where a person engages directly or indirectly in any transaction, operation or scheme, hereinafter referred to as a “transaction”, with a connected person, the amount of each person’s taxable income derived from the transaction shall be consistent with the arm’s length principle.

(2) A transaction shall be consistent with the arm’s length principle where the conditions of the transaction do not differ from the conditions that would have applied between independent persons in comparable transactions carried out under comparable circumstances.

(3) Where a transaction between connected persons is not consistent with the arm’s length principle in accordance with subsection (1), then —

- (a) any amount of income that would have accrued to either of the connected persons; and
- (b) any amount of income taxable in Botswana if the conditions of the transactions had been consistent with the arm’s length principle, but have not accrued to that person due to the non-arm’s length conditions, shall be included in the taxable income of that person and taxed accordingly.

(4) The determination of whether the conditions of a transaction are consistent with the arm’s length principle under subsection (1) and the determination of any quantum of adjustments made under subsection (2) shall be prescribed by the Minister.

(5) A person who engages in a transaction to which subsection (1) applies shall keep the required documentation as shall be prescribed by the Minister.

(6) Notwithstanding the provisions of subsections (1) and (2) where a taxpayer engages directly or indirectly in a transaction with a connected person not resident in Botswana for the acquisition of a new or used asset from the connected person and the connected person purchased that asset from an independent third party, the Commissioner General shall determine the purchase price of the asset to be nil for the purposes of computing the taxable income of the taxpayer unless the taxpayer provides a tax invoice for the asset issued by the independent third party to the connected person for the acquisition of the asset.

(7) A taxpayer may apply to the Commissioner General for an advance pricing agreement which shall specify the appropriate criteria for the application of this section to one or more specific transactions for a fixed period of time.

(8) The Commissioner General may agree to enter into an advance pricing agreement on a unilateral basis or through consultation with the competent authority of the country of residence of the person with which the transaction is to be entered into, provided that the country of residence is a country with which the Government of Botswana has a double taxation avoidance agreement.

(9) Where the Commissioner General enters into an advance pricing agreement with a taxpayer, provided that the terms and conditions set out in the advance pricing agreements are fully complied with to the satisfaction of the Commissioner General, no adjustment shall be made by the Commissioner General under this section to the transactions that are within the scope of the advance pricing agreement.

(10) The Minister may prescribe regulations for advance pricing agreements which shall specify —

- (a) eligibility for application for an advance pricing agreement;
- (b) time limits for advance pricing agreements;
- (c) the application procedure and process;
- (d) annual compliance procedures for the concluded advance pricing agreements;
- (e) the conditions and procedures for revocation or cancellation of an advance pricing agreement;
- or
- (f) other requirements as the Minister may consider necessary for the better carrying out of the provisions of this section.”.

4. The Act is amended in section 41 (1) by deleting paragraph (k).

5. The Act is amended by inserting immediately after section 41, the following new section —

<sup>“Deductions
not allowed</sup> 41A. (1) Notwithstanding any other provision of this Act, a deduction shall not be allowed for the purpose of ascertaining the taxable income of any company in respect of any amount of net interest expense in respect of any tax period that exceeds 30 percent of earnings before interest, tax, depreciation and amortisation, hereinafter referred to as “tax EBITDA”, of the company, except for a company whose main business is banking or insurance.

(2) For the purposes of this section “net interest expense” means the interest paid or accrued by the company during the tax period, minus the amount of interest included in the taxable income of such company for that tax period.

(3) For purposes of this section, interest includes —

- (a) interest on all forms of debt;
- (b) payments made which are economically equivalent to interest;
- (c) expenses incurred in connection with the raising of finance;
- (d) payments under profit participating loans;
- (e) imputed interest on instruments such as convertible bonds and zero coupon bonds;
- (f) amounts under alternative financing arrangements, such as Islamic finance;
- (g) the finance cost element of finance lease payments;
- (h) capitalised interest included in the balance sheet value of a related asset, or the amortisation of capitalised interest;
- (i) amounts measured by reference to a funding return under transfer pricing rules;
- (j) where applicable, notional interest amounts under derivative instruments or hedging arrangements related to an entity’s borrowings;
- (k) certain foreign exchange gains and losses on borrowings and instruments connected with the raising of finance;
- (l) guarantee fees with respect to financing arrangements; and
- (m) arrangement fees and similar costs related to the borrowing of funds.

(4) The tax EBITDA means the sum of —

- (a) taxable income;
- (b) net interest expense;
- (c) depreciation; and
- (d) amortisation.

(5) The interest for which a deduction is denied under this section may be carried forward and treated as incurred during the next taxable period and the interest so denied may be carried forward for three years.”.

6. The Act is amended by inserting immediately after section 43, the following new section —

“Interest deductibility: mine sand minerals 43A. (1) The deductions allowed for an amount of interest paid by a resident company during the year shall be determined in accordance with section 41A.

(2) Notwithstanding section 41A(5), the amount of interest for which a deduction is denied under this section may be carried forward and treated as incurred during the next taxable period and the interest so denied may be carried forward for ten years.”.

7. The Act is amended in section 69 (1) by inserting immediately after paragraph (c), the following new paragraph —

“(d) to furnish the Commissioner General with all of the documentation required under section 36A (5) when required to do so by the Commissioner General.”.

8. The Act is amended in section 118 by inserting immediately after subsection (2), the following new subsections —

“(2A) Where the Commissioner General has disregarded a transaction under section 36, as a result of the fictitious or artificial nature of the transaction, the taxpayer shall be liable to a penalty which is the greater of —

(a) an amount equal to 200% of the amount of tax that would have been avoided but for the application of the tax avoidance provision; or

(b) a fine of P10 000.

(2B) Where a person has not complied with the provisions of section 36A on transfer pricing, the taxpayer shall be liable to a penalty which is the greater of —

(a) an amount equal to 200% of the amount of the tax that would have been payable had the transaction been conducted at arm’s length; or

(b) a fine of P10 000.”.

9. The Act is amended by inserting immediately after section 118, the following new section —

“Penalties: failure to furnish transfer pricing documentation 118A. (1) A person who fails to comply with the provisions of section 69 (1) (a) to (c) or (3) shall be liable to a penalty not exceeding P10 000.

(2) A person who fails to comply with the provisions of section 69 (1) (d) shall be liable to a penalty not exceeding P500 000.”.

10. The Act is amended by substituting for section 122, the following new section —

Insertion of section 43A in the Act

Amendment of section 69 of the Act

Amendment of section 118 of the Act

Insertion of section 118A in the Act

Amendment of section 122 of the Act

“Offences:
failure to
comply with
requirements
of this Act

122. (1) A person who —
- (a) fails or neglects to furnish to the Commissioner General any return or document as and when required under this Act;
 - (b) fails to comply with the requirements of any notice in writing served on him or her under this Act;
 - (c) refuses or neglects to answer truly and fully any questions put to him or her or to supply any information required from him or her respecting his or her gross income or the gross income of any other person;
 - (d) fails to keep a proper record of his or her transactions as required under section 26;
 - (e) fails to preserve any books of account or document which he or she is required to preserve under section 144;
 - (f) obstructs or hinders any person appointed or employed under this Act in the discharge of his or her duties;
 - (g) fails to disclose in any tax return made by him or her any gross income accrued to him or her or any material facts which should have been disclosed;
 - (h) signs any return or statement rendered to the Commissioner General without reasonable grounds for believing that return or statement or any part thereof to be correct, or
 - (i) enters into a transaction under section 36 which is regarded as artificial or fictitious,
- commits an offence and shall be liable to a fine of P10 000 and to imprisonment for one year.
- (2) Any person who, having been convicted under subsection (1) of failing to do anything required to be done by him or her under this Act, fails, within any further period specified by the Commissioner General in a notice served on that person, to comply with the requirements of the notice, shall be guilty of a further offence and shall be liable for each day during which the default continues to a fine of P100 and to imprisonment for one month.”

11. The Act is amended by inserting immediately after section 129, the following new section —

“Mitigation of
penalties on
transfer pricing

129A. Notwithstanding section 129, where a person has committed a breach under section 118A, the Commissioner General may mitigate any fine imposed by him or her but shall not mitigate the fine to less than P250 000 whether before or after judgment, for the recovery of the tax has been obtained.”

Insertion
of section 129A
in the Act

12. The Act is amended in section 137 by inserting the following new definition in its correct alphabetical order —

Amendment
of section 137
of the Act

““international financial services centre company” means a company incorporated in Botswana to provide any of the approved financial operations under section 138 (7) to its associated or related companies;”.

13. Section 138 of the Act is amended by substituting for subsection (7), the following new subsection —

Amendment
of section 138
of the Act

“(7) The following shall be approved financial operations for the purpose of subsection (2) —

- (a) banking and financing operations;
- (b) the broking and trading of securities;
- (c) investment advice;
- (d) management and custodial functions in relation to collective investment schemes;
- (e) insurance and related activities;
- (f) registrars and transfer agency services;
- (g) accounting and financial administration; and
- (h) other operations that the Minister may declare by Order from time to time to be approved financial operations for the purposes of this subsection.”.

14. The Act is amended in the Twelfth Schedule by deleting paragraph 6.

Amendment
of Twelfth
Schedule
of the Act

PASSED by the National Assembly this 12th day of December, 2018.

BARBARA N. DITHAPO,
Clerk of the National Assembly.