INCOME TAX (AMENDMENT) ACT, 1998

No. 18 **of 1998**

ARRANGEMENT OF SECTIONS

An Act to amend the Income Tax Act.

Date of Assent: 16th September, 1998.

Date of Commencement: 25th September, 1998.

ENACTED by the Parliament of Botswana.

1. This Act may be cited as the Income Tax (Amendment) Act, 1998. Short title

2. Section 2 of the Income Tax Act (hereinafter referred to as "the Act"), is amended — Amendment of section 2 of Act No. 12 of 1995

(*a*) by inserting in their correct alphabetical order, the following new definitions —

(i) "'equity' means paid up value of all shares and the amount standing to the credit of the share premium account of a company, the accumulated profits and the asset revaluation reserves of the company at the beginning of the year of assessment, reduced by the sum of any debt obligation owed by the company and accumulated losses at the beginning of the year of assessment" ; and

(ii) 'debt' means the greatest amount at any time during the year of assessment of any debt obligation owed by the company on which interest is payable and deductible";

(*b*) in the definition of the word "company" by substituting for paragraph (*c*) the following new paragraph —

"(*c*) collective investment undertaking or unit trust; and"; and

(*c*) in the definition of the word "dividend" under paragraph (*d*) (i) of the proviso thereto, by deleting the words " the shares or units of which are accepted for listing on the Botswana Stock Exchange,".

Amendment of section 10 of the Act

3. Section 10 of the Act is amended by deleting the words " and subject to subsection (2)" therefrom.

Amendment of section 30 of the Act

4. Section 30 (1) (*d*) of the Act is amended by deleting the words "remaining after the operation of paragraph 7 of Part V of the Third Schedule".

Amendment of section 42 of the Act

5. Section 42 (1) (*a*) (ii) of the Act is amended by —

(*a*) substituting for the words "that the Commissioner may allow", the words "specified in the Twelfth Schedule"; and

(*b*) inserting the following new proviso:

"Provided that deductions shall be subject to the provisions of the Twelfth Schedule.".

Amendment of section 50 of the Act

6. Section 50 of the Act is amended in subsection (2) —

(*a*) by deleting the word "or" at the end of sub-paragraph (i);

(*b*) by inserting immediately after sub paragraph (i) the following new sub paragraphs (ii) and (iii) —

"(ii) a Minister or Member of Parliament who is entitled to pension and gratuity which is exempt from tax under paragraph xxxiv of Part II of the Second Schedule;" ; and

"(iii) an employee who is entitled on termination of his contract to a gratuity which is exempt from tax under paragraph xxxv of Part II of the Second Schedule;" ; and

(*c*) by renumbering sub paragraph (ii) sub paragraph (iv).

Amendment of section 54 of the Act

7. Section 54 of the Act is amended —

(*a*) in subsection (*b*), by deleting the word "and" at the end thereof;

(*b*) in subsection (*c*), by substituting the full stop at the end thereof with a semi colon and the word "and"; and

(*c*) by inserting immediately after subsection (*c*), the following new subsection (*d*) —

"(*d*) the chargeable income of mining operations shall be ascertained in accordance with the provisions of the Twelfth Schedule".

8. Section 56 of the Act is amended in subsection (1), by deleting the words "if so directed by the Commissioner," therefrom. Amendment of section 56 of the Act

9. Section 96 of the Act is amended — Amendment of section 96 of the Act

(*a*) in subsection (1), by substituting for the words "two percent" the words "one and a half percent"; and

(*b*) by deleting subsection (2) therefrom.

10. Section 117 of the Act is amended by inserting immediately after subsection (5) the following new subsections (6) and (7) — Amendment of section 117 of the Act

"(6) For the purposes of withholding taxes as contained under the provisions of Division III of Part VIII, the Commissioner shall impose on a person who after reasonable request —

(*a*) fails to give access to books and records;

(*b*) fails to appear at a tax office for determination of the tax liability of such person for withholding of tax; or

(*c*) otherwise impedes the determination or collection or withholding tax under Division III of Part VIII,

a penalty of P100 per day or 1 percent of the tax due for each month or part of a month during which such failure or impediment continues, whichever is greater." ; and

"(7) A person who —

(*a*) within the prescribed time fails to register as an employer, to notify any change of address or to notify that he has ceased to be an employer;

(*b*) within the prescribed time fails to deduct any amount of tax from the remuneration paid to an employee;

(*c*) within the prescribed time fails to pay to the Commissioner any amount of tax deducted from an employees' remuneration;

(*d*) fails to comply with any direction issued or condition specified by the Commissioner under the Fifth Schedule;

(*e*) fails to maintain a record of remuneration paid to his employees and tax deducted therefrom;

(*f*) fails to deliver to any employee a certificate of tax deducted from remuneration as and when required;

(*g*) furnishes to his employer or Commissioner an incorrect return of personal particulars, or gives incorrect information to his employer in relation to a matter affecting the amount of tax to be deducted from his remuneration;

(*h*) issues, possesses, uses or causes to be issued or used any certificate of remuneration and tax deducted which is incorrect;

(*i*) fails to deduct any tax from payment made to a non resident to which section 56 applies;

(*j*) within the prescribed period, fails to pay to the Commissioner any amount deducted under section 56;

(*k*) within the prescribed period fails to notify the Commissioner that he has entered into a contract to which the Sixth Schedule applies; or

(*l*) fails to comply with the provisions of section 57;

shall be liable to a penalty of P100 per day or 1 percent of the tax due for each month or part of a month that the violation continues, whichever is the greater."

Amendment of section 123 of the Act

11. Section 123 of the Act is amended in subsection (1) by inserting immediately after the word "who" a comma and the words "willfully and with intent to evade liability to tax".

Amendment of section 125 of the Act

12. Section 125 of the Act is amended by inserting immediately after the word "who" a comma and the words "willfully and with intent to evade liability to tax".

Amendment of section 126 of the Act

13. Section 126 of the Act is amended by inserting immediately after the word "who" a comma and the words "willfully and with intent to evade liability to tax."

Amendment of section 129 of the Act

14. Section 129 (2) of the Act is amended —

(*a*) in paragraph (iv), by deleting the word "or" at the end thereof;

(*b*) by inserting immediately after paragraph (iv) the following new paragraph (v) —

"(v) it is a Collective Investment Undertaking or Unit Trust; or"; and

(*c*) by renumbering paragraph (v) as paragraph (vi).

Amendment of section 132 of the Act

15. Section 132 (1) of the Act is amended by inserting immediately after the word "accrued" the words "and shall form part of the taxable income of such a participator and be charged to tax at the prevailing dividend withholding tax rate".

Amendment of section 137 of the Act

16. Section 137 of the Act is amended —

(*a*) in subsection (1) by inserting

(i) immediately after the word "shall" the words "maintain and";

(ii) immediately after the word "preserve" the words "in Botswana";

(*b*) by inserting immediately after subsection (1), the following new subsection (2):

"(2) In the case of foreign business not registered in Botswana and whose presence in Botswana is in relation to specific contractual transactions, the business shall make available to the Commissioner for examination and audit in Botswana, such books of account and documents as the Commissioner may request for a period of seven years." ; and

(*c*) renumbering sub sections (2), (3) and (4) sub sections (3), (4) and (5) respectively.

17. The Second Schedule to the Act is amended in Part II — *Amendment of Second Schedule to the Act*

(*a*) in paragraph (xxxii), by substituting the full stop at the end thereof with a semi colon; and

(*b*) by inserting immediately after paragraph (xxxii), the following new paragraphs:

"(xxxiii) former President's pension and benefits under the Presidents (Pension and Benefits) Act, 1998; *Act No. 3 of 1998*

(xxxiv) pensions and gratuities payable to a Minister and Member of Parliament under the Ministers and National Assembly Gratuities and Pension Act, 1998; and *Act No. 7 of 1998*

(xxxv) gratuity payable to any citizen pensioner appointed on contract for a period of 24 months to 60 months." *Cap. 27:01*

18. The Third Schedule to the Act is amended — *Amendment of Third Schedule to the Act*

(*a*) by deleting Part V therefrom ;

(*b*) by renumbering Parts VI and VII as Parts Vand VI respectively; and

(*c*) in Part VI, proviso to paragraph 3, by substituting for the word "Twelfth" the word "Tenth".

19. The Fifth Schedule to the Act is amended — *Amendment of Fifth Schedule to the Act*

(*a*) in paragraph 9 —

(i) sub paragraph 2(*a*), by substituting for the figure "15" the figure "31"; and

(ii) sub paragraph 10, by substituting for the figure "15" the figure "31";

(*b*) in paragraph 13(1) —

(i) sub paragraph (*a*), by substituting for the figure "15" the figure "31" ; and

(ii) sub paragraph (*b*) by substituting for the figure "15" the figure "31";

(*c*) by deleting paragraph 15 therefrom.

20. The Sixth Schedule to the Act is amended — *Amendment of Sixth Schedule to the Act*

(*a*) by substituting for paragraph 1(*c*) the following new paragraph 1(*c*) —

"the name, address and taxpayer identification number of the non resident person to whom payments are to be made;" ;

(*b*) by substituting for paragraph 2 the following new paragraph 2—

"Any person upon making any payment to which this Schedule applies, shall deduct tax in accordance with paragraph 3.";

(*c*) in paragraph 3 —

(i) in sub paragraph (1) by deleting immediately after the word "payments," the words "in respect of which a direction is given under paragraph 2";

(ii) in sub paragraph (2)

(i) by substituting for the words "a direction given" the words "the tax";

(ii) by deleting the word "directed"; and

(iii) in 2 (*b*) by deleting the words "cancel the direction and";

(*d*) in paragraph 5 by inserting immediately after the word "shall" the words ",within 15 days,";

(*e*) in paragraph 6 by—

(i) by deleting the hyphen thereof;

(ii) by deleting sub paragraph (*a*) therefrom;

(iii) by making sub paragraph (*b*) part of paragraph 6;

(*f*) in paragraph 8 (1) by substituting for the figure "15" the figure "31".

Amendment of Seventh Schedule to the Act

21. The Seventh Schedule to the Act is amended —

(*a*) in paragraph 4 by inserting immediately after the word "therefrom" the words "within 15 days after the end of the month during which the tax was deducted" at the end thereof.

(*b*) in paragraph 7(1) by substituting for the figure "15" the figure "31".

Insertion of Twelfth Schedule to the Act

22. The Act is amended by inserting immediately after Eleventh Schedule the following new Twelfth Schedule —

"TWELFTH SCHEDULE

(section 42)

Mining capital allowance

1. In ascertaining the business chargeable income of any person for any tax year from a business of mining, there shall be deducted from his business assessable income an allowance to be known as a mining capital allowance, computed in accordance with 100 percent of the mining capital expenditure made in the year in which such expenditure was incurred with unlimited carry forward of losses.

Separate calculations for different mines

2. Where separate and distinct mining operations are carried on in mines which are not contiguous, the deduction to be allowed shall be calculated separately and shall not be transferable between such operations, except expenditure on a license or lease which has been relinquished by the mining company.

Balancing allowance and balancing charge

3. Where a mine to which this Part applies is disposed of or the mineral concession in respect thereof is terminated in any tax year, the provisions of paragraphs 2 and 3 of Part V of the Third Schedule shall apply; and the references therein to allowances shall be deemed to relate to the mining capital allowances granted in respect of the mining capital expenditure in relation to that mine.

Mining profits

4. Mining profits shall be taxed according to the following formula—

$$\text{Annual tax rate} = 70 - \frac{1500}{X}$$

where X is the profitability ratio, given by taxable income as a percentage of gross income.

Provided that the tax rate shall not be less than the company rate (current 25 percent) made up of 15 percent basic company tax rate and 10 percent additional company tax rate.

5. Head office expenses allowed as a deduction in ascertaining gross revenue from mineral license shall be limited to 1.5 percent of gross income for the year of assessment and an excess of such expense above the limit shall be treated and taxed as a dividend. Head office expenses

6. Where a foreign controlled resident company has a foreign debt-to-equity ratio in excess of 3 to 1 at any time during the year of assessment, the amount of interest paid by the resident company during that year on that part of the debt that exceeds the ratio shall be disallowed as a deduction and an amount so disallowed shall be treated and taxed as a dividend. Foreign controlled company

7. Where a foreign based company grants a loan to an affiliated company resident in Botswana, at an interest rate which the Commissioner considers to be in excess of the market rate which a borrower dealing at arm's length with a lender would pay for that type and currency of loan, that part of interest payment which exceed the market rate shall be disallowed as a deduction and the amount of interest so disallowed shall be treated and taxed as a dividend. Foreign based company

8. Royalty payments made by the mining company under the provisions of the Mines and Minerals Act during any year of assessment shall be allowed as a deduction in the computation of the company's chargeable income in the year of assessment. Royalty payments

9. The rate of withholding taxes shall be— Withholding taxes

(*a*) 15 percent on each payment of dividend made to a resident;

(*b*) 15 percent on each payment of dividend, interest, commercial royalty, management or consultancy fee made to a non resident; and

(*c*) 10 percent on each payment of entertainment fee made to a non resident.

10. (1) The Commissioner may request the company to furnish such documents as he may require to show that all minerals sold or disposed by the company in any year of assessment have been valued at a fair market price for the purpose of determining the company's income tax liability for the year. Request of documents

(2) Where the Commissioner is not satisfied that the minerals were sold at a fair market price, he may make a determination as to the appropriate valuation of the minerals for income tax purposes.

11. (1) The provisions of this Schedule shall not be subject to negotiations under section 53 or any other section of the Act and shall not be applicable to diamond mining. Application

(2) Any mining company which is subject to the existing mining tax agreement may continue to operate under the terms of such agreement or make a once only election to come under the provisions of this Schedule by written notice to the Commissioner, not later than 30th June, 1999.

(3) Where a company makes an election to be taxed under this Schedule, the provisions of the mining tax agreement shall not be applicable.

Diamond mining

12. Diamond mining shall be taxed under the terms of an agreement entered into under the provisions of section 53 of this Act."

PASSED by the National Assembly this 29th day of July, 1998.

C.T. MOMPEI,
Clerk of the National Assembly.