

INCOME TAX (AMENDMENT) ACT, 1999

No. 15



of 1999

ARRANGEMENT OF SECTIONS

SECTION

1. Short title and commencement
2. Amendment of section 2 of Act No. 12 of 1995
3. Amendment of section 11 of the Act
4. Amendment of section 21 of the Act
5. Amendment of section 31 of the Act
6. Amendment of section 34 of the Act
7. Amendment of section 40 of the Act
8. Amendment of section 50 of the Act
9. Amendment of section 57 of the Act
10. Amendment of section 58 of the Act
11. Amendment of section 62 of the Act
12. Amendment of section 63 of the Act
13. Insertion of Part XVI to the Act
14. Renumbering of Part XVI of the Act
15. Amendment of the Second Schedule to the Act
16. Amendment of the Fifth Schedule to the Act
17. Amendment of the Eighth Schedule to the Act
18. Amendment of the Tenth Schedule to the Act

An Act to amend the Income Tax Act, 1995

Date of Assent: 19.8.99.

Date of Commencement: 1.7.99.

ENACTED by the Parliament of Botswana.

1. This Act may be cited as the Income Tax (Amendment) Act, 1999 and shall be deemed to have come into effect on 1st July, 1999.

2. The Income Tax Act (hereinafter referred to as "the Act") is amended in section 2 —

Short title and
commencement

Amendment
of section 2
of Act No. 12
of 1995

- (a) by inserting in their correct alphabetical order, the following new definitions —
- (i) “approved financial operations” means those operations specified in a tax certificate granted by the Minister under section 137;
 - (ii) “international financial services centre” means a centre established under section 137;
 - (iii) “international financial services centre company” means a company in possession of a valid certificate granted under section 137;
 - (iv) “qualifying foreign participation” means a participation held by an international financial services centre company in a company which is not resident in Botswana, where the international financial services centre company controls either directly or indirectly, alone or with connected persons, 25% or more of the share capital including 25% or more of the voting rights of the non resident company;
 - (v) “qualifying foreign branch” means a branch of an international financial services centre company through which the company carries on business operations outside Botswana;
 - (vi) “unit” means any investment such as a subscription for shares or a contribution of capital in a collective investment undertaking which entitles the investor to a share in the profits or capital of the undertaking;
 - (vii) “unit holder” means a person who by reason of the holding of a unit or under the terms of a unit, has a beneficial interest in the profits or capital of an undertaking;
- (b) by substituting for the definition of the terms “unit trust” or “collective investment” the following definition —
- “collective investment undertaking” means an undertaking-
- (a) the principle objective of which is the collective investment of its funds in real or personal property of whatever kind including securities and other liquid financial assets, with the aim of spreading investment risk and giving its members, shareholders or unit holders the benefit of the results of the management of its funds; and
 - (b) the units of which are at the request of the holders, redeemed directly or indirectly, out of those undertaking’s assets;
- (c) in the definition of the word “company”, in paragraph (c), by deleting the words “or unit trust”;
- (d) in the definition of the word “dividend”, paragraph (d) (i), by substituting for the word “or” after the words “unit trust”, a comma;

- (e) in the definition of the word “resident in Botswana” by —
 - (i) deleting paragraphs (ii) and (iii) therefrom; and
 - (ii) renumbering paragraphs (iv), (v) and (vi) as paragraphs (ii), (iii) and (iv) respectively; and
- (f) in the definition of the word “specified corporation”, by inserting in its correct alphabetical order, the name “Botswana Telecommunications Corporation”.

3. Section 11 of the Act is amended by substituting for paragraph (i) the following new paragraph —

Amendment of
section 11 of the
Act

“(i) any investment made outside Botswana or any business carried on outside Botswana by a resident of Botswana.”

4. Section 21 of the Act is amended by inserting immediately after section 21, the following new section —

Amendment of
section 21 of
the Act

“Collective investment undertaking 21A. A collective investment undertaking shall be charged to tax on the undistributed amount of the chargeable income and the amount of the chargeable income that has been distributed to shareholders shall retain its form and be taxed as such in the hands of shareholders.”

5. Section 31 of the Act is amended in subsection (9) —

Amendment
of section 31
of the Act

(a) by renumbering subsection (9) (a) as subsection (9) and paragraph (b) as subsection (10);

(b) by inserting immediately after subsection (10) the following new subsection —

“(11) Where a non citizen employee is entitled to a bonus or gratuity under a contract of employment, one third of such bonus or gratuity shall be excluded from his gross income, and the remaining two thirds thereof shall be deemed to have accrued evenly over the duration of the contract or over the last three years thereof, whichever is the lesser, or over the last year of the contract, at the option of the employee.”

(c) by renumbering paragraphs (c) and (d) as subsections (12) and (13) respectively;

(d) by inserting immediately after subsection (13) the following subsections —

“(14) Where an employee receives a retrenchment package, one third of the amount received in money or money’s worth or equivalent of the threshold, whichever is greater, shall be exempt from tax and at the option of the taxpayer, the remaining two thirds thereof may be deemed to have accrued at the time it is payable or accrued in three successive equal instalments, the last of such instalments being deemed to have accrued on the date on which the whole amount becomes payable.

(15) For the purpose of subsection (14), retrenchment package has the meaning assigned to it in the Employment Act.”

Cap. 47:01

Amendment
of section 34
of the Act

6. Section 34 of the Act is amended in sub section (1) —

(a) by inserting immediately after paragraph (c), the following new paragraph —

“(d) assets of an international financial services centre company situated in Botswana”; and

(b) by substituting for the proviso thereof the following new proviso —

“Provided that the provisions of this sub section shall not apply to any amount which would otherwise be included in the gross income under —

(i) section 9, accruing on the disposal of any property in the ordinary course of business;

(ii) section 138, accruing on the disposal of any property by an international financial services centre company in the ordinary course of business; or

(iii) section 139 in respect of any specified foreign exchange gain.”

Amendment
of section 40
of the Act

7. The proviso to section 40 (1) (j) is amended by the deletion of the words “quoted on the Botswana Stock Exchange”.

Amendment of
section 50 of
the Act

8. Section 50 of the Act is amended —

(a) in sub section (1) by deleting immediately after the word “less” the words “in the case of a resident individual”; and

(b) in the proviso to sub section (2), by substituting for sub paragraph

(i) the following new sub paragraph —

“(i) this subsection shall not apply to an employee who, not being a citizen of Botswana, commenced a contract of employment before the 1st July, 1999, and is entitled on the termination of that contract to a bonus or gratuity which is exempt from tax under paragraph (xviii) of Part II of the Second Schedule.

Amendment
of section 57
of the Act

9. Section 57 of the Act is amended by inserting immediately after sub section (3), the following new sub section —

“(4) This section shall not apply to —

(a) any payment of interest, commercial royalty or management consultancy fee; and

(b) the payment of a dividend to a non resident, an international financial services centre company or a collective investment undertaking,

where the payment is made by an international financial services centre company or a collective investment undertaking which is exempt from tax under paragraph (xvi) of Part I of the Second Schedule.”

10. Section 58 of the Act is amended by inserting immediately after sub section (3), the following new sub sections —

**Amendment
of section 58
of the Act**

“(4) Where an international financial services centre company pays a dividend which is exempt from withholding tax under section 57(5), such dividend shall not form part of the assessable income of the shareholder.

(5) The tax rate specified in table IV paragraph 6 of the Eighth Schedule or such lesser rate as Parliament may from time to time specify, shall apply for each tax year until the tax year 2019/2020”.

11. Section 62 of the Act is amended by inserting immediately after sub section (3), the following new subsections —

**Amendment
of section 62
of the Act**

“(4) Notwithstanding the provisions of subsection (3), where an amount accrued to a resident of Botswana from a source outside Botswana is charged to tax under section 11, credit for any tax payable under the laws of the country from which such amount accrued shall be allowed as a credit against tax charged in Botswana, and credit for such tax shall be calculated in the manner provided under section 63.

(5) Where an international financial services centre company has gross income accrued from a source outside Botswana which is charged to tax under this Act, credit for any tax payable under the laws of the country from which such gross income accrued shall be calculated in accordance with section 63 and shall be set off against the tax charged under this Act and the credit shall apply whether or not an agreement referred to in section 52 is in place with that country.”

12. Section 63 of the Act is amended by inserting immediately after sub section (2) the following new sub section —

**Amendment
of section 63
of the Act**

“(3) In the case of an international financial services centre company, the tax charged under this Act in relation to any tax year, means that proportion of such tax which is equal to the proportion that gross income which is accrued from a source outside Botswana bears to the gross income of that tax year as defined in section 138 and the credit available for foreign tax shall be restricted in accordance with the following formula:

**Tax payable X Gross income from foreign source
in Botswana Gross income**

Provided that the foreign tax credit will be restricted to the tax payable in the foreign country if less than the amount determined by the above formula.”

13. The Act is amended by inserting immediately after Part XV, the following new Part —

“PART XVI — *Taxation of International Financial Services Centre Companies*

**Definitions
of terms**

136. In this part, unless the context otherwise requires —
“average foreign exchange rate” means the average of the monthly foreign exchange rates between the currency of the state and the functional currency of an international financial services centre company, as published by the Bank of Botswana for the relevant period, or where published, the average rate applicable to that tax year;
“currency of the state” means the Pula;
“functional currency” means in relation to an international financial services centre company, the currency of the primary economic environment in which the international financial services centre company operates or, if elected by the company, the currency of the state.

Tax certificate

137. (1) The Minister may by Order published in the Gazette, provide for —

- (a) the establishment, marketing and operation of an international financial services centre;**
- (b) the constitution of an international financial services centre certification committee; and**
- (c) powers, duties and functions of a committee established under paragraph (b).**

(2) The Minister or his authorised representative may, on the recommendation of a committee established in accordance with sub section (1)(b), issue a tax certificate certifying that activities of a company as are specified in the certificate are with effect from the date specified in the certificate, approved financial operations and any tax certificate so given, unless it is revoked, shall remain in force until 31st December 2020.

(3) A certificate issued in accordance with sub section (2) may be given subject to such conditions as the Minister on the recommendation of a committee established in accordance with sub section (1)(b) considers proper and specifies in the tax certificate.

(4) A certificate issued in accordance with sub section (2) shall not be granted to a person who does not have either a license or letter of exemption in accordance with section 3 of the Bank of Botswana Act or who shall not have been registered under the Insurance Industry Act.

Cap. 55:01

Cap. 46:01

(5) Where in the case of a company in relation to which a certificate under sub section (2) has been given the Minister is satisfied that —

- (a) the company has ceased to carry on business;
 - (b) the company has breached any of the conditions referred to in sub section (3);
 - (c) the license granted in accordance with section 3 of the Bank of Botswana Act has been revoked or the registration under the Insurance Industry Act has been cancelled;
 - (d) the company has carried on activities that have had or may have an adverse effect on the use or development of the international financial services centre or are otherwise inimical to the development of the international financial services centre;
 - (e) a change in the ownership of the company has occurred since the grant of the certificate without the prior written approval of the Minister; or
 - (f) the company has carried on business with persons who are resident in Botswana and are not international financial services centre companies,
- the Minister may, on the recommendation of the international financial services centre certification committee, by notice in writing served on the company require the company to rectify the position or revoke the certificate with effect from such date as may be specified in the notice.

Cap. 55:01

Cap. 46:01

(6) For the purposes of sub section (5), ownership of a company shall be deemed to have changed if the beneficial ownership of one quarter or more of its share capital or one quarter or more of the voting rights affecting the day to day management of its business shall have changed hands in comparison with the date on which the certificate is granted.

(7) The following shall be approved financial operations for the purpose of sub section (2) provided that they shall be carried on with persons not resident in Botswana or international financial services companies —

- (a) banking and financing operations transacted in foreign currency;
 - (b) the broking and trading of securities denominated in foreign currency;
 - (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) exploitation of intellectual property;
 - (h) development and supply of computer software for use in the provision of services described in (a) to (f) above;
 - (i) accounting and financial administration; and
 - (j) other operations that the Minister may declare by order from time to time to be approved financial operations for the purposes of this section.
- (8) In considering an application for a tax certificate, the international financial services centre certification committee shall have regard to —
- (a) the number of Botswana citizens who will be employed in relation to the approved operation and the capacities in which they will be employed;
 - (b) facilities proposed for the training and imparting of skills to Botswana citizens;
 - (c) provisions made for the eventual replacement of non resident employees by Botswana citizens; and
 - (d) provision made for the participation by Botswana citizens in the management of the business.
- (9) A tax certificate shall entitle a company to carry on the approved financial operations either on its own account or through a wholly owned subsidiary.
- (10) The Commissioner may by notice in writing require a company claiming relief from tax by virtue of this section to furnish him with such information, participation or particulars as may be necessary for the purpose of giving effect to this section.

Gross income

138. Notwithstanding section 9(1) and subject to Parts IV and VIII, the gross income of an international financial services centre company shall be the total amount whether in cash or otherwise, accrued or deemed to have accrued to it in that tax year from all sources both inside and outside Botswana, but shall not include any amount of a capital nature except to the extent specified in this Act:

Provided that where an international financial services centre company carries on business through a qualifying

foreign branch, the amount of gross income which is deemed to have accrued to it from the qualifying foreign branch shall be such sum remaining which is not deemed to accrue from a source situate in Botswana.

139. (1) The gross income of an international financial services centre company shall include the amount of any specified foreign exchange gain, provided the gain has been credited in the profit and loss account of the international financial services centre company under a commercially recognised system of accounting.

(2) In ascertaining the chargeable income of an international financial services centre company, there shall be deducted the amount of any specified foreign exchange loss, provided the loss has been debited in the profit and loss account of the international financial services centre company under a commercially recognised system of accounting.

(3) A contract which, for the purposes of this section is a relevant contract shall be disregarded for all purposes of the Act except under this section.

(4) In this section, unless the context otherwise requires —

“rate of exchange” means the price at which two currencies might reasonably be expected to be exchanged between persons dealing at arms length and, unless there is evidence to the contrary, this price shall be the rate quoted by the Bank of Botswana;

“relevant asset or liability” means the assets and liabilities of an international financial services centre company, other than shareholders equity, which are held for the purposes of the approved financial operations of the company as stated in its tax certificate granted in accordance with section 137, including a liability for the discharge of a tax under section 49 (d) and (e);

“relevant contract” means a contract entered into for the purpose of reducing or eliminating the risk of loss arising in respect of a relevant asset or liability due to a change in a rate of exchange, whether or not the contract is recognised on the balance sheet of a company;

“shareholder’s equity” means the share capital and reserves of a company which are classified as equity or its equivalent in the balance sheet under a commercially recognised system of accounting;

“specified foreign exchange gain” means a gain whether realised or unrealised, that results directly from a change in a rate of exchange and is attributable to a relevant asset, liability or contract; and

Foreign debt
interest

“specified foreign exchange loss” means a loss whether realised or unrealised that results directly from a change in a rate of exchange and is attributable to a relevant asset, liability or a relevant contract.

140. (1) Where an amount of foreign debt interest is, apart from this section, allowable as a deduction from the gross income of an international financial services centre company in a particular tax year and, at any time during that tax year, the total foreign debt of the tax payer exceeds the foreign equity product for that year, then the amount of foreign debt interest ascertained in accordance with the following formula:

$$I \times \frac{A}{B} \times \frac{C}{365}$$

where —

- A is the amount of the excess of the total foreign debt over the foreign equity product;
- B is the total foreign debt;
- C is the number of days in that tax year during which the total foreign debt exceeded the foreign equity product by that amount; and
- I is the foreign debt interest, shall not be allowable as a deduction.

(2) The formula in sub section (1) shall be reapplied in every circumstance in which the excess represented by A changes in order to identify the total amount of foreign debt interest which is not allowable as a deduction for an international financial services centre company in the relevant tax year.

(3) In this section —

“approved multiple” means the maximum number of times that the foreign debt is divisible by the foreign equity and such multiple shall be fixed by the Commissioner on application by an international financial services centre company, at a level which the Commissioner deems reasonable:

Provided that in the absence of such an application, the approved multiple shall be —

- (i) in the case of banks, a multiple of 12; and
- (ii) in the case of other international financial services centre companies, a multiple of 3;

“bank” means a bank as defined in the Banking Act;
“connected persons” means —

- (a) at least two companies where either of the companies has control directly or indirectly, of the other, or if both such companies are controlled, directly or indirectly, by the same person or persons; and
- (b) any person if that person has control of a company or if the person and persons connected to that person together have control of the company;

“control” means where a person exercises, is able to exercise or is entitled to acquire control whether direct or indirectly over the company’s affairs and in particular if the person possesses or is entitled to acquire —

- (i) the greater part of the share capital of or voting rights in the company;
- (ii) such part of the share capital that would entitle them to the greater part of the distribution of all of the income of the company; or
- (iii) such right as would entitle the person to the greater part of the assets of the company on winding up or in any circumstances.

“foreign controller” means in relation to an international financial services centre company, a non resident who either alone or together with a connected person has control, directly or indirectly, of the resident company;

“foreign debt” means the balance outstanding on any amount owing by an international financial services centre company to its foreign controller, or to a connected person of the foreign controller, and where interest is, or may become payable in respect of the amount owed:

Provided that where an amount is owing by an international financial services centre company to a non resident other than its foreign controller, or a connected person of the foreign controller, and the amount owing is wholly or partly guaranteed directly or indirectly by the foreign controller, or by a connected

person of the foreign controller, the amount shall be treated for the purpose of this definition as an amount owing by the international financial services centre company to its foreign controller; “foreign debt interest” means the interest payable by an international financial services centre company in respect of an amount of foreign debt, which, is apart from this section, allowable as a deduction from the gross income of the company; “foreign equity” means so much of the amount standing to the credit calculated under a commercially recognised system of accounting of the —

- (i) share or branch capital account, both equity and non equity;
- (ii) share premium account;
- (iii) accumulated profits account excluding, accumulated losses, if any; and
- (iv) other reserve accounts;

of an international financial services centre company that its foreign controller or a connected person of its foreign controller would be beneficially entitled to receive by way of distribution on a liquidation of the international financial services centre company; and

“foreign equity product” means the foreign equity outstanding at the end of the accounting period of an international financial services centre company multiplied by the approved multiple.

Accounts

141. (1) The accounts of an international financial services centre company together with the reconciliation of the accounts with the chargeable income, which must be submitted with the tax return in accordance with section 70(1) shall be prepared in the functional currency of an international financial services centre company.

(2) The chargeable income in the reconciliation shall be translated into the currency of the state at the average foreign exchange rate for the period.”

- 14. Part XVI of the Act is amended by renumbering —**
- (a) Part XVI as Part XVII; and
 - (b) sections 136, 137, 138 and 139 as sections 142, 143, 144 and 145 respectively.
- 15. The Second Schedule to the Act is amended —**
- (a) in Part I by inserting immediately after paragraph (xv) the following new paragraph —
“(xvi) any collective investment undertaking provided that in any tax year —
 - (a) the undertaking is managed by an international financial services centre company; and
 - (b) except to the extent the units are held by the undertaking itself, an international financial services centre company or another collective investment undertaking, all the unit holders in the undertaking are persons resident outside Botswana.”;
 - (b) in Part II —
 - (i) in paragraph (xviii) by inserting immediately after the words “a citizen of Botswana,” the words “whose contract of employment commenced before the 1st July, 1999,”
 - (ii) in paragraph (xxxi) by substituting for the figure P1 000 the figure P2 500; and
 - (iii) by inserting immediately after paragraph (xxxv) the following new paragraphs —
“(xxxvi) any dividends received by an international financial services centre company in respect of a qualifying foreign participation as defined under section 2; and
“(xxxvii) the amount of gross income of an international financial services centre company which is deemed to have accrued to it from a qualifying foreign branch as defined under section 2 and provided for under section 138.
- 16. The Fifth Schedule to the Act is amended in paragraph 1, in the definition of the word “remuneration”, by inserting immediately after sub paragraph (c), the following new sub paragraph —**
“(d) any other cash and non cash employee benefits.”
- 17. The Eighth Schedule to the Act is amended in Table III, by inserting immediately after paragraph 6, the following new paragraph —**
- | | | |
|--|--------------------|-----|
| “7. International
financial services
centre company” | All taxable income | 15% |
|--|--------------------|-----|
- 18. The Tenth Schedule to the Act is amended —**
- (a) by inserting immediately after paragraph 1(e), the following new paragraph —

Renumbering
of Part XVI
of the Act

Amendment
of the Second
Schedule to the
Act

Amendment of
the Fifth
Schedule to
the Act

Amendment
of the Eighth
Schedule to
the Act

Amendment
of the Tenth
Schedule to
the Act

- “(f) any property which represents a qualifying foreign participation as defined under section 2.”; and
(b) by inserting immediately after paragraph 4 (f), the following proviso —

“Provided that the provisions of this paragraph shall not apply to any amount which would otherwise be deducted, in ascertaining the chargeable income of an international financial services centre company, under section 139 (2) in respect of any specified foreign exchange loss.”

PASSED by the National Assembly this 15th day of July, 1999.

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