

Botswana Unified Revenue Service

DEPARTMENTAL GUIDANCE NOTE ON TAX DEDUCTIBLE FROM PAYMENTS OF MANAGEMENT OR CONSULTANCY FEES TO NON-RESIDENTS – (Section 58* and Seventh Schedule to the Income Tax Act, 1995)

1. INTRODUCTION:

1.1. Purpose of this DGN:

This Departmental Guidance Note is issued to explain the provisions and procedure relating to tax treatment of management or consultancy fees paid to non-residents. The purpose of this Note is to enumerate and explain the respective obligations of the persons making payment for management or consultancy fees and the procedure to be followed to comply with those obligations under the Income Tax Act 1995 as amended with effect from 1 July 2006.

This Note has no force in Law. It does not bind the Commissioner nor does it restrict the rights of Objection and Appeal as provided by the Income Tax Act 1995.

1.2. Relevant provisions of law:

The law relating to tax treatment of management or consultancy fees payable to a non-resident person is enshrined in Section 58 and the Seventh Schedule of the Income Tax Act 1995. Section 58 which lays down the substantive law in this regard, reads as under:

58*. “(1) Every person who –

(a) being a resident company, makes any payment of dividend to a resident or a non-resident;

(b) makes any payment of interest to a resident or a non-resident;

(c) makes any payment of commercial royalty, entertainment fee, or management or consultancy fee to a non-resident,

shall deduct tax from such payment in accordance with and in the manner specified in the Seventh Schedule and shall carry out such other obligations as are imposed by that Schedule.

* All references to the provisions of the Income Tax Act are based on the latest edition of Laws of Botswana published in 2005.

(2) For the purposes of this section a person, including a partnership, to whom any payment is made to which this section applies shall be presumed, unless the contrary is proved, to be a non-resident if such payment is made to an address outside Botswana.

(3) The Commissioner may direct that this section shall not apply to any payment of interest to a non-resident, if he is satisfied that, by reason of the small amount of the payment or any other special circumstances, it is reasonable to so direct.

4) This section shall not apply to –

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

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

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

(c) any payment of interest to a resident where the recipient of such interest is a person exempt from taxation; and

(d) an IFSC company, a banking company or a financial institution receiving such interest in its ordinary course of business.”

The amount of tax to be deducted and the relevant procedure is laid down in the Seventh Schedule as amended by the Income Tax (Amendment)Act 2006. The amount of tax to be deducted is @15 % of the gross payment of management or consultancy fees to a non-resident.

1.3. Persons covered :

The persons covered under the provisions referred to in 1.2 above are

a. Every person who makes any payment of management or consultancy fees to a non-resident.

b. Every non-resident person who receives any payment of management or consultancy fees.

1.4. Registration requirements

Every person responsible for making payments of management or consultancy fees must register with the Commissioner of Taxes for the purposes of withholding tax.

The relevant form is ITRG 1, which can be obtained from the Taxpayer Assistance Centre (TAC) of the Botswana Unified Revenue Service(BURS) (Phone: 3614600) and should be submitted after completing the same to the TAC / Registration Section of BURS.

2. RELEVANT PAYMENTS

2.1. Payments covered:

The payments covered under this DGN are “management or consultancy fees”.

2.2. Management or consultancy fees:

‘Management or consultancy fee’ has been defined under section 2 of the Income Tax Act as under:

“Management or consultancy fee means any amount payable for administrative, managerial, technical or consultative services or any similar services, whether such services are of a professional nature or not.”

It is to be noted that the definition embraces amounts payable for all types of services whether of a professional nature or not.

The source of any management or consultancy fees is deemed to be in Botswana if the payer is resident in Botswana or has a permanent establishment in Botswana.

2.3. Exempted Payments:

The provisions of section 58 and the Seventh Schedule are not applicable in the following cases :

- (i) If the amount is exempt under a Double Taxation Avoidance Agreement with another country (paragraph (xxiv), Part II of Second Schedule).Currently, Botswana has effective Double Taxation

Avoidance Agreements with the UK, South Africa, Sweden, Mauritius, France, Namibia, Seychelles and Barbados

- (ii) If exemption is granted by virtue of an agreement entered into with the Minister and approved by a resolution of the National Assembly (Section 54 and paragraph (xxiv) Part II of Second Schedule).
- (iii) Where business is carried on or services are rendered under an agreement for provision of technical assistance with the Government (Paragraph (xix) Part II of Second Schedule). The exemption must be approved by the Minister under a notice in writing to the Commissioner General of BURS. This exemption will apply only to the contracts between the Government of Botswana and the Government or government agency of another country.
- (iv) If the payer of such management or consultancy fees is either an IFSC company or a Collective Investment Undertaking exempt under paragraph (xvi) of Part I of the Second Schedule to the Income Tax Act 1995.

Wherever exemption is claimed by the non-resident receiving the management or consultancy fees, the person responsible for payment shall allow exemption only when a ruling to that effect is issued by the Commissioner General. The payer must verify the claim of exemption with the Commissioner General's Office if the person receiving the management or consultancy fees fails to produce the ruling from the Commissioner General.

3. WITHHOLDING REQUIREMENTS

3.1. Amount to be withheld

Every person making any payment of management or consultancy fees to a non-resident shall deduct tax @ of 15% from all payments made .

3.2. Payment to the Commissioner General , BURS

The tax withheld is to be paid over to the Commissioner General by the 15th of the month following the month in which the tax was withheld. Delay in paying over the tax creates a liability to charge of interest @ 2% per month or part of a month besides penalty under section 118 (7) at the rate of P100 per day or 1 percent of the tax due, whichever is greater , for each month or part of the month

** All references to the provisions of the Income Tax Act are based on the latest edition of Laws of Botswana published in 2005.*

during which the violation continues. Such a person will also be liable for prosecution under section 127 of the Income Tax Act which may result in a fine of Pula 4000 and to imprisonment for two years.

3.3. Certificate of Deduction

Every person who deducts any tax @ 15% from payments of management or consultancy fees must within 15 days issue a tax deduction certificate to the person to whom payment was made , in the prescribed Form ITW 9 after getting it duly approved by the office of the Commissioner General.

Form ITW 9s are available with the Taxpayer Assistance Centre / Withholding Taxes Division of BURS (Phone No 3614600), which may be obtained by the payer in advance to facilitate handing over of tax deduction certificates to the payee within the prescribed time of 15 days.

3.4. Final withholding

The tax withheld from payments made as management or consultancy fees to a non-resident is a final withholding tax.

4. TAX TREATMENT OF THE PAYER

4.1. Allowable as deduction

Although expenditure on management or consultancy fees can be claimed under the general deductions provisions under Part VI section 39 (2), specific provision is made in section 41 (2) (b) to deal with such fees, thus casting a greater burden on the claimant to prove to the satisfaction of the Commissioner General that the amount paid was wholly , exclusively and necessarily incurred by the payer in the production of his assessable income.

4.2. Powers of the Commissioner General to disregard a transaction between connected parties

In the anti-avoidance provisions of the Act (Section 36), an agreement or contract between connected parties for providing such services is deemed not to be an arm's length transaction. This gives the Commissioner General the power to disregard such contracts and deal with the transaction in a manner, which he deems appropriate.

4.3. Strict Proof required for allowance of deduction to the payer

** All references to the provisions of the Income Tax Act are based on the latest edition of Laws of Botswana published in 2005.*

In order to give effect to these provisions, the Commissioner will be looking for strict proof (among other matters) before allowing a claim. He will look

- i) For proper documentation of the contract giving full details of services to be rendered and payments to be made.
- ii) At the ability and capacity of the person providing the services to provide the services.
- iii) For the necessity of such services, in regard to extent and cost for the Botswana business.
- iv) At the reasonableness of the payment.

5. TAX TREATMENT OF PAYEE

5.1. Two Categories of payees

Management or consultancy services can be rendered either by enterprises (companies, partnership and similar organisations) or individuals. The tax treatment will depend on the category which the payee falls in.

5.2 Enterprises:-

- i) With a fixed base:- Where an enterprise renders services from a fixed base in Botswana regularly available to it to render such services then liability to tax on Botswana income will be by assessment or through self assessment in the case of companies.

It would not be necessary to deduct withholding tax in such cases.

- ii) Without a fixed base:-Where there is no fixed base, the withholding tax @ 15% would be the final tax.

5.3 Individuals:-

Where a non-resident individual renders such services to a Botswana entity , any payment for such services shall be subject to the 15 % final withholding tax by the payer. This applies to all non-resident individuals, who practice their profession, like engineers, architects, doctors, surveyors etc.

6. Effect of Double Taxation Avoidance Agreements:-

Botswana at present, has double taxation avoidance agreements (DTAAs) with the United Kingdom (UK) , the Republic of South Africa (RSA), Sweden , Mauritius , France , Namibia , Seychelles and Barbados. These DTAAs modify the law so that

- i) Where a U.K. enterprise renders management or consultancy service without having a permanent establishment in Botswana, then income from such services does not attract tax in Botswana. However, under the new renegotiated DTAA with the UK , with effect from 1 July 2007, a 7.5% withholding tax will apply in all such cases.

If the services are rendered by a permanent establishment, then income from such services is liable to tax in Botswana by assessment or self assessment in the case of companies.

- ii) Where a U.K. individual renders services without a fixed base in Botswana, his income from such services does not attract tax in Botswana. However, under the new renegotiated DTAA with the UK, with effect from 1 July 2007, a 7.5% withholding tax will apply in all such cases.
- iii) Where an individual or enterprise of RSA renders management or consultancy services in Botswana, without a fixed base or permanent establishment in Botswana , such management or consultancy fees would be taxable in Botswana @10% as per the Technical Fees article of the renegotiated Botswana – RSA DTAA effective 20th May 2004.If the services are rendered through a permanent establishment or a fixed base, then the taxation will be in accordance with the article relevant to business profits.
- iv) Where an individual or enterprise of Sweden or Mauritius or Namibia renders management or consultancy services in Botswana, without a fixed base or permanent establishment in Botswana , such management or consultancy fees would be taxable in Botswana @15% as per the relevant articles of the respective DTAAs .If the services are rendered through a permanent establishment or a fixed base, then the taxation

will be in accordance with the article relevant to business profits or independent personal services as the case may be.

- v) Where an individual or enterprise of France renders management or consultancy services in Botswana, without a fixed base or a permanent establishment in Botswana, such management or consultancy fees would be taxable in Botswana @7.5% as per the relevant article of the Botswana-France DTAA effective from 1 July 2004. If the services are rendered through a permanent establishment or a fixed base, then the taxation will be in accordance with the article relevant to business profits or independent personal services as the case may be.

- vi) Where an individual or enterprise of Seychelles renders management or consultancy services in Botswana, without a fixed base or a permanent establishment in Botswana, such management or consultancy fees would be taxable in Botswana @10% as per the relevant article of the Botswana-Seychelles DTAA. If the services are rendered through a permanent establishment or a fixed base, then the taxation will be in accordance with the article relevant to business profits or independent personal services as the case may be.

- vii) Where an individual or enterprise of Barbados renders management or consultancy services in Botswana, without a fixed base or a permanent establishment in Botswana, such management or consultancy fees would be taxable in Botswana @10% as per the relevant article of the Botswana-Barbados DTAA. If the services are rendered through a permanent establishment or a fixed base, then the taxation will be in accordance with the article relevant to business profits or independent personal services as the case may be.

7. LIABILITY IN THE EVENT OF NON-DEDUCTION AND /OR NON-PAYMENT

7.1 Personal liability of the payer:

** All references to the provisions of the Income Tax Act are based on the latest edition of Laws of Botswana published in 2005.*

The person making payments to which Section 58 applies shall be personally liable for the tax to be withheld and in case of his failure to deduct tax, the tax will be recoverable from him.

7.2 Non-deduction and/or non-payment are punishable:

Failure to deduct tax and pay the same and maintain record for inspection by the Commissioner General shall, besides inviting interest under Section 101 of the Income Tax Act, also attract penalty under sections 118(6) and 118(7) of the Income Tax Act. Where the failure to deduct is willful with the intent to evade tax, the person responsible for deducting may also be prosecuted under Section 127 and 128 of the Income Tax Act.

8.CONCLUSION

8.1. Payer's Responsibilities

It is the responsibility of the person making the payments of management or consultancy fees to a non-resident individual or enterprise to deduct tax @ 15% in terms of section 58 and in accordance with the provisions of the Seventh Schedule to the Income Tax Act. The person withholding tax on such payment of management or consultancy fees shall do the following:

- (i) Deduct tax and pay the same within 15 days of such deduction to the Commissioner General. Taxes withheld and paid by him will be recorded in ITW.7, the statement of monthly tax deduction and payments.
- (ii) Any variation in the rate of withholding tax should be applied only if variation is approved by the Commissioner General by virtue of the payee being covered under the relevant article of the relevant Double Taxation Avoidance Agreement as enumerated in paragraph 6 above.
- (iii) Furnish to the payee certificate of such deduction in ITW.9 with the stamp of the Commissioner General within 15 days of the deduction. The white copy of ITW.9 shall be furnished to the payee, the green copy will be filed with the Commissioner General and the pink will be retained by the payer.

- (iv) Furnish annual return of withholding taxes in Form ITW.10 to the Commissioner General within 31 days of the end of the relevant tax year.
- (v) Maintain record of all payments and produce the same for inspection by the Commissioner General whenever required by him to do so.

8.2. Assistance available

In need of any clarification, please contact the offices of the Botswana Unified Revenue Service at the addresses and phone numbers given below:

Department of Taxes
Private Bag 0013
Gaborone
Phone: 3614600
Fax: 3953101

Department of Taxes
Collection Division
Private Bag 38
Francistown
Phone: 212734
Fax: 214267

Department of Taxes
Collection Division
Private Bag 13
Selebi-Phikwe
Phone: 810795
Fax: 814862

7. WITHDRAWAL OF EARLIER DGNS

All earlier Departmental Guidance Notes on the subject covered by this DGN are hereby withdrawn.

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**Commissioner of Internal Revenue
Private Bag 0013,
Gaborone**