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Nauru

G.N.No. 877/2020

**MINISTRY OF FINANCE
Nauru Revenue Office**

Taxation Determination No 5 / 2020

This Taxation Determination, to the extent that it is capable of being a 'public ruling' in terms of section 47 of the *Revenue Administration Act 2014 (as amended)* (RAA), is a public ruling for the purposes of section 48 of the RAA. Section 47(1) of the RAA provides that the Secretary may make a public ruling setting out the Secretary's interpretation on the application of a tax law in the circumstances specified in the ruling which is intended to achieve consistency in the administration of the tax laws and provide guidance to taxpayers (particularly for the purposes of making self-assessments). Section 47(2) of the RAA provides that a public ruling is binding on the Secretary until withdrawn in accordance with section 49 of the RAA. As a public ruling is not law, section 47(3) provides that a public ruling is not binding on taxpayers. Unless otherwise stated, this Determination applies to years commencing both before and after its date of notice in the Gazette in accordance with Section 48(2) of the RAA.

TAXATION DETERMINATION

Business Profits Tax: deductibility of employment related expenses, where employment tax is required to be withheld by a person, which has not been paid to the Secretary.

1. A resident person or a permanent establishment in Nauru of a non- resident person making a payment of employment income that is subject to employment tax must withhold tax from the gross amount paid at the employment tax rate specified in Schedule 1 of the *Employment & Services Tax Act (2014) (as amended)*, (ESTA), in accordance with section 17 of the ESTA.
2. A person required to withhold employment tax under section 18(1) of the ESTA must pay the withheld tax to the Secretary within 15 days after the end of the month in which the income was paid in accordance with section 22(1) of the ESTA. Penalties may apply where a person fails to make a services tax remittance as required or is late in remitting the employment tax to the Nauru Revenue Office.
3. In addition, section 20(2) of the *Business Tax Act 2016 (as amended)*, (BTA), provides that if a person is allowed a business profits tax deduction for a payment from which the person is required to withhold tax under

a withholding tax provision, no such deduction is allowable until the tax year in which the withholding tax has been paid to the Secretary.

Example:

A company pays salaries to a non-resident on 10 June 2019 but does not remit the applicable employment tax to the Nauru Revenue Office (NRO) until 10 October 2019.

The company's Business Profits Tax return for the income year ended 30 June 2019 is required to be lodged no later than 30 September 2019.

The company is not entitled to a business tax deduction for the 2019 year of income until such time that the employment tax has been remitted to the NRO. Accordingly, a business profits tax deduction is not allowable when the company furnished its business tax return on 30 September 2019.

The company may, however, request an amendment to its 2019 year original Business Profits Tax assessment to allow a business profits tax deduction for employment related expenses on or after 10 October 2019.

In the above example, if the company failed to lodge its 2019 return until 10 October 2019, it would be entitled to a business profits tax deduction at the time of the deemed assessment; ie. 10 October 2019.

The company would, of course, be liable for late payment penalty on the unpaid employment tax from 15 July 2019 to 10 October 2019.

Legislative References

- (i) Employment & Services Tax Act (as amended) (ESTA) –

*Section 5 - Employment income
Section 11 - Imposition of employment tax;
Section 17 - Withholding of tax from employment income;
Section 22(1) - Payment of withholding tax;
The "Schedule";*

- (ii) Business Tax Act 2016 (as amended)

Sections 20 (2) - Non – deductible expenditure or losses;

- (iii) Revenue Administration Act 2014 (as amended)

*Section 63 – Late Payment Penalty
Section 71 – Failure to withhold tax
Section 73 – Failure to Pay Tax by the Due Date*

Terms and Definitions

(1) Employment & Services Tax Act 2014 (as amended)

Section 3 – Definitions

“*employment income*” – ‘**employment income**’ has the meaning in section 5;

“non-resident individual” – ‘**non-resident individual**’ has the meaning in section 7;

“non-resident person” – ‘**non-resident person**’ means a person who is not a resident person;

“person” – ‘**person**’ means: (a) an individual; (b) a partnership, trust, company, or other body of persons; (c) the Government of Nauru, a local authority in Nauru, a foreign government, or a political subdivision of a foreign government; or (d) an international organisation;

“resident individual” – ‘**resident individual**’ has the meaning in section 7 ;

“resident person” – ‘**resident person**’ means : (a) a resident individual; (b) a partnership, trust, company, or other body of persons that is incorporated, formed, settled, or otherwise established or created in Nauru; or (c) the Government of Nauru or any other local authority;

“withholding tax” – ‘**withholding tax**’ means tax withheld or required to be held under section 17 or 18.

Section 5 - Employment income

Section (1) Subject to subsection (2), employment income means:

- (a) salary, wages, an allowance, leave pay, payment in lieu of leave, overtime pay, bonus, commission, fee, gratuity, a salary or wage supplement, or other similar amount received by an employee in respect of employment;
 - (b) an amount received by an employee on termination of employment, whether paid voluntarily, under an agreement, or as a result of legal proceedings, including any compensation for redundancy or loss of employment, or a golden handshake payment.
- (2) Employment income does not include an allowance that the Secretary regards as reasonably likely to be expended by an employee in the performance of the employee’s duties of employment.
- (3) An amount is received by an employee in respect of employment regardless of whether it is paid by:
- (a) the employer of the employee;
 - (b) an associate of the employer of the employee;
 - (c) a third party arranger; or
 - (d) a past or prospective employer of the employee.

- (4) *An amount is received by an employee even though it is paid to an associate of the employee by the employer of the employee, an associate of the employer, or a third party arranger.*

Section 7 - Resident individual

- (1) *Subject to subsection (2), an individual is a resident individual if:*
- (a) *the individual is a citizen of Nauru, except when the individual has a permanent home outside Nauru;*
 - (b) *the individual resides in Nauru as a resettled refugee or an asylum seeker within the meaning in the Refugee Convention Act 2012; or*
 - (c) *the individual is married to an individual who is a resident individual under paragraph (a).*
- (2) *Despite subsection (1), a citizen of Nauru who is an employee of the Government of Nauru posted abroad is a resident individual.*
- (3) *An individual who is not a resident individual is a non-resident individual.*

Section 11 – Imposition of employment tax

- (1) *Subject to this Act, a tax to be known as “employment tax” is imposed for each pay period at the rate or rates specified in the Schedule on an employee who has received employment income from sources in Nauru for the period.*
- (2) *Subsection (1) does not apply to employment income that is exempt income.*
- (3) *The employment tax imposed under subsection (1) on an employee for a pay period is computed by applying the employment tax rate or rates applicable to the employee specified in the Schedule to the gross amount of employment income of the employee for the period.*
- (4) *The employment tax payable by an employee for a pay period is discharged when the employer has correctly withheld tax under section 17 from the payment of the employment income for the period.*

Section 17 - Withholding of tax from employment income

- (1) *An employer paying employment income to an employee that is subject to tax under section 11 must withhold tax from the gross amount of employment income paid to the employee at the employee tax rate or rates applicable to the employee as specified in the Schedule.*
- (2) *An employer must notify the Secretary, in writing, in relation to an employee that is a resident individual if the employer pays employment income to the employee that is subject to tax under section 11 on a basis other than monthly, fortnightly, or weekly.*
- (3) *If an employer has notified the Secretary under subsection (2), the Secretary must advise the employer, by notice in writing, of the amount of tax to be withheld by the employer from the employment income paid to the employee and the employer must withhold tax accordingly.*

- (4) *The Secretary may prepare tax tables to assist employers with the withholding of tax under this section.*
- (5) *The obligation of an employer to withhold tax under this section:*
 - (a) *is not reduced or extinguished because the employer has a right, or is otherwise obliged, to withhold any other amount from a payment of employment income; and*
 - (b) *applies despite any law that provides that the employment income of an employee is not to be reduced or subject to attachment.*

Section 22 (1) – Payment of withholding tax

- (1) *A person liable for withholding tax for a calendar month must pay the tax to the Secretary within 15 days after the end of the month. “*

2. Business Tax Act (2016) (as amended)

Section 3 – Definitions -

“ business profits tax deduction” – **‘deductions’** is defined in Section 19 of the Business Tax Act;

“permanent establishment” – **‘permanent establishment’** is defined in Section 7 of the Business Tax Act;

Section 7 – ‘Permanent establishment’

- (1) *Subject to this section, a permanent establishment is a place of business through which the business of a person is wholly or partly conducted.*
- (2) *The following are treated as a permanent establishment:*
 - (a) *place of management, branch, office, factory, warehouse, or workshop, but not an office that has representation of the person’s business as its sole activity;*
 - (b) *a mine site, oil or gas well, quarry, or other place of exploration for, or exploitation of, natural resources, including a boat or ship that provides a base for the exploration or exploitation of natural resources;*
 - (c) *the furnishing of services, including consultancy services, by a person, including through employees or other personnel engaged by the person for such purpose, but only if activities of that nature continue for the same or a connected project of the person or an associate for a period or periods aggregating more than ninety days in any twelve-month period.*
- (3) *Subject to subsection (4), a building site, construction, assembly or installation project, or supervisory activities connected with such site or project is a permanent establishment only if the site, project, or activities continue for more than ninety days.*

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- (4) *When a person operates a building site, or conducts a project or activity referred to subsection (3), any connected activities conducted by an associate will be added to the period of time during which the first-mentioned person has operated the building site or conducted the activities for the purpose of determining whether the ninety-day period is exceeded.*
- (5) *Despite subsections (1) and (2), when a person (referred to as the “agent”) acts on behalf of another person (referred to as the “principal”), the agent shall be a permanent establishment of the principal if the agent:*
 - (i) *regularly negotiates contracts on behalf of the principal, whether the contracts are concluded in the name of the principal or the agent; or*
 - (ii) *maintains a stock of goods from which the agent regularly delivers goods on behalf of the principal.*

Section 19 ‘Deductions’

- (1) *Subject to this Act, the total amount of deductions allowed to a person for a tax year is the sum of the following amounts:*
 - (a) *expenditures or losses to the extent incurred by the person during the year in deriving amounts included in gross revenue;*
 - (b) *the cost of inventory disposed of by the person during the year as determined under international financial reporting standards;*
 - (c) *the total amount by which the depreciable assets and business intangibles of the person have declined in value during the year from use in deriving amounts included in gross revenue as determined under section 21;*
 - (d) *a loss on disposal of a business asset by the person during the year, other than inventory dealt with under subsection (1)(b);*
 - (e) *any other amount allowed as a deduction to the person under this Act.*
- (2) *For the purposes of subsection (1)(d), a loss on disposal of a business asset is the amount by which the net book value of the asset at the time of disposal exceeds consideration for the disposal.*
- (3) *The Regulations may provide rules for the deduction of expenditures relating to mining operations.*

Section 20(2) ‘Non-deductible expenditures or losses’

- (1) *If a person is allowed a deduction for a payment from which the person is required to withhold tax under a withholding tax provision, the deduction is not allowed until the tax year in which the withholding tax has been paid to the Secretary. “*

Revenue Administration Act (2014) (as amended)

Section 3 Definitions

“Penalty” – ***Penalty*** means a penalty imposed under a tax law.

Section 63 Late payment penalty

‘Late payment penalty’ is defined as – (1) A taxpayer who fails to pay tax by the due date or, when the Secretary has extended the due date under section 23, by the extended due date, is liable for a late payment penalty equal to 15% of the amount of unpaid tax; (2) Late payment penalty paid by a taxpayer under subsection(1) must be refunded to the taxpayer in accordance with section 37(4) to the extent that the tax to which the penalty relates is found not to have been payable;(3) in the section “tax” does not include penalty. “

Tax offences

As an alternative to applying an administrative penalty under PART 12 (Division 2) of the *Revenue Administration Act (2014) (as amended)* (RAA), including late payment penalty (section 63), the NRO may consider if a tax offence has occurred under PART 12 (Division 1) (section 59).

Under section 70 of the RAA, a person commits an offence if the person fails to withhold tax or, having withheld tax, fails to pay the tax to the Secretary as required under a tax law.

A person convicted of an offence under section 71 of the RAA is liable under section 82 of the RAA for a fine not exceeding AUD\$5,000 or to imprisonment for a term not exceeding 2 years, or to both a fine and imprisonment.

Taxpayer protection

Under section 47 of the *Revenue Administration Act 2014*, the Secretary for Finance has made this ruling in accordance with section 48 of that Act. This ruling is binding on the Secretary for Finance until it is withdrawn. It is not binding on a taxpayer.

Date of effect: 10th December, 2020.

NOVENA ITSIMAERA
SECRETARY FOR FINANCE