



**REPUBLIC OF NAURU
GOVERNMENT GAZETTE
PUBLISHED BY AUTHORITY
EXTRAORDINARY**

No. 216

10th December, 2020

Nauru

G.N.No. 873/2020

**MINISTRY OF FINANCE
Nauru Revenue Office**

Taxation Determination No1 / 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) (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 Section 47(2) (RAA) provides that a public ruling is binding on the Secretary until withdrawn in accordance with section 49 (RAA).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) (RAA).

TAXATION DETERMINATION

Business Profits Tax: deductibility of royalties where non-resident tax is required to be withheld by a person, and has not been withheld and paid to the Secretary.

1. A resident person, or a permanent establishment in Nauru of a non- resident person, making a royalty payment that is subject to non-resident tax, hereinafter referred to as NRT, must withhold tax from the gross amount paid at the rate specified in Schedule 1, in accordance with section 44 (1) of the *Business Tax Act (2016) (as amended)*, (BTA).
2. A person required to withhold NRT under section 44(1) 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 44(2) of the BTA. Penalties may apply where a person fails to make a NRT remittance as required, or is late in remitting NRT to the Nauru Revenue Office.
3. In addition, section 20(2) of the 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, the deduction is not allowed until the tax year in which the withholding tax has been paid to the Secretary.

Example:

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

The company's business profits tax annual return form for the tax year ended 30 June 2019 is due for filing no later than 30 September 2019.

The company is not entitled to a business profits tax deduction for the 2019 tax year until such time that the NRT has been remitted to the NRO. Accordingly, a business profits tax deduction would not be allowable when the company filed its business profits tax annual return form 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 the royalty payment on or after 10 October 2019.

In the above example, if the company failed to lodge its 2019 return form 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 for the unpaid NRT from 15 July 2019 to 10 October 2019.

Legislative References

Business Tax Act, 2016 (as amended)–

Section 20(2) – Non-deductible expenditure or losses

Section 44(1) and 44(2) – Withholding tax

Schedule 1 – Rates of tax

Revenue Administration Act, 2014 (as amended)–

Section 28 – Late payment interest

Section 63 – Late payment penalty

Section 71 – Failure to withhold tax

Section 73 – Failure to pay tax by the due date

Terms and Definitions

Business Tax Act, 2016 (as amended)

“ *Section 3 – Definitions -*

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

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

“ non resident tax”- **‘non-resident tax’** means non-resident tax imposed under section 13;

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

“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 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 local authority in Nauru;

“royalty” – **‘royalty’** means an amount, however described, whether periodical or a lump sum, as consideration for:

- (a) the use of, or right to use a patent, invention, design or model, secret formula or process, trademark, or other like property or right;
- (b) the use of, or right to use a copyright of a literary, artistic, or scientific work (including films or video tapes for use in connection with television or tapes in connection with radio broadcasting);
- (c) the receipt of, or right to receive, visual images or sounds, or both, transmitted by satellite, cable, optic fibre, or similar technology in connection with television, radio, or internet broadcasting;
- (d) the use of or right to use industrial, commercial, or scientific equipment;
- (e) the supply of any scientific, technical, industrial, or commercial knowledge, information, experience, or skill;
- (f) the supply of assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of property, a right, or a supply referred to in paragraphs (a) - (e);
- (g) the right to take minerals or a living or non-living resource from land or sea, and includes an amount calculated in whole or part by reference to the quantity or value of minerals or a living or non-living resource taken from land or sea;

“withholding tax” means **‘withholding tax’** as defined in Section 44 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.*
- (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 13 – **‘Imposition of non-resident tax’**

- (1) *Subject to this Act, a tax to be known as “non-resident tax” is imposed at the rate specified in Schedule 1 on a non-resident person who has derived interest, a royalty, or insurance premium from sources in Nauru.*

- (2) *The non-resident tax payable by a non-resident person under subsection (1) is computed by applying the rate of tax specified in Schedule 1 to the gross amount of the interest, a royalty, or insurance premium derived by the person.*
- (3) *Subsection (1) does not apply to:*
- (a) *an amount that is exempt income;*
 - (b) *interest, a royalty, or insurance premium that is attributable to a business conducted by the non-resident person through a permanent establishment in Nauru and, in that case, the amount is taxable under section 11; or*
 - (c) *an amount subject to services tax.*
- (4) *The tax payable under subsection (1) is discharged if the tax has been paid to the Secretary in accordance with section 44.*

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 44 **‘Withholding tax’**

- (1) *A resident person or a permanent establishment in Nauru of a non-resident person making a payment of interest, a royalty, or insurance premium that is subject to non-resident tax must withhold tax from the gross amount paid at the non-resident tax rate specified in Schedule 1.*

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- (2) *A person required to withhold tax under subsection (1) must file a withholding tax return and pay the withheld tax to the Secretary within 15 days after the end of the month in which the income was paid.*
- (3) *A person who fails to withhold tax as required under this section or who, having withheld tax, fails to pay the tax to the Secretary as required under subsection (2) is personally liable to pay the amount of withholding tax to the Secretary.*
- (4) *A person who is personally liable for withholding tax under subsection (3) as a result of failing to withhold the tax is entitled to recover the tax from the recipient of the payment.*
- (5) *If a person fails to withhold tax as required under this section, the Secretary may recover the tax from the recipient of the payment of the interest, royalty, or insurance premium.*
- (6) *Despite the recovery of any tax under subsection (5), the person who failed to withhold the tax continues to be liable for the following:*
 - (a) *any legal action in relation to the failure, including prosecution for an offence under the Revenue Administration Act;*
 - (b) *the imposition of penalty in respect of the failure.*
- (7) *A person required to withhold tax under this section must:*
 - (a) *keep records of the gross amount of interest, royalties, or insurance premiums paid to non-resident persons and the amount of tax withheld from each payment; and*
 - (b) *within 15 days after the end of the tax year or within such further period as the Secretary may allow by notice in writing, file with the Secretary an annual withholding tax summary in the approved form.*
- (8) *Income subject to withholding under subsection (1) is treated as having been paid to a non-resident person if any of the following applies:*
 - (a) *the income is actually paid to the person;*
 - (b) *the income is applied on behalf of the person either at the instruction of the person or under any law;*
 - (c) *the income is reinvested, accumulated, or capitalised for the benefit of the person;*
 - (d) *the income is credited to an account for the benefit of the person.*
- (9) *In this section, ‘tax year’ means the period of 12 month ending on June 30.”*

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 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