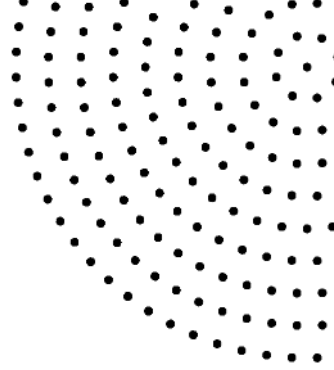


Tax Amendments and Employees' Tax in Namibia

MARCH 2022

PRESENTED BY

Hartmuth van Alphen CA(Nam)/CA(SA)



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Hartmuth is the director of VA consultant and is an independent consultant undertaking projects in analysis of business risks, due diligence investigations, feasibility studies, financial and management accounting and Namibian Income Tax and Value-Added Tax. He was a tax partner for over 22 years at Grant Thornton Neuhaus responsible for consulting on Income Tax and Value-Added Tax matters, in-house training and the audit of companies active in various industries, from retailers, construction industry to manufacturing and mining.



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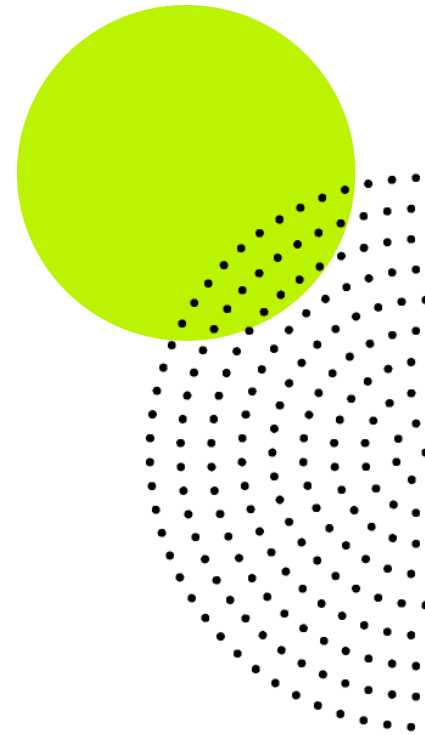
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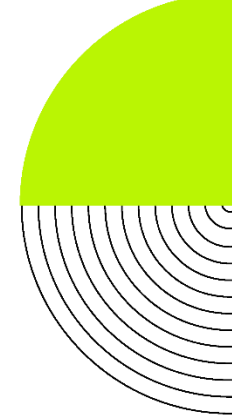
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CPD INDEX

1. Income Tax – recent changes to the Act
2. Employees Tax
3. Employee benefits and deductions



1. Income Tax – recent changes to the Act



1. Income Tax Update

Registered manufacturers (s 5A)

- An additional allowance of 25% of salaries, wages and training costs of employees who are directly engaged in the manufacturing process (s 17A).
- An additional allowance of 25% of marketing and related costs incurred in respect of manufactured goods exported (s 17B).
- An additional allowance of 25% in respect of inward transportation costs by road or rail of material, components and equipment imported for use directly in the manufacturing activity for which the company is registered (s 17D).
- Annual building allowance (8%) may be claimed by owners or lessees of factory buildings (first proviso to s 17(1)(f)).

1. Income Tax Update (continued)

Registered manufacturers (s 5A) (continued)

- The taxable income derived from manufacturing activities in respect of which the taxpayer is registered, is taxed at 18% (para 3(2) of Sch 4).
- The deduction of the allowances in ss 17A, 17B and 17D may not create or increase an assessed loss (s 21(2)).
- Section 5A was repealed by section 1(1) of the Income Tax Amendment Act No. 2 of 2020. The repeal has come into operation on 31 December 2020, but does not affect taxpayers who were registered manufacturers at that date.
- The annual building allowance of 8% per section 17(1)(f) has been repealed by s 2 of the IT Amendment Act No. 5 of 2021.
- The deduction of the special tax incentives under ss 17(1)(f), 17A, 17B and 17D shall continue to apply until the end of the 2025 tax year of a registered manufacturer (s 4 of the IT Amendment Act No. 5 of 2021).

1. Income Tax Update (continued)

Registered manufacturers (s 5A) (continued)

- Taxable income derived from the export of goods manufactured in Namibia is reduced by an allowance of 80%. This allowance does not apply to the taxable income derived from the export of manufactured fish and meat products (s 17C).
- For this allowance to apply, the taxpayer is not required to be a registered manufacturer, nor is he required to have manufactured the exported goods himself.
- The repeal of s 17C comes into operation at the end of five years commencing on 31 December 2020; thus the allowance is available to taxpayers till the end of their 2025 tax year.

1. Income Tax Update (continued)

Namibia defined (s 1)

- Namibia includes the territorial sea as well as the exclusive economic zone (EEZ) over which Namibia exercises sovereign rights concerning the exploration and exploitation of the natural resources of the sea bed, its subsoil and in the water.
- The territorial sea extends 12 nautical miles (22.224 km) out from the low water line.
- The EEZ is the part of the ocean that extends beyond the territorial sea for a distance of 200 nautical miles (370.4 km) out from the low water line. In this zone, Namibia has the sole right to exploit the natural resources (eg mining, fishing, kelp harvesting and oil and gas).

1. Income Tax Update (continued)

Namibia defined (s 1) (continued)

- All income derived from any trade carried on in the EEZ by any person (resident or non-resident) is from a source within Namibia and therefore taxable in Namibia.
- Note that the continental shelf is included in the definition, however, very little economic activity takes place beyond the EEZ.
- In the case of a person ordinarily resident in Namibia or a domestic company, the above-mentioned zones are of no consequence to their liability to tax on income derived from any business carried on as owner or charterer of any ship or trading in any commodity (eg fish caught) acquired in connection with the operation of such ship (eg goods transported elsewhere in the world).
- Section 15(1)(d) deems such income to be from a source within Namibia, regardless wheresoever in the world that person or company carries on his/its trade.

1. Income Tax Update (continued)

Income Tax Base - Source of Income

- The four factors that determine liability for normal tax are: -
 - Who is the taxpayer.
 - When the tax is due – timing and the year of assessment.
 - The source of the income.
 - The nature of the receipt or accrual (capital or income).

Source of the income

- Namibia taxes income based on source or deemed source, not the place of residence of the taxpayer.
- When establishing the source of income, it is necessary to apply a two-tier test -
 - firstly it is necessary to establish the originating cause of the income, i. e. the reason why the income accrued to the taxpayer, and

1. Income Tax Update (continued)

Source of the income (continued)

- secondly, the problem of locating the originating cause must be solved.
- locating, in a geographical sense, the originating cause of the income is often a difficult task.
- The originating cause (*causa causans*) usually is –
 - some personal activity of the taxpayer - rendering of services to another person, either as employee or as independent contractor.
 - some property over which the taxpayer has rights – transferring ownership of property or granting the right of use to another person, be it an immovable, movable or intangible asset.
 - a combination of both – carries on profit-producing activities involving the transfer of ownership of property or the grant of its use and the rendering of services.

1. Income Tax Update (continued)

Source of the income (continued)

- Where an employee, who is ordinarily resident in Namibia, renders services during any temporary absence from Namibia and such services are rendered for or on behalf of his employer in Namibia, the originating cause (the source) of income is deemed to be within Namibia (s 15(1)(f)).
- The reason for this is that the services rendered outside Namibia under these circumstances are merely incidental to the services normally rendered in Namibia.
- 'Temporary' means irregular or unscheduled, as opposed to a systematic absence from Namibia. A systematic absence is planned for and not incidental to the employee's normal duties in Namibia.

1. Income Tax Update (continued)

Person

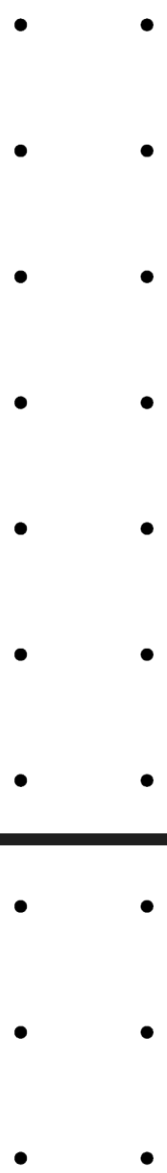
Who is a person?

- The definition includes a natural person, trust, deceased estate, company, close corporation and unit trust scheme. A partnership is included for the purposes of the withholding tax on interest only.

Tax rates - individuals

- Progressive rates.
- First N\$ 50 000 tax exempt.
- Rates start at 18%.
- Income in excess of N\$ 1 500 000 is taxed at 37%.
- Part-time employees must be taxed at 18%.

2. Employees Tax



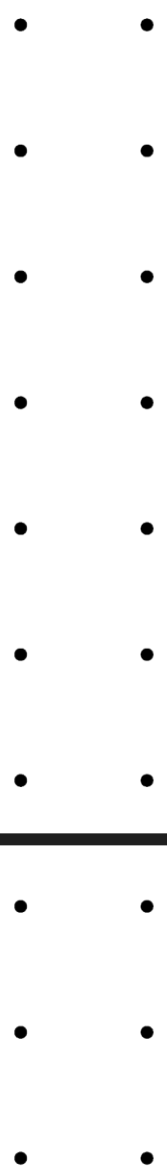
2. Employees Tax

- An employee is a person (other than a company) who receives remuneration.
- Every employer who pays or is liable to pay remuneration must deduct 'Pay As You Earn' by way of a withholding tax. (Schedule 2, para 2(1))
- Remuneration includes any salary, wage, overtime pay, allowance, emolument and other like payments; whether or not paid in respect of services rendered.
- Directors'/members' emoluments and fees payable to trustees of for example, pension and medical aid funds, are included in the definition of remuneration and are subject to employees' tax.
- This also applies to emoluments payable to the non-executive directors of a company.

2. Employees Tax (continued)

- Employees' tax (PAYE) must be deducted by the employer from remuneration paid to an employee and be paid within 20 days following the end of the month during which the amount was deducted.
- Every employee who is subject to income tax in terms of the tax rates, is obliged to register and furnish his employer with a copy of his certificate of registration (Schedule 2, para 12(1)).
- If an employer has not received the above-mentioned certificate from an employee, he is obliged to calculate the employees' tax at the maximum rate of tax applicable to individuals, currently 37% (Schedule 2, para 12(2)).

3. Employee benefits and deductions



3. Employees Benefits and Deductions

- The employer must, for all employees who were in his employ for the full year of assessment, ensure that the employees' tax deducted from the annual remuneration of that employee, has been calculated and deducted correctly (Schedule 2, para 12A).
- Director's fees received by a non-resident person who is a director of a Namibian company are from a source within Namibia. These fees are subject to the 25% withholding tax on services rendered by non-residents (s 35A(3)(b)) and are not subject to PAYE. The withholding tax is a final tax.
- Non-resident independent contractors are potentially subject to PAYE on their fees. The withholding tax on services may override this provision or a DTA with the country of residence may deny Namibia the right to tax that income.

3. Employees Benefits and Deductions (continued)

- The remuneration of employees who are residents of treaty countries is taxable in their home country only, if –
 - the person is present in Namibia for a period less than 183 days in a 12 month period; and
 - remuneration is paid by an employer who is not a resident of Namibia; and
 - the expense is not borne by a PE or a fixed base which the employer has in Namibia.
- If employment is exercised aboard a ship, aircraft or rail or road transport vehicle operated in international traffic, the remuneration is taxed only in the Contracting State in which the POEM of the employer is situated.
- Always study the applicable DTA, as the detail may differ between agreements.

3. Employees Benefits and Deductions (continued)

Married persons

- Any income derived by a spouse (the first spouse) from his or her spouse (the second spouse) –
 - from a trade carried on in partnership or association between the spouses, or
 - from any partnership of which the second spouse is a member, or
 - from a private company of which the second spouse is the sole, main or one of the principal shareholders,

3. Employees Benefits and Deductions (continued)

Married persons (continued)

Which is excessive in comparison to the participation of the first spouse in the business and the market value of the services rendered by the first spouse, shall be deemed to be income of the second spouse (Schedule 4, para 2).

3. Employees Benefits and Deductions (continued)

Schedule 4 - paragraph 2 example	<u>First spouse</u>	<u>Second spouse</u>	<u>Combined</u>
	<u>N\$</u>	<u>N\$</u>	<u>N\$</u>
Remuneration received	<u>960 000</u>	<u>2 660 000</u>	<u>3 620 000</u>
Fair remuneration receivable	<u>240 000</u>	<u>2 660 000</u>	<u>2 900 000</u>
Adjustment required in terms of para 2 of Schedule 4	<u>720 000</u>	<u>-</u>	<u>720 000</u>
Adjusted taxable income of each spouse	<u>240 000</u>	<u>3 380 000</u>	<u>3 620 000</u>

3. Employees Benefits and Deductions (continued)

Deductible expenses

- Excessive expenditure: Where the remuneration paid to an 'employee' (often a member of a CC or a close relative) bears little or no relationship to the true worth of the services rendered by the employee (devoid of commercial rationality/ motivated by benevolence), the deduction by the employer of this expense is disallowed under both, s 17(1)(a) (not in the production of income) and s 24(g) (not for the purposes of trade). Also consider para 2 of Schedule 4.
- The amount will nevertheless be taxable, as it is revenue in nature and beneficially received, whether for services rendered or not. It does not follow that, because an amount is not allowed as a deduction from income, it is not taxable in the hands of the recipient (*WF Johnstone & Co Ltd v CIR*).

3. Employees Benefits and Deductions (continued)

Excessive expenditure – effect of s 24(g)

Excessive expenditure - not for the purpose of trade		<u>N\$</u>
Taxable income of CC before member's salary		12 550 000
Less: member's salary		<u>7 430 000</u>
Taxable income		<u>5 120 000</u>
Market related salary of member		<u>2 400 000</u>
Excessive salary		<u>5 030 000</u>
Adjusted taxable income of CC		<u>10 150 000</u>
Taxable income of member		<u>7 430 000</u>

3. Employees Benefits and Deductions (continued)

Employees benefits and deductions

- The single most important characteristic of the regulations dealing with the taxation of employee benefits is that these depend upon the existence of an employer/employee link for activation.
- It is only amounts received by an employee *qua* employee that fall within para (g) of the definition of 'gross income'.
- This employer/employee link does not exist in relation to the holder of an office, such as a non-executive director who only receives fees for attending board meetings.
- Where a non-executive director receives a company car for private use, the value will only be subject to PAYE if he receives it for services rendered or to be rendered. Where the car is given to him because he exercises control by virtue of his shareholding in the company, there is no taxable benefit under para (g) (Zim *ITC 1590*).

3. Employees Benefits and Deductions (continued)

Employees benefits and deductions

- The non-executive director nevertheless must include this benefit, based on its objective value, in his gross income.
- Fringe benefits relate to the taxable value of any benefit a person receives in respect of his employment other than remuneration, such as the free use of an asset.
- Fringe benefit regulations do not apply to self employed persons.
- Taxable amount of a company car is calculated as follows: -
 - if all running, maintenance and insurance costs are borne by the employer the value is calculated at 1.5% per month of the cash value of the car (the annual taxable amount of a car costing N\$ 800 000 is N\$ 144 000).
 - if the cost of fuel is borne by the employee, the rate is 1.4%.

3. Employees Benefits and Deductions (continued)

Employees benefits and deductions – Travel and car allowance

- The amount, by which the allowance exceeds the expenditure related to business travel, is deemed to be taxable income of the recipient.
- Only employees who are obliged to use their cars for business purposes as a condition of their employment, are entitled to claim such expenses.
- The capital cost of a car is claimed over 3 years based on the ratio of business km to total km travelled.
- The tax value of the vehicle is calculated by deducting the s 17(1)(e) deductions from the original cost price and the recoupment under s 14(4) is calculated by deducting the tax value from the proceeds received when selling the vehicle (assuming proceeds are below cost).
- The opening tax value of the vehicle is always equal to the original cost price thereof and is not adjusted for the % business use.

3. Employees Benefits and Deductions (continued)

Tax value and recoupment

Tax value and recoupment of business use vehicle	
	<u>N\$</u>
Cost price of vehicle = tax value at date of purchase	<u>740 000</u>
Wear and tear deduction - year 1 (58%)	143 067
- year 2 (62%)	152 933
- year 3 (44%)	<u>108 533</u>
	<u>404 533</u>
Tax value of vehicle after 3 years	335 467
Proceeds from disposal of vehicle - year 5	<u>495 000</u>
Recoupment under s 14(4)	<u>159 533</u>

3. Employees Benefits and Deductions (continued)

Entertainment and cell phone allowances

- Claim actual costs incurred by employee when entertaining or the use of the phone for business purposes.

Housing loan

- The taxable value arising from a loan received for the purchase or improvement of the employee's residence is calculated at 12% interest less the actual interest payable.

Free housing

- Taxable value is the rent paid by the employer.
- Employer owned houses are taxed based on tables issued by the IRD in 1993; value linked to the number of living rooms in the house and where in Namibia the house is situated.

3. Employees Benefits and Deductions (continued)

Approved housing scheme (s 16A)

- The amounts/values of loan repayments, free employer housing or rent paid is reduced by 1/3 if the benefit is granted in terms of an approved housing scheme. The employer's policy document setting out the details of the housing scheme must accompany the employer's application for approval to NamRA.
- An employee participating in the scheme may not sacrifice remuneration as a result. Thus, the only time an employee may participate in the scheme, is at the time his employment commences or his remuneration is increased by the value of the housing benefit.

3. Employees Benefits and Deductions (continued)

Approved housing scheme....(continued)

- Section 16A(4)(b) states that the Minister shall not approve any scheme where a housing benefit is granted in substitution for any reward for services rendered which would otherwise have been granted to such employee.
- My interpretation of s 16A(4)(b) is: - Where two employees perform identical services and one receives a housing benefit and the other not, the remuneration of the employee who receives the benefit must exceed the remuneration of the other employee by the amount of the benefit.
- It appears that the intention of the legislator was, that the housing benefit must always be granted in addition to the employee's normal remuneration.
- The opening words of subsection (4) prohibit the Minister from approving a scheme if this condition is not met.

3. Employees Benefits and Deductions (continued)

Housing allowance – s 16A

Housing allowance under s 16A		
		<u>N\$</u>
Housing allowance granted		<u>9 000</u>
Actual rent payable		<u>10 600</u>
1/3 of allowance exempt from tax		<u>3 000</u>
Actual rent payable		<u>7 450</u>
1/3 of actual rent exempt from tax		<u>2 483</u>
The 1/3 tax exempt portion is always limited to the smaller of: - the allowance granted or the actual rent payable		

3. Employees Benefits and Deductions (continued)

Employee benefits and deductions

- The value of car and travel allowances should be determined by taking the circumstances of the employee into account. It is important to make employees aware of the necessity to keep accurate vehicle log books and to retain all relevant expense vouchers.
- Where an employee plans to buy a new vehicle, it is advisable to effect that purchase as early as possible in the year of assessment so that the value of a full year's allowance is available against which the 1/3 wear and tear deduction on the new vehicle can be claimed.
- The value of all employee benefits must be disclosed separately on the annual PAYE 5 certificate and per the detailed payroll submitted monthly on ITAS.

3. Employees Benefits and Deductions (continued)

Employee benefits and deductions

- Expenditure claimed against an allowance received may not exceed the amount of the allowance, except where the expenditure qualifies as a deduction under s 17(1)(a) read together with s 24(g); this applies whether an employee earns performance-based income or fixed income only (*CIR v Van der Walt*).
- In the case of home office expenditure, an employee might find it difficult to prove that the expenditure was incurred in the production of income; eg where he receives his remuneration regardless whether such expenditure was incurred or not.
- *Bona fide* allowances paid to employees are not subject to the employer withholding PAYE. This is supported by the wording of s 14(1) and confirmed in PN No. 3 of 2001.
- The portion of any allowance which exceeds the claimable expenditure, is deemed to be taxable income of the employee (s 14(1)).

3. Employees Benefits and Deductions (continued)

Employee benefits and deductions

- Where an employer enters into a valid 'salary sacrifice/substitution scheme' with his employees (eg a *bona fide* bursary scheme), the scheme should pass the normality test in s 95(1)(b).
- The taxpayer should also be able to rebut the presumption in s 95(4)(a) that the scheme was entered into 'solely or mainly' for the purpose of the avoidance of any liability to tax. Education of the beneficiary is the sole or main purpose of the scheme.
- In *Anglo Platinum Management Services (Pty) Ltd v C:SARS* and in *ITC 1663 & ITC 1682* the court accepted the principle and legality of a properly arranged salary substitution scheme based on, *inter alia*, renegotiated employee agreements.
- The difficulty that often arises is, that the actual implementation and maintenance of a scheme does not necessarily reflect what has been agreed to with the employees and vice versa.

3. Employees Benefits and Deductions (continued)

Employee benefits and deductions

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3. Employees Benefits and Deductions (continued)

Bursary scheme – cash effect

Bona fide bursary scheme - effect on disposable income	Scenarios	
	<u>1</u>	<u>2</u>
	<u>N\$</u>	<u>N\$</u>
Gross annual remuneration - (1) no bursary - (2) bursary	<u>1 230 000</u>	<u>1 134 000</u>
Tax payable	<u>342 600</u>	<u>311 880</u>
After tax take-home pay	887 400	822 120
Add: annual bursary paid to educational institution	<u>-</u>	<u>96 000</u>
Total cash available to employee and dependent	<u>887 400</u>	<u>918 120</u>
Cash advantage - annual		<u>30 720</u>
- monthly		<u>2 560</u>

3. Employees Benefits and Deductions (continued)

Employee benefits and deductions

- The benefit or advantage to be derived by an employee from being granted shares or a share option in his employer company or a company which is linked to his employer, is a taxable fringe benefit.
- This is not the case where the shares are issued or sold to the individual for reasons other than employment, for example to obtain/retain his/her services as director of the company.
- Generally, the taxable benefit derived by the employee is the market value of the shares when awarded, less the cost to the employee of these shares.
- What is the position of the company as far as deductibility of the cost of the shares/share option granted is concerned?

3. Employees Benefits and Deductions (continued)

Employee benefits and deductions

- S 17(1)(a) requires that expenditure must have been incurred for the purpose of earning income, before it ranks for deduction in terms of the section.
- Does a company incur expenditure within the meaning of s 17(1)(a) when it issues shares?
- In *C:SARS v Labat Africa Ltd* the SCA held that the issue of shares does not involve a movement of assets and accordingly, the issue of shares does not qualify as 'expenditure incurred'.

3. Employees Benefits and Deductions (continued)

Employee benefits and deductions

- A safe way is to pay the employee the appropriate cash amount (to be utilised by the employee to pay for the shares) to induce him to leave his former employer or an incentive bonus in the case of an existing employee.
- On this basis the company has incurred expenditure which qualifies as a deduction, while the benefit to the employee (whether cash or shares) is in any event taxable under paragraph (b) of the definition of 'gross income'.
- Any amount received by an employee or the holder of an office because of the termination of his services is exempt from tax, up to a maximum of N\$ 300 000 over the taxpayers lifetime (s 16(1)(o)).
- Any balance of the amount received is taxed in three equal instalments, at the option of the taxpayer, beginning in the year the amount is received by or accrued to the taxpayer and the two successive tax years (s 13(3)).

3. Employees Benefits and Deductions (continued)

Employee benefits and deductions

- The section 13(3) concession only applies if the amount received is due to superannuation (retirement due to old age in terms of the employer's rules), ill-health or other infirmity; or the Minister is satisfied that the circumstances warrant this concession.
- Amounts which do not qualify under s 16(1)(o) are leave pay, performance bonuses or long-service awards (receipts in terms of para (b) of the definition of 'gross income').

3. Employees Benefits and Deductions (continued)

Three-year spread of retrenchment package

Three-year spread of retrenchment package under s 13(3)		<u>N\$</u>
Retrenchment package received by employee - due to superannuation		<u>1 886 000</u>
Tax payable if taxed in year of receipt		<u>571 820</u>
Taxed over three years at the option of the employee		
- year 1		<u>628 667</u>
- year 2		<u>628 667</u>
- year 3		<u>628 667</u>
Annual tax payable		<u>153 600</u>
Cash flow advantage of spreading tax liability		<u>111 020</u>

3. Employees Benefits and Deductions (continued)

Employee benefits and deductions

- In the case of retrenchment, the Labour Commissioner must be notified in terms of s 34(1)(a) of the Labour Act, 2007.
- The s 16(1)(o) exemption does not apply unless: -
 - the person has attained the age of 55 years; or
 - the Minister is satisfied that the person's services are terminated due to superannuation, ill-health or other infirmity; or
 - the Minister is satisfied that the person's services are terminated due to the taxpayer becoming redundant because the employer is reducing personnel or has/intends to cease carrying on the trade in respect of which he was employed.
- The employer has to obtain a directive from NamRA, requesting the approval of the s 16(1)(o) exemption and the rate at which the balance of the amount payable to the employee must be taxed.

3. Employees Benefits and Deductions (continued)

Employee benefits and deductions

- Any taxable portion of an amount received from a pension fund, provident fund or preservation fund is taxed at the average rate applicable to the taxpayer's income, excluding the amount received from the pension fund, provident fund or preservation fund, but the rate shall not be less than the lowest rate at which tax becomes payable, currently 18% (s 5(3)).
- An employee may deduct up to N\$ 150 000 per annum in respect of his total contributions to a pension fund, provident fund, retirement annuity fund or an education policy (effective 1 March 2022).
- The contributions by an employee to a medical aid scheme are not deductible by the employee (s 24(b)).
- Where an employee is contractually bound to pay the contributions to the scheme but the employer does so on his behalf, a taxable benefit arises to the employee under para (b) of the 'gross income' definition.

3. Employees Benefits and Deductions (continued)

Fund pay-out – averaging of tax

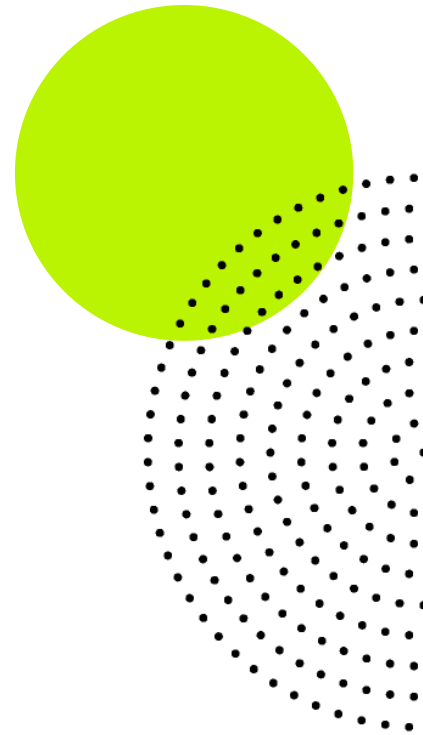
Application of section 5(3) - average tax rate of individual	Scenarios	
	1	2
Gross amount due from fund	1 230 000	402 000
Less: 1/3 portion excluded from 'gross income'	<u>410 000</u>	<u>134 000</u>
Amount to which averaging of tax rate per s 5(3) applies	<u>820 000</u>	<u>268 000</u>
Annual remuneration	2 400 000	880 000
Add: Pay-out received from fund per above	<u>820 000</u>	<u>268 000</u>
Total taxable income for the year	<u>3 220 000</u>	<u>1 148 000</u>
Tax payable based on the tax tables	<u>1 065 400</u>	<u>316 360</u>
Taxable income excluding fund pay-out	<u>2 400 000</u>	<u>880 000</u>
Tax payable on this amount based on the tax tables	<u>762 000</u>	<u>230 600</u>
Average tax rate of the taxpayer - excluding fund pay-out	<u>31,75%</u>	<u>26,20%</u>
Tax payable on fund pay-out applying the average tax rate	260 350	70 228
Add: tax payable on other income	<u>762 000</u>	<u>230 600</u>
Total tax payable	<u>1 022 350</u>	<u>300 828</u>
Cash flow benefit - due to averaging	<u>43 050</u>	<u>15 532</u>

QUESTIONS & ANSWERS

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3. Employees Benefits and Deductions (continued)

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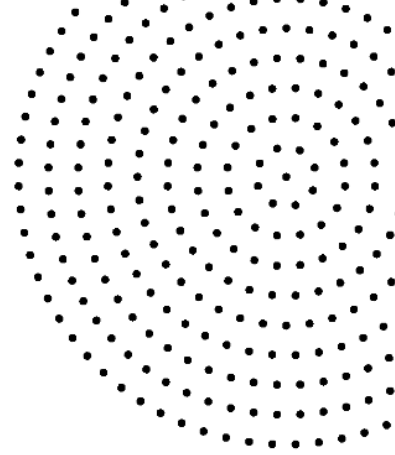
E-mail: hvanalphen@vaconsulting.com.na

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