

THE INCOME TAX (AMENDMENT) ACT, 2023

(Act No. 20 of 2023)



I ASSENT

MSWATI III
KING OF THE KINGDOM
OF ESWATINI14th JULY, 2023AN ACT
ENTITLED**AN ACT** to amend the Income Tax Order 1975 and to provide for incidental matters.**ENACTED** by the King and the Parliament of Eswatini.*Short title and commencement.*

1. (1) This Act may be cited as the Income Tax (Amendment) Act, 2023 and shall be read as one with the Income Tax Order, 1975 (hereinafter referred to as the "Order").

(2) This Act shall come into force on a date to be determined by the Minister by Notice in the Gazette.

Amendment of section 2

2. Section 2 of the Order is amended -

(a) by adding, in alphabetical order, new definitions as follows -

"arm's length principle", means the price payable between independent enterprises;

"associate person" means, in relation to a person, any other person who acts or is likely to act in accordance with the directions, requests, suggestions, or wishes of the person and without limiting the generality of the above, the following are treated as an associate person-

- (a) a relative;
- (b) a partner, an associate of a partner or a partnership in which the person is a partner;
- (c) the trustee of a trust under which the person or an associate, benefits or is capable of benefiting; or
- (d) a company in which the person either alone, or together with an associate, controls directly or indirectly 50% or more of the share capital or voting power in the

company, or which is accustomed or may reasonably be expected to act in accordance with the directions or wishes of the person or an associate of the person;

“beneficial tax regime”, means the rate stated by the Minister in the gazette in terms of section 65quin (8);

“business asset” means an asset which is used or held ready for use in a business including shares;”

“business debt” means –

- (a) a debt the proceeds of which are used to acquire a business asset or to incur an expense of the business; or
- (b) a debt arising, as a result of being given time to pay, on the acquisition of a business asset or the incurring of an expense of a business;”

“controlled transaction” means any transaction between associated persons;”

“disposal”, in relation to an asset, means-

- (a) the sale, exchange, redemption, or distribution of the asset;
- (b) the transfer of the asset by way of gift; or
- (c) the destruction, loss, or extinction of the asset; and
- (d) includes the disposal of a part of an asset;”

“enterprise”, means any commercial or business activity carried on by any person;”

“financial information” means data about the monetary transactions of a person including, but not limited to, balance sheets, income statements, cash flow statements and statements of shareholders' equity;

“financial indicator” means -

- (a) in relation to the comparable uncontrolled price method, the price;
- (b) in relation to the cost-plus method, the mark up on costs;
- (c) in relation to the resale price method, the resale margin;
- (d) in relation to the transaction net margin method, the net profit margin; or
- (e) in relation to the transactional profit split method, the division of the operating profit and loss;

“initial allowance” means an eligible depreciable asset used in Eswatini for the first time in a year of assessment for business purposes and computed in accordance with section 14 (1) (e), (f), (g) and (h);

"pension preservation fund" means a pension fund which is registered under the Retirement Funds Act of 2005, and is approved by the Commissioner in respect of the year of assessment in question on condition that the Commissioner may approve a fund subject to such limitations and conditions as the Commissioner may determine, but shall not approve a fund unless, in respect of that year of assessment, the Commissioner is satisfied that the rules of the fund provide that-

- (a) membership of the fund consists of -
 - (i) former members of a pension fund whose membership of that fund has terminated due to-
 - (A) resignation, retrenchment or dismissal from employment and who elected to have any lump sum benefit that is payable as a result of the termination transferred to that fund;
 - (B) the winding up or partial winding of the fund, if the member elects or is required in terms of the rules to transfer to this fund, or
 - (ii) former members of any other pension preservation fund-
 - (A) if that fund was wound up or partially wound up; or
 - (B) if the member elected to have any lump sum benefit transferred to this preservation fund and who made this election while they were members of that other fund;
 - (iii) former members of a pension fund or nominees or dependants of that former member in respect of whom a benefit is due by that fund that has not been paid within twenty-four months of the due date; or
- (b) payments or transfers to the fund in respect of a member are limited to the lump sum benefit, or any unclaimed benefit as defined in the Retirement Funds Act, that is paid or transferred to the fund by-
 - (i) a pension fund or any other pension preservation fund of which such member was previously a member; or
 - (ii) a pension fund or pension preservation fund of which such member's former spouse is or was previously a member and such payment or transfer was made pursuant to an election by such member in terms of the provisions of the Retirement Funds Act,
- (c) with the exception of amounts transferred to any other pension or pension preservation fund, not more than one amount is allowed to be paid to the member during the period of membership of the fund or any other pension preservation fund provided that -
 - (i) this paragraph applies separately to each payment or transfer to the fund contemplated in paragraph (b);
 - (ii) a member, other than a member contemplated in paragraph (a);

(iii) of this proviso, will become entitled to a benefit on his or her retirement date: and

(iv) not more than one-third of the total value of the retirement interest may be commuted for a single payment and that the remainder must be paid in the form of an annuity (including a living annuity) except where two-thirds of the total value does not exceed forty-one thousand emalangeni or where the member is deceased;

(d) the rules of a pension fund that is doing the business of a preservation fund as prescribed by the Commissioner from time to time are submitted to the Commissioner for approval in terms of the provisions of this definition;"

"permanent establishment" means -

(a) a fixed place of business through which the business of an enterprise is wholly or partly carried on, and includes -

- (i) a place of management;
 - (ii) a branch;
 - (iii) an office;
 - (iv) a factory;
 - (v) a workshop;
 - (vi) a mine;
 - (vii) an oil or gas well;
 - (viii) a quarry or any other place of extraction of natural resources;
 - (ix) a farm;
 - (x) a plantation or other place where agricultural, forestry plantation or related activities are carried out; or
 - (xi) an installation or structure used in the exploration for natural resources;
 - (xii) a place where a person has, is using or is installing substantial equipment or substantial machinery;
 - (xiii) a building site or construction or assembly or installation project or any supervisory activity in connection with such site or project;
 - (xiv) the furnishing of services, including consultancy services, by the non-resident person, through employees or other personnel engaged by the non-resident person for such a purpose, but only if activities of that nature continue within Eswatini for a period or periods exceeding in the aggregate more than thirty days (30) days in any twelve (12) month period commencing or ending in the year of assessment concerned;
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- (b) notwithstanding the provisions of paragraph (a) but subject to the provisions of paragraph (c), where a person is acting in Eswatini on behalf of a non-resident person, that non-resident shall be deemed to have a permanent establishment in Eswatini in respect of any activities which that person undertakes for that non-resident person, if such a person -
 - (i) habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded and these contracts are-
 - (A) in the name of the non-resident;
 - (B) for the transfer of the ownership of, or for the granting of the right to use, property owned by that non-resident person or that the non-resident person has the right to use; or
 - (C) for the provision of services by that non-resident person;
 - (ii) does not habitually conclude contracts nor plays the principal role leading to the conclusion of such contracts, but habitually maintains in Eswatini a stock of goods or merchandise from which that person regularly delivers goods or merchandise on behalf of the non-resident person.
- (c) paragraph (b) shall not apply where the person acting in Eswatini on behalf of a non-resident person of a foreign State carries on business in Eswatini as an independent agent and acts for that non-resident person in the ordinary course of that business;
- (d) where, however, a person acts exclusively or almost exclusively on behalf of one or more persons to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such person;
- (e) the fact that a company which is a resident of Eswatini controls or is controlled by a company which is a resident of a foreign State, or which carries on business in a foreign State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other; or
- (f) for the purposes of the definition of 'permanent establishment', a person is closely related to a person if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons;

"presumptive tax" means tax payable on turnover by a person registered as a small business in terms of the Sixth Schedule;

"provident preservation fund" means a provident fund which is registered under the Retirement Funds Act of 2005 or its successor, and which is approved by the Commissioner in respect of the year of assessment in question on condition that the Commissioner may approve a fund subject to such limitations and conditions as the Commissioner may determine, but shall not approve a fund unless, in respect of that year of assessment, the Commissioner is satisfied that the rules of the fund provide that-

- (a) membership of the fund consists of-

- (i) former members of a provident fund whose membership of that fund has terminated due to-
 - (A) resignation, retrenchment or dismissal from employment and who elected to have any lump sum benefit that is payable as a result of the termination transferred to that fund;
 - (B) the winding up or partial winding of the fund, if the members elected or are required in terms of the rules to transfer to this fund; or
- (ii) former members of any other provident preservation fund-
 - (A) if that fund was wound up or partially wound up; or
 - (B) if the member elected to have any lump sum benefit transferred to this preservation fund and who made this election while they were members of that other fund;
- (iii) former members of a provident fund or nominees or dependants of that former member in respect of whom a benefit is due by that fund that has not been paid within twenty-four months of the due date; or
- (b) payments or transfers to the fund in respect of a member are limited to the lump sum benefits or any unclaimed benefit as defined in the Retirement Funds Act, that is paid or transferred to the fund by-
 - (i) a provident fund or any other provident preservation fund of which such member was previously a member; or
 - (ii) a provident fund or provident preservation fund of which such member's former spouse is or was previously a member and such payment or transfer was made pursuant to an election by such member in terms of the provisions of the Retirement Funds Act;
- (c) with the exception of amounts transferred to any other provident or provident preservation fund, not more than one amount is allowed to be paid to the member during the period of membership of the fund or any other provident preservation fund provided-
 - (i) that this paragraph applies separately to each payment or transfer to the fund contemplated in paragraph (b); and
 - (ii) a member, other than a member contemplated in paragraph (a) (iii) of this proviso, will become entitled to a benefit on the retirement date of that member.
- (d) that the rules of a provident fund that is doing the business of a preservation fund as prescribed by the Commissioner from time to time must be submitted to the Commissioner for approval in terms of the provisions of this definition;"

"Retirement Funds Act" means the Retirement Funds Act, 2005 or its successor;

"tax EBITDA" means the sum of the taxable profits, net interest expense, depreciation and amortisation of the company";

"tested party", means a party which meets the criteria as set out in section 65*sex*;

"transfer pricing methods", refers to the approved transfer pricing methods in terms of section 65*quin* (3);

"uncontrolled transaction", means any transaction between independent persons."

(b) by replacing the definition of "Commissioner" with the following new definition –

"Commissioner" means the Commissioner General for the Eswatini Revenue Authority;" and

(c) by deleting the definition of "Deputy Commissioner";

(d) by amending the definition of "royalty" as follows -

(i) Delete the words "means any payment" and replace with the words "means payment of any kind received as a consideration";

(ii) Insert a new sub-paragraph (iv) after paragraph (b) (iii) as follows -

"(iii) industrial, commercial or scientific equipment; or"

Amendment of section 3

3. Section 3 of the Order is amended by deleting and replacing it with the following new section 3 –

"Administration of the Act

3. (1) The Commissioner shall be responsible for carrying out the provisions of this Order.

(2) The powers conferred, and the duties imposed upon the Commissioner by or under the provisions of this Order may be exercised or performed by the Commissioner personally, or by any officer or person engaged in carrying out the said provisions under the control, direction or supervision of the Commissioner.

(3) Any decision made by and any notice or communication issued or signed by any such officer or person may be withdrawn or amended by the Commissioner or by the officer or person concerned, and shall for the purposes of the said provisions, until it has been withdrawn, be deemed to have been made, issued or signed by the Commissioner -

Provided that a decision made by any such officer in the exercise of any discretionary power under the provisions of this Order shall not be withdrawn or amended after the expiration of three years from the date of the written notification of such decision or of the notice of assessments giving effect thereto, if all the material facts were known to the said officer when he made his decision.

(4) Any written decision by the Commissioner personally in the exercise of any discretionary power under the provisions of this Order shall not be withdrawn or amended by the Commissioner if all the material facts were known to him when he made the decision.

Amendment of section 4

4. Section 4 of the Order is amended by deleting the section in its entirety.

Amendment of section 6

5. Section 6 of the Order is amended by adding a new subsection (4) after subsection (3) as follows;

“(4) There shall be charged, levied and paid a tax to be known as the presumptive tax on turnover, payable by a person registered as a small business taxpayer in terms of the Sixth Schedule, and –

- (a) the tax shall be a final tax on the business income of the taxpayer;
- (b) a deduction shall not be allowed under this Order for expenditures or losses incurred in the production of the business income; and
- (c) a tax credit allowed under this Order shall not be used to reduce the tax payable on the business income of the taxpayer, except as provided in the Sixth Schedule to this Order.”

Amendment of section 11

6. Section 11 of the Order is amended, in subsection (10), by deleting the entire subsection (10) and replacing it with the following new subsection (10) –

“(10) So much of any amount which has been paid by a company to or otherwise made available for the personal use of a shareholder or director of such company from the company's undistributed profits, reserves or other assets by way of loan that has created rights and obligations which would not normally be created between persons dealing at arm's length, shall be deemed to be part of the taxable income of such shareholder or director for that year of assessment.”

Amendment of section 12

7. Section 12 of the Order is amended in subsection (1) as follows -

- (a) in paragraph (g), by deleting the entire paragraph (g);
- (b) in paragraph (j), –
 - (i) by replacing subparagraph (i) with the following new subparagraph (i) –

“(i) commutation of an amount not exceeding one-third of the total value of any annuity payable from a pension fund or pension preservation fund;”
 - (ii) by replacing subparagraph (ii) with the following new subparagraph (ii) –

“(ii) amounts due from a provident fund, benefit fund or unemployment insurance fund;”

- (c) in paragraph (qq), by deleting the entire paragraph and replacing it with a new paragraph (qq) as follows—

“(qq) (i) interest received by, accrued to, or, in favour of, any natural person in any year of assessment from a co-operative society, a savings account in a financial institution or a building society or the Eswatini Development and Savings Bank carrying on business in Eswatini; and

- (ii) for the purposes of this paragraph, “savings account” excludes a call account, notice deposit, fixed deposit, permanent or fixed period share, subscription share, deposits in a unit trust company or other similar deposit accounts used for investment purposes;”

- (d) by inserting the following new paragraph (uu) immediately after paragraph (u)–

“(uu) interest received by or accrued to or in favour of any person ordinarily resident or carrying on business in Eswatini which is subject to tax under section 32C of this Order.”

Amendment of section 14

8. Section 14 of the Order is amended as follows –(a) in subsection (1) –

- (i) by inserting a new paragraph (aa) immediately after paragraph (a) as follows—

“(aa) the amount of any loss incurred on the disposal of a business asset (other than trading stock) or on the satisfaction of a business debt, whether or not the asset or debt was on revenue or capital account, as determined under Division X;”

- (ii) by deleting the proviso to paragraph (c) in its entirety and replacing it with a new proviso to paragraph (c) as follows–

“Provided that the value of any machinery or plant used by the taxpayer for the purposes of the business shall not be less than five (5) million Emalangeni of the deduction which may be made under paragraph (e) (i) and (ii)”.

- (iii) by deleting the word “fifty” wherever it appears in paragraph (e) and replace it with the word “thirty”.

- (iv) by replacing paragraph (i) with the following new paragraph (i) as follows –

“14 (1) (i) any sum not exceeding fifteen per cent of a pensionable salary which was contributed during the year of assessment by way of current contribution to any pension fund”. (b) by inserting new sections 14*ter*, 14*quat* and 14*quin* immediately after section 14*bis* as follows;

Apportionment of Deductions

14*ter*. A deduction relating to more than one class of income shall be reasonably apportioned among the classes of income to which it relates.

Losses Carried Forward

14quat. (1) Where business income of an individual taxpayer is exceeded by deductions relating to that income, the loss, being the amount of the excess –

- (a) shall not be deducted against other income of the taxpayer but shall be carried forward; and
- (b) shall be deducted in determining the taxable business income in subsequent years of assessment.

(2) Where property income of an individual taxpayer is exceeded by deductions relating to that income, the loss, being the amount of the excess –

- (a) shall not be deducted against other income of the taxpayer but shall be carried forward; and
- (b) shall be deducted in determining taxable property income in subsequent years of assessment.

(3) Subject to subsection (4), where the taxpayer is a company, the excess of the deductions allowed over the taxpayer's gross income shall be carried forward and shall be deducted in determining taxable income in subsequent years of assessment.

(4) Where manufacturing income of a resident company is exceeded by the deductions relating to that income, the loss, being the amount of the excess –

- (a) shall not be deducted against other income of the company but shall be carried forward; and
- (b) shall be deducted in determining the chargeable manufacturing income in subsequent years of assessment.

(5) Subsections (1), (2) and (3) shall apply separately to income derived from sources in Eswatini and to foreign source income.

(6) Where farming income of an individual taxpayer is exceeded by the deductions relating to that income, the loss, being the amount of the excess –

- (a) shall not be deducted against other income of the taxpayer but shall be carried forward; and
- (b) shall be deducted in determining the taxable farming income in subsequent years of assessment.

(7) A set-off shall not be allowed for any balance of assessed loss not exhausted after five consecutive years of assessment of incurring such loss.

(8) Notwithstanding any provision in this Order, the assessed loss in the maintenance of a timber plantation shall be carried forward until such time as the timber plantation has reached maturity.

(9) Notwithstanding any provision in this Order, the assessed loss in the maintenance of an orchard plantation shall be carried forward until such time as the orchard becomes productive.

(10) In this section-

“farming” means primary farming operations, whether pastoral or agricultural.

“taxable farming income” means the taxable income arising from farming.

Insertion of a new section 20ter

9. The Order is amended by inserting immediately after section 20bis the following new section 20ter-

“Long-term contracts

20ter. (1) Income and deductions relating to a long-term contract are taken into account on the basis of the percentage of the contract completed during the year of assessment.

(2) The percentage of completion is determined by comparing costs allocated to the contract and incurred before the end of the year of assessment with the estimated total contract costs as determined at the time of commencement of the contract.

(3) Where, in the year of assessment in which a long-term contract is completed, it is determined that the contract has made a final year loss, the Commissioner may allow the loss to be carried back to the preceding year of assessment and applied against the amount included in gross income under subsection (1) for that year.

(4) In this section, “final year loss”, in relation to a long-term contract, occurs where the following conditions are satisfied -

- (a) the profit estimated to be made under the contract for the purposes of subsection (1) exceeds the actual profit (including a loss) made under contract; and
- (b) the difference between the estimated profit and the actual profit exceeds the amount included in gross income under subsection (1) for the year of assessment in which the contract is completed, and the amount of excess referred to in paragraph (b) is the amount of the final year loss; and
- (c) in this section “long-term contract” means a contract for installation, construction or, in relation to each, the performance of related services, which is not completed within the year of assessment in which work under the contract commenced, other than a contract estimated to be completed within (6) months of the date on which work under the contract commenced.”

Amendment of section 21

10. Section 21 of the Order is amended in subsection 2 by deleting the proviso to subsection (2).

Amendment of section 27

11. Section 27 of the Order is amended after paragraph (c) by deleting the word "ten" between "to" and "per" and replacing it with "fifteen"

Amendment of section 29

12. Section 29 of the Order is amended by deleting paragraph (c) in its entirety.

Amendment of section 32C

13. Section 32C of the order is amended by inserting a new section 32C as follows—

"Withholding tax from payments of interest made to persons resident in Eswatini.

32C. (1) There shall be charged, levied and paid a tax in respect of any amount received by or accrued to or in favour of any person ordinarily resident in Eswatini who derived interest or dividend from society shares from a financial institution, unit trust company, building society or mutual loan society.

(2) The rate of tax shall be ten per centum of the gross amount.

(3) This section does not apply to a company or any person or institution exempt in terms of sections 12 (1) (a) (iii).

(4) Every person who makes any payment of interest or dividend to a person to whom subsection (1) applies, shall withhold tax from such payment in accordance with the rate specified in subsection (2).

(5) The tax withheld under subsection (4) shall be a final tax and —

(a) no further tax liability shall be imposed upon the taxpayer in respect of the interest to which the tax relates;

(b) the income shall not be aggregated with the other income of the taxpayer for the purposes of ascertaining taxable income;

(c) no deduction shall be allowed for any expenditure or losses actually incurred in deriving the income; and

(d) no refund of tax shall be made in respect of the income.

(6) Every person who has withheld any tax under subsection (4) shall within fifteen days from the end of the month in which the interest was paid remit to the Commissioner the amount of tax so withheld.

(7) Every person making any payment (of interest) to which this section applies shall maintain a record showing in relation to each year of assessment —

(a) the payment of interest made to each resident person; and

(b) the tax withheld from such payment.

and such record shall be kept for the period specified under section 35*bis* for examination by the Commissioner as and when required.

(8) A person who fails to withhold any tax under subsection (4) or having withheld such tax fails to remit to the Commissioner, as required under subsection (6), shall, in addition to any penalty for which that person may be liable under section 40*bis* or section 66, be personally liable to pay the Commissioner that amount of tax as if it were tax due and payable by such person under Part VII of this Order.”

Amendment of section 32E

14. Section 32E is amended as follows -

- (a) by deleting the proviso to subsection (1) in its entirety;
- (b) by deleting subsection (4) in its entirety.

Amendment of section 32F

15. Section 32F is amended in subsection (3) by deleting paragraph (a) and replacing it with a new paragraph (a) as follows-

- “(a) on or before the fifteenth (15th) day of the next month following the month of payment remit to the Commissioner the amount of tax so withheld;”

Amendment of section 32G

16. Section 32G is amended in subsection (3) by deleting paragraph (a) and replacing it with a new paragraph (a) as follows-

- “(a) on or before the fifteenth (15th) day of the next month following the month of payment remit to the Commissioner the amount of tax so withheld;”

Insertion of a new Division X under Part III

17. Part III of the Order is amended by inserting a new Division X immediately after Division IX as follows-

“DIVISION X – GAINS AND LOSSES ON DISPOSAL OF BUSINESS ASSETS

3211. (1) The gain arising from the disposal of a business asset (other than trading stock) is the excess of the consideration received over the cost base of the asset.

(2) The loss arising from the disposal of a business asset (other than trading Stock) is the excess of the cost base over the consideration received.

(3) Where the Commissioner is satisfied that an asset of a taxpayer -

- (a) ceases to be a business asset in the hands of the taxpayer; or
- (b) becomes a business asset in the hands of the taxpayer,

the taxpayer is deemed to have disposed of the asset for its market value at the time of the change in character of the asset and to have immediately re-acquired it for a cost base equal to that same value.

(4) A non-resident person who becomes a resident person is deemed to have acquired all business assets (other than taxable assets) owned by the person at the time of becoming resident for their market value at that time.

(5) A resident person who becomes a non-resident person is deemed to have disposed of all business assets (other than taxable assets) owned by the person at the time of becoming a non-resident for their market value at that time.

(6) Where a person to whom subsection (5) would otherwise apply -

(a) intends, in the future, to re-acquire status as a resident person; and

(b) provides the Commissioner with sufficient security to satisfy any tax liability which would otherwise arise under subsection (5),

the Commissioner may, by notice in writing, exempt the person from the application of subsection (5).

(7) In this section, "taxable asset" means a business asset acquired by a person before becoming a resident where, if the person disposed of the asset before becoming resident, the gain or loss arising on the disposal would be subject to tax under this Order.

Cost Base

32I. (1) Subject to this Order, this section establishes the cost base of a business asset.

(2) The cost base of a business asset purchased, produced, or constructed by the taxpayer is the amount paid or incurred by the taxpayer in respect of the asset, and includes the market value of any consideration in kind given for the asset.

(3) Subject to subsection (4), the cost base of a business asset acquired in a non-arm's length transaction is the market value of the asset at the date of acquisition.

(4) The cost base of a business asset acquired in a transaction described in section 32J (2) is the amount of the consideration deemed by that subsection to have been received by the person disposing of the asset.

(5) Where a part of a business asset is disposed of, the cost base of the asset is apportioned between the part of the asset retained and the part disposed of in accordance with their respective market values at the time of acquisition.

(6) Expenditures incurred to alter or improve a business asset which have not been allowed as a deduction are added to the cost base of the asset.

(7) Where the receipt of a business asset represents income subject to tax, the cost base of the asset is the amount or value included in gross income plus any amount paid by the taxpayer for the asset.

(8) Where the receipt of a business asset represents income which is exempt from tax, the cost base of the asset is the amount or value which is exempt from tax plus any amount paid by the taxpayer for the asset.

(9) Where a business asset of a taxpayer is an interest in immovable property which has been held by the taxpayer for more than twelve months, the cost base of the asset is indexed for inflation as prescribed by regulations for the purpose of calculating any gain on the disposal of the asset.

(10) Subsection (9) does not apply where the interest in immovable property is trading stock of the taxpayer.

(11) In calculating the amount of any loss on disposal of an asset, the cost base of the asset is reduced by any depreciation deductions allowed in respect of the asset.

(12) The cost base of a business asset shall be the value of the business asset and any expenditure on the business asset on the date of commencement of this Act.

(13) Any business asset acquired before the date of commencement of this Act shall be deemed to have been acquired on the date of commencement of this Act.

Special Rules for Consideration Received

32J. (1) The consideration received on disposal of a business asset includes the market value of any consideration in kind.

(2) Where a business asset is disposed of to an associate or in a non-arm's length transaction other than by way of transmission of the asset to a trustee or beneficiary on the death of a taxpayer, the person disposing of the asset (referred to as the "disposer") is treated as having received consideration equal to the greater of -

- (a) the cost base of the asset to the disposer; or
- (b) the fair market value of the asset at the date of disposal.

(3) Where two or more assets are disposed of in a single transaction and the consideration paid for each asset is not specified, the total consideration received is apportioned among the assets disposed of in proportion to their respective market values at the time of the transaction.

(4) Where a part of a business asset is disposed of, the consideration received is apportioned between the part of the asset disposed of and the part of the asset retained in proportion to their respective market values at the time of acquisition.

(5) Where a taxpayer disposes of an asset in respect of which the taxpayer had been allowed initial allowance under section 14 (1) (c), the amount of the allowance allowed shall be included in the consideration received for the disposal of the asset.

Non-recognition of Gain or Loss

32K. (1) Any gain or loss shall not be taken into account in determining taxable income in-

- (a) a transfer of a business asset between spouses;

- (b) a transfer of a business asset between former spouses as part of a divorce settlement or bona fide separation agreement;
- (c) an involuntary disposal of a business asset to the extent to which the proceeds are reinvested in an asset of a like kind within one year of the involuntary disposal; or
- (d) the transmission of a business asset to a trustee or beneficiary on the death of a taxpayer.

(2) Where no gain or loss is taken into account as a result of subsection (1) (a), (b), or (d), the transferee is deemed to have acquired the transferred or transmitted asset as a business for a consideration equal to the cost base of the asset to the transferor or deceased taxpayer, as the case may be.

(3) The cost base of a replacement asset described in subsection (1) (c) is the cost base of the replaced asset plus any consideration given by the taxpayer for the replaced asset.

Roll-over relief

32L. (1) Where a resident person (referred to as the "transferor") transfers a business asset (with or without any liability not in excess of the cost base of the asset) to a resident company (referred to as the "transferee") in exchange for a share in the transferee and the transferor has a fifty per cent (50%) or greater interest in the transferee immediately after the transfer –

- (a) the transfer is not treated as a disposal of the asset by the transferor but is treated as the acquisition by the transferee of a business asset; and
- (b) the transferee's cost base for the asset is equal to the transferor's cost base for the asset at the time of transfer; and
- (c) the cost base of a share received by the transferor in exchange for the asset is equal to the cost base of the asset transferred, less any liability assumed by the transferor in respect of the asset.

(2) Where, as part of the liquidation of a resident company (referred to as the "liquidated company"), a business asset is transferred to a shareholder being a resident company (referred to as the "transferee company") and, immediately prior to the transfer, the transferee company held a fifty per cent (50%) or greater interest in the liquidated company–

- (a) the transfer is not treated as a disposal of the asset by the liquidated company, but is treated as the acquisition of the business asset by the transferee company; and
 - (b) the transferee's cost base for the asset is the same as the liquidated company's cost base for the asset at the time of transfer; and
 - (c) the transfer of the asset is not a dividend; and
 - (d) no gain or loss is taken into account on the cancellation of the transferee's shares in the liquidated company.
-

(3) Where a resident company or a group of resident companies is reorganised without any significant change in the underlying ownership or control of the company or group, the Commissioner may-

- (a) permit any resident company involved in the reorganisation to treat it as not giving rise to the disposal of any business asset or realisation of any business debt, as the case may be; and
- (b) determine the cost base of any business asset held, or business debt undertaken, by the resident company after the reorganisation in order to reflect the fact that no disposal or realisation is treated as having occurred."

Amendment of section 33

18. Section 33 of the Order is amended by -

- (a) adding a proviso immediately after subsection (1) as follows-

"Provided that upon application in writing by any person, the Commissioner may, where good cause is shown by the person, extend the period in which a return is to be submitted."

- (b) deleting subsection (12) in its entirety;

- (c) adding new subsections (16), (17), (18), (19) and (20) immediately after subsection (15) as follows-

"(16) Every person shall, when making any payment of withheld tax, submit a return to the Commissioner.

(17) For the purposes of subsection (16), a person who fails to submit a return on the date as required under this Order, shall be liable to an administrative penalty not exceeding twenty-five (25) Emalangeni per day after the due date and the liability ceases at the time the Commissioner receives the return."

(18) A person registered to electronically submit a return or other document or communication shall not make a submission in any alternative format.

(19) Notwithstanding subsection (18), whenever the electronic system established by the Commissioner is inoperative, the Commissioner may accept the submission of a return or other document or communication in any alternative format.

(20) A person registered to submit a return or other document or communication in terms of subsection (18) shall not de-register before the lapse of at least two years of registration."

Amendment of section 34ter

19. Section 34ter is amended by adding a new subsection (4) immediately after subsection (3) as follows;

- "(4) Any person who fails to comply with the provisions of subsection (1) shall, while such failure to comply continues, be liable to a penalty of twenty-five (25) Emalangeni for each

day during which such failure continues subject to a maximum of ten thousand (10, 000) Emalangeni and such penalty shall be recovered by the Commissioner under the provisions of this Order.”

Amendment of section 35

20. Section 35 is amended as follows:

(a) add a new subsection (9) immediately after subsection (8) as follows;

“(9) Any person who fails to comply with the provisions of subsection (1), (2), (4) or (7) shall, while such failure to comply continues, be liable to a penalty of twenty-five (25) Emalangeni for each day during which such failure continues subject to a maximum of ten thousand Emalangeni (10, 000), and such penalty shall be recovered by the Commissioner under the provisions of this Order.”

(b) insert a new subsection (10) immediately after subsection (9) which reads as follows;

“(10) Any person who fails to comply with this section shall be liable to a penalty of twenty-five (25) Emalangeni for each day during which the failure continues subject to a maximum of ten thousand (10, 000), emalangeni and such penalty shall be collected by the Commissioner under the provisions of this Order.”

Amendment of section 37

21. Section 37 is amended by adding a new subsection (4) immediately after subsection (3) which reads as follows-

“(4) Any person who fails to comply with this section shall be liable to a penalty of twenty-five (25) emalangeni for each day during which the failure continues subject to a maximum of ten thousand (10, 000), emalangeni and such penalty shall be recovered by the Commissioner under the provisions of this Order.”

Amendment of section 38

22. Section 38 is amended by adding a proviso which reads as follows-

“Provided that any person who fails to comply with this section shall be liable to a penalty of twenty-five (25) Emalangeni for each day during which the failure continues subject to a maximum of ten thousand (10, 000) Emalangeni, and such penalty shall be collected by the Commissioner under the provisions of this Order.”

Amendment of section 40

23. Section 40 of the Order is amended-

(a) in subsection (8), by replacing subsection (8) with the following new subsection (8) -

“(8) a taxpayer who makes default in rendering a return in respect of any year of assessment, shall, in addition to any other penalty or charge for which he may be liable under this Order, pay a penalty of -

(b) in the case of a natural person, twenty-five emalangeni for each day during which such default continues; and

(c) in the case of any other person, twenty-five (25) Emalangeni for each day during which such default continues.”

(d) by adding immediately after subsection (8) the following new subsection (9) -

“(9) There shall be no liability for additional tax under subsections (1)(b) and (c) where the incorrect statement is the subject of a private ruling application filed with the Commissioner before, or at the time of, furnishing the return.”

Insertion of a new section 49bis

24. The Order is amended by inserting, immediately after section 49, a new section 49bis as follows-

“Duties of receivers

49bis. (1) In this section, “receiver” means a person who, with respect to an asset in Eswatini, is-

- (a) a liquidator of a company;
- (b) a receiver appointed out of court or by a court;
- (c) a trustee for a bankrupt person;
- (d) a mortgagee in possession;
- (e) an executor of a deceased estate; or
- (f) any other person conducting the business of a person legally incapacitated.

(2) A receiver shall in writing notify the Commissioner within fourteen days (14) after being appointed to the position of receiver or taking possession of an asset in Eswatini, whichever first occurs.

(3) The Commissioner may in writing notify a receiver of the amount which appears to the Commissioner to be sufficient to provide for any tax which is or will become payable by the person whose assets are in the possession of the receiver.

(4) A receiver shall not part with any asset in Eswatini which is held by the receiver in their capacity as receiver without the prior written permission of the Commissioner.

(5) A receiver-

- (a) shall set aside, out of the proceeds of sale of an asset, the amount notified by the Commissioner under subsection (2), or such lesser amount as is subsequently agreed on by the Commissioner;
- (b) shall be liable to the extent of the amount set aside for the tax of the person who owned the asset; and,
- (c) may pay any debt that has priority over the tax referred to in this section notwithstanding any provision of this section.

(6) A receiver is personally liable to the extent of any amount required to be set aside under subsection (4) for the tax referred to in subsection (2) if, and to the extent that, the receiver fails to comply with the requirements of this section.

(7) Where two or more persons are receivers in respect of a taxpayer or deceased, the obligations and liabilities under this section shall apply jointly and severally to the receivers but may be discharged by any of them."

Insertion of a new section 50bis

25. The Order is amended by inserting immediately after section 50 a new section 50bis as follows-

"Closure of business and distress proceedings

50bis. (1) Where a person liable for tax has failed to remit the amount payable by that person within the prescribed time, the Commissioner may upon ex parte application to the Magistrate Court or High Court apply for an order to lock up and seal the business premises of that person and where the court grants such Order, after that the goods in the business premises shall be attached and at the disposal of the Commissioner.

(2) The Commissioner may recover unpaid tax by distress proceedings against the movable and immovable property of the person liable to pay the tax, by issuing an order in writing, specifying the person against whose property the proceedings are authorized, the location of the property, and the tax liability to which the proceedings relate and may require a police officer to be present while the distress is being executed.

(3) For the purposes of executing distress under subsection (2), an officer may at any time enter any premises described in the order authorizing the distress proceedings.

(4) Property upon which a distress is levied under this section, other than perishable goods, shall be kept for twenty days either at the premises where the distress was levied or at such other place as the Commissioner may consider appropriate, at the cost of the person liable.

(5) Where the person liable does not pay the tax due, together with the costs of the distress-

- (a) in the case of perishable goods, within a period that the Commissioner considers reasonable having regard to the condition of the goods; or
- (b) in any other case, within twenty days after the distress is levied, the property distressed may be sold by public auction, or in such other manner as the Commissioner may direct.

(6) The proceeds of a disposal under subsection (5) shall be applied by the auctioneer or seller first towards the cost of taking, keeping, and selling the property distrained upon, then towards the tax due and payable, and the remainder of the proceeds, if any, shall be given to the person liable.

(7) All costs incurred by the Commissioner in respect of any distress may be recovered from the person liable, as tax due under this Order."

Amendment of section 51.

26. (a) The Order is amended in subsection (3) by inserting "company" between "director" and "secretary";

Insertion of section 51bis

27. The Order is amended by inserting immediately after section 51 a new section 51bis as follows-

"Delegation of authority by public officer

51bis. (1) The Commissioner may allow a public officer referred to in section 51 to delegate any authority conferred under this Order to any person through a power of attorney in the prescribed form.

(2) Any public officer who delegates authority in subsection (1) shall be regarded, for all intents and purposes, as liable for anything done by the person so delegated in terms of such power of attorney."

Amendment of section 54

28. Section 54 of the Order is amended by deleting section 54 in its entirety and replacing it with a new section 54 as follows -

"Appeal against Commissioner's decision

54. Any taxpayer who is dissatisfied with any decision of the Commissioner as notified in the notice of alteration or reduction of an assessment or disallowance of an objection may appeal to the Revenue Appeals Tribunal in terms of the Revenue Appeals Tribunal Act, 2019."

Amendment of section 55

29. Section 55 is amended-

- (a) in the heading of section 55 by inserting the words "objection or" between the words "pending" and "appeal"
- (b) in the second line by inserting the words "objection or" between the words "any" and "appeal".

Amendment of section 61

30. Section 61 is amended by adding new sections 61ter and 61quat immediately after section 61bis to read as follows:

"Preferential claim to assets

61ter. From the date on which tax is due and payable, the Commissioner has, subject to the Insolvency Act, 1955 or successor in title, a preferential claim against other claimants upon the assets of the person liable to pay the tax until the tax is paid.

Security

61*quat*. Where it appears to the Commissioner necessary to do so for the protection of the revenue, the Commissioner may require any person to give security of an amount and in a manner that the Commissioner may determine for the payment of tax which is or may become due by the person.”

Amendment of section 65

31. Section 65 is amended by inserting a new sections 65*quat*, 65*quin* and 65*sex* immediately after section 65*ter* as follows:

“Arm’s Length determination

65*quat*. (1) For the purposes of this Order, where -

- (a) a person liable to tax in Eswatini engages directly or indirectly in a transaction, an operation or scheme with an associated person; or
- (b) a person not liable to tax in Eswatini engages directly or indirectly in a transaction with an associated person not liable to tax in Eswatini where the transaction is in relation to a permanent establishment in Eswatini of one of the two associated persons, the amount of each person’s taxable income shall be determined in a manner that is consistent with the arm’s length principle;

Provided that the amount of such taxable income shall be consistent with the arm’s length principle if the conditions of those transactions do not differ from the conditions that would have applied between independent persons in comparable transactions carried out under comparable circumstances.

(2) Where the conditions of a transaction between associated persons to which subsection (1) applies are not consistent with the arm’s length principle and the effect of that inconsistency is reducing or postponing the liability to tax of any person for any year of assessment, the taxable income of that person shall be computed as though the conditions of the transaction are consistent with the arm’s length principle.

(3) The determination of whether the conditions of a controlled transaction are consistent with the arm’s length principle of subsection (1), and of the quantum of any adjustment made under subsection (2), shall be made in accordance with section 65 *quin* (1).

(4) Notwithstanding the provisions of subsection (1) no deductions shall not be allowed in respect of amounts, if any, paid or payable, otherwise than towards reimbursement of actual expenses, by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment.

Transfer pricing methods

65quin. (1) The arm's length remuneration of a controlled transaction shall be determined by applying the most appropriate transfer pricing method to the circumstances of the case in accordance with subsection (3).

(2) The criteria for selecting the most appropriate transfer pricing method shall be -

- (a) the respective strengths and weaknesses of the approved methods;
- (b) the appropriateness of an approved method in view of the nature of the controlled transaction, determined in particular through an analysis of the functions undertaken by each person in the controlled transaction, taking into account assets used and risks assumed;
- (c) the availability of reliable information needed to apply the selected transfer pricing method; and
- (d) the degree of comparability between the controlled and uncontrolled transactions, including the reliability of comparability adjustments, if any, that may be required to eliminate differences between them.

(3) The approved transfer pricing methods shall be -

- (a) the comparable uncontrolled price method, which consists of comparing the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction;
- (b) the resale price method, which consists of comparing the resale margin that a purchaser of property in a controlled transaction earns from reselling that property in an uncontrolled transaction with the resale margin that is earned in comparable uncontrolled purchase and resale transactions;
- (c) the cost-plus method, which consists of comparing the mark up on those costs directly and indirectly incurred in the supply of property or services in a controlled transaction with the mark up on those costs directly and indirectly incurred in the supply of property or services in a comparable uncontrolled transaction;
- (d) the transactional net margin method, which consists of comparing the net profit margin relative to an appropriate base, such as costs, sales or assets, that a person achieves in a controlled transaction with the net profit margin relative to the same base achieved in comparable uncontrolled transactions;
- (e) the transactional profit split method, which consists of allocating to each associated person participating in a controlled transaction the portion of common operating profit (or loss) derived from such transaction that an independent person would expect to earn from engaging in a comparable uncontrolled transaction -

Provided that where it is possible to determine an arm's length remuneration for some of the functions performed by the associated persons in connection with the transaction using one of the approved methods described above, the transactional profit split method shall be applied based on the common residual profit that results once such functions are so remunerated.

(4) It shall not be necessary to apply more than one method to determine the arm's length remuneration for a given controlled transaction.

(5) A transfer pricing method other than the approved methods contained in subsection (3) may be applied where the Commissioner is satisfied that -

- (a) none of the approved methods can be reasonably applied to determine arm's length conditions for the controlled transaction; and
- (b) such other method yields a result consistent with that which would be achieved by independent persons engaging in comparable uncontrolled transactions under comparable circumstances.

(6) When a method other than the approved methods contained in subsection (3) is used, it shall establish that the requirements of subsection (5) have been satisfied.

(7) The provisions of section 65quat (1) shall also apply where-

- (a) a person liable to tax in Eswatini engages in a transaction with a person located in a tax jurisdiction that the Commissioner determines provides a beneficial tax regime, whether or not such a person is an associated person.
- (b) the provisions of section 65quat (1) shall also apply where a person located in a tax jurisdiction that the Commissioner determines provides a beneficial tax regime, engages in a transaction that relates to a permanent establishment of a non-resident person in Eswatini whether or not such a person is an associated person.

(8) For the purposes of subsection (7), a tax jurisdiction or administrative regime will be deemed to provide a beneficial tax regime where the jurisdiction or administrative regime whose effective tax rate is within the limits as prescribed by the Minister by a notice published in the gazette.

(9) Notwithstanding the provisions of section 65quat (1) and (2), where a person liable to tax in Eswatini engages directly or indirectly in a transaction with an associated person or a non-resident person engages directly or indirectly in a transaction relating to a permanent establishment in Eswatini with an associated person for the export or import involving grains, oil seeds, other products obtained from the land, hydrocarbons or derivatives thereof from -

- (a) an international or domestic commodity exchange market;
- (b) recognised and transparent price reporting or statistical agencies; or
- (c) governmental price-setting agencies, or from any other index;

the quoted price on the date on which the goods are shipped, regardless of the means of transport, shall be, without considering the price that was agreed upon with the associated person, the sale price used for the purposes of computing the taxable income of that person, unless the person provides all of the evidence needed to show that adjustments are appropriate to that quoted

price to be consistent with the arm's length principle -

Provided that in the case of goods exported from Eswatini, the price agreed upon between the group and independent person is higher than the quoted price at the above-mentioned date, the agreed price in this case shall be considered as the sale price for the purposes of computing the seller's taxable income in Eswatini.

(10) For the purposes of subsection (9), the date of the transaction shall be deemed to be the date of shipment as evidenced by the bill of lading, airway bill or equivalent document depending on the means of transport, unless the person provides evidence of the actual pricing date agreed by the associated persons in the transaction.

(11) Every person who engages in a transaction to which section 65*quat* (1) applies shall keep the documentation required under section 35*bis* and the other documents which may be required by the Commissioner as per the Transfer Pricing Regulations.

(12) Notwithstanding any other provision of this Act, where a person engages in a transaction with an associated person that involves the transfer of rights in an intangible property, other than the alienation of an intangible property, the consideration payable in that transaction shall not exceed a percentage, published by the Minister in the Gazette, of the earnings before interest, taxes, depreciation, amortisation and royalties payable derived from the commercial activity conducted by the person in which the rights transferred are exploited.

(13) This section shall not apply in respect of controlled transactions between persons who are liable to tax in Eswatini where the persons are able to satisfy the Commissioner that the value of all the transactions between those persons is less than the threshold in the year of assessment, as specified by the Minister through a notice in the gazette, unless the Commissioner directs the taxpayer in writing, prior to the year of assessment that this section shall apply.

Tested Party

65*sax*. (1) When applying a cost plus, resale price or transactional net margin method, it shall be necessary to select the party to the transaction, for which a financial indicator, mark-up on costs, gross margin, or net profit indicator, is tested under the most appropriate transfer pricing method in the circumstance.

(2) The selection of the tested party should be consistent with the functional analysis of the transaction.

(3) The tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparable can be found and will most often be the one that has the less complex functional analysis.

(4) Where the most appropriate transfer pricing method in the circumstances of the case, determined following the guidance above, is a one-sided method, financial information on the tested party is needed in addition to the information referred to in regulation 11 irrespective of whether the tested party is a domestic or foreign entity.

(5) Where the most appropriate method is a cost plus, resale price or transactional net margin method and the tested party is a foreign entity, sufficient information is needed to be able to reliably apply the selected method to the foreign tested party and to enable a review by the Commissioner of the application of the method to the foreign tested party.

(6) The provisions of sections 65*quat*, 65*quin* and 65*sex* shall be interpreted in accordance with the Organization for Economic Cooperation and Development Transfer Pricing Guidelines for Multinational Persons and Tax Administrations (OECD Transfer Pricing Guidelines).

(7) Where there is any inconsistency between this Order and the OECD Transfer Pricing Guidelines, this Order shall prevail.”

Interest deduction

65*sep*. (1) Notwithstanding any other provision of this Order, no deduction of interest shall be allowed for the purpose of ascertaining the taxable profits of any company that is a member of a group of companies, except a company whose main business is banking or insurance, in respect of any amount of net interest expense for any year of assessment that exceeds thirty percent (30%) of the tax earnings before interest, taxes, depreciation and amortisation (hereinafter referred to as “tax EBITDA”) of the company.

(2) In this section, “net interest expense” means, the interest paid or accrued by the company during the year of assessment minus the amount of interest included in the taxable income of such company for that period.

(3) In this section, “interest” includes –

- (a) interest on all forms of debt, loan, deposit, claim or other right or obligation;
 - (b) expenses incurred in connection with the raising of finance;
 - (c) payments under profit participating loans;
 - (d) imputed interest on instruments such as convertible bonds and zero-coupon bonds;
 - (e) amounts under alternative financing arrangements, such as Islamic finance;
 - (f) the finance cost element of finance lease payments;
 - (g) capitalised interest included in the balance sheet value of a related asset, or the amortisation of capitalised interest;
 - (h) amounts measured by reference to a funding return under transfer pricing rules ;
 - (i) where applicable notional interest amounts under derivative instruments or hedging arrangements related to borrowings of an entity;
 - (j) certain foreign exchange gains and losses on borrowings and instruments connected with the raising of finance;
 - (k) guarantee fees with respect to financing arrangements;
 - (l) arrangement fees and similar costs related to the borrowing of funds; and
 - (m) any payment economically equivalent to interest.
-

(4) The interest for which a deduction is denied under this section may be carried forward and treated as incurred during the next year of assessment and the interest so denied may be carried forward for three (3) years.

Amendment of section 66.

32. Section 66 is amended by inserting a new section 66bis immediately after section 66 as follows:

“Offence by Body Corporate.

66bis. (1) Where an offence under this Order has been committed by a company, every person who, at the time the offence was committed was –

- (a) a public officer or other similar officer of the company; or
- (b) acting or purporting to act in the capacity stated in paragraph (a),

shall be deemed to have committed the offence.

(2) Subsection (1) shall not apply to a person where –

- (a) the offence was committed without that person’s consent or knowledge; and
- (b) the person having regard to the nature of the person’s functions and all the circumstances has exercised reasonable diligence to prevent the commission

of the offence.”

Insertion of a new section 68quin

34. The Order is amended by inserting immediately after section 68quat a new section 68quin as follows-

“Binding general rulings

68quin. (1) The Commissioner may issue a binding general ruling that is effective for a particular tax period, either definite period or an indefinite period.

(2) A binding general ruling shall state-

- (a) that it is a binding general ruling made under this section;
- (b) the provisions of the Order which are the subject of the binding general ruling; and
- (c) either the tax period or other definite period for which it applies or in the case of a binding general ruling for an indefinite period, that it is for an indefinite period and the date or tax period from which it applies.

(3) A binding general ruling may be issued as a practice note or in another form and may be issued in the manner that the Commissioner prescribes.

(4) A publication or other written statement does not constitute and may not be

considered or treated as a binding general ruling unless it contains the information prescribed by subsection (2)."

Amendment of section 69

35. Section 69 is amended by deleting subsection (2) in its entirety and replacing it with a new subsection (2) as follows;

"(2) Notwithstanding any other provisions of this Order, where the Minister is satisfied that an investment project being proposed by a new business is beneficial to the development of the economy, the Minister may, with prior approval of Cabinet, enter into a tax agreement and nominate such qualifying business as a "development enterprise" by granting the tax concessions in accordance with the Seventh Schedule."

Insertion of a new section 69quin

36. The Order is amended by inserting immediately after section 69quat a new section 69quin as follows-

"Supremacy of Order

69quin. Where there is any inconsistency between this Order and any other law prescribing a rate of tax, this Order shall prevail."

Amendment of First Schedule

37. The First Schedule is amended in paragraph 8 (5) by deleting the words "sixty thousand Emalangeni" after the word "of" and replace them with the words "one hundred thousand Emalangeni."

Amendment of the Second Schedule

38. The Second Schedule is amended -

- (a) under definition of "employee" by inserting the following new paragraph "c" immediately after paragraph "b"

"(c)an independent insurance broker;"

and renumber the following paragraphs in the correct order.

- (b) by adding, immediately after the definition of "employment", the definition "independent Insurance Broker" means and insurance broker as defined under section 2 of the Insurance Act, 2005";
- (c) by inserting, immediately after paragraph 11A, a new paragraph 11B as follows-

"Estimated Assessments

11B. (1) Where any employer who is required to deduct employees' tax in terms of paragraph 2, has failed to so deduct such tax, or has failed to pay over any amount of employees' tax deducted, and such employer has not been absolved from his liabilities

in terms of the provisions of this schedule, the Commissioner may make a reasonable estimate of the amount of employees' tax which is required to be deducted and issue a notice of assessment of the unpaid amount.

(2) An employer shall be liable to the Commissioner for the payment of the amount of employees' tax so estimated as if such amount was deducted as contemplated in paragraph 2.

(3) Any estimate of the amount of employees' tax payable by an employer in terms of the provisions of subparagraph (1), shall be subject to objection and appeal."

(a) in paragraph 14 -

(i) by deleting and replacing subparagraph (2), with a new subparagraph (2) as follows -

"(2) Every employer shall, within seven days after the end of the month, or within such longer time as the Commissioner may approve, render a monthly declaration return in such form as the Commissioner may approve, showing in addition to any other information that may be required, the total remuneration paid to or accrued to the employees in respect of such a month and the total amount of employees' tax deducted from such remuneration during such month."

(ii) by replacing subparagraph (3A), with a new subparagraph (3A) as follows-

"(3A) Notwithstanding the provisions of paragraph 19 (2) (f), any employer who fails to comply with the provisions of paragraphs 14 (2) or (3) shall, while such failure to comply continues, be liable to a penalty of two hundred emalangeni for each day during which the failure continues."

Amendment of the Third Schedule

39. The Third Schedule to the Income Tax Order, 1975 is amended by deleting the schedule in its entirety and replacing it with a new schedule as follows -

"THIRD SCHEDULE

RATES OF NORMAL TAX

PART I

1. For the purposes of Section 6 (3) of the Order, the rates of tax to be levied for the year of assessment ending 30 June 2023 are as follows -

- (a) in the case of a company, for each Lilangeni of taxable income, twenty-five per cent;
- (b) in the case of a person (other than a company or trust), as prescribed in Part II of the Schedule and such rates of tax shall, in the case of a natural person, be reduced by way of a rebate -
 - (i) of an amount not exceeding the sum of eight thousand two hundred Emalangeni (E8,200) in any year of assessment; and,

- (ii) of an additional amount not exceeding two thousand seven hundred Emalangeni if the person is over the age of sixty (60) years on the last day of the year of assessment;
 - (c) in the case of a trust, for each Lilangeni of taxable income, thirty-three per cent (33%);
 - (d) in the case of a non-complying pension fund, provident fund, retirement annuity fund or benefit fund, for each Lilangeni of taxable trust income of the fund, thirty-three per cent (33%);
 - (e) in the case of a natural person who, during the year of assessment, was ordinarily resident in Eswatini, for each Lilangeni of dividend income, ten per cent (10%);
 - (f) in the case of a natural person who, during the year of assessment, was ordinarily resident in Eswatini, for each Lilangeni of taxable interest income, ten per cent (10%);
 - (g) in the case of a natural person who, during the year of assessment, was ordinarily resident in Eswatini, for each Lilangeni of taxable income received or accrued at the time of redundancy or retirement, as prescribed in Part III of the Schedule: Provided that in accordance with section 8 no reduction by way of rebate shall be made if the tax payable in terms of section 6 is subject to the rates of tax prescribed in Part III hereof.
2. In the case of a person (other than a company or trust) who, during the year of assessment was not resident in Eswatini, the rate of tax to be levied shall not reduce the total tax payable below an amount equal –
- (a) to 10 per cent (10%) for each Lilangeni of taxable income; and
 - (b) to three per cent (3%) for each Lilangeni of such part where any part of the taxable income consists of a pension.
3. In the case of a person who, during the year of assessment, qualifies as a small business taxpayer as defined in the Sixth Schedule to this Order, the rate of tax to be levied on the taxable turnover shall be as prescribed in Part IV of this Schedule.

PART II

Rates of income tax in the case of persons other than companies or trusts shall be calculated in accordance with the table below:

Taxable Income Exceeds E	Taxable Income Does Not Exceed E	Rates of Tax E
0	100 000	0+20% of the excess over 0
100 000	150 000	20 000 + 25% of taxable income in excess of 100 000
150 000	200 000	32 500 + 30% of taxable income in excess of 150 000
200 000	250 000	47 500 + 33% of taxable income in excess of 200 000

PART III

Rates of income tax in the case of a redundant or retiring natural person shall be calculated in accordance with the table below:

Taxable Income Exceeds E	Taxable Income Does Not Exceed E	Rates of Tax E
0	330 000	25% of each E1 of the taxable income
330 000		82 500 + 30% of taxable income in excess of 330 000

The prescribed rates of income tax under Part III applies to lump sum amounts which exceeds the amount exempted under section 14 (1) (I) (iii).

PART IV

The rates of turnover tax in respect of the taxable turnover of any person that qualifies as a small business taxpayer as defined in the Sixth Schedule to this Order, shall be calculated in accordance with the table below:

Gross Turnover	Rate of Tax
Where the gross turnover of the taxpayer does not exceed E50,000.00	0 %
Where the gross turnover of the taxpayer exceeds E50,000.00	1.75 %

Amendment of Schedule

40. The schedule of the order is amended by adding a new Sixth Schedule and a new Seventh Schedule immediately after the Fifth Schedule as follows-

“SIXTH SCHEDULE**PART I****PRESUMPTIVE TAX****DETERMINATION OF TURNOVER TAX PAYABLE BY SMALL BUSINESSES**

(Under section 6 (4))

Interpretation

1. In this Schedule, unless the context indicates otherwise, any meaning ascribed to a word or expression in this Act shall bear the meaning so ascribed and-

“basic records” means a simple notebook or cashbook, fixed asset register, register of daily sales (or services rendered) and spreadsheet where payments are recorded daily;

"investment income" means-

- (a) any income in the form of annuities, dividends, interest, rental derived in respect of immovable property leased for commercial purposes, royalties, or income of a similar nature; or
- (b) any proceeds derived from the disposal of financial instruments;

"professional services" are occupations in the tertiary sector of the economy requiring special training in the arts or sciences. Such services shall be of a technical or consultancy nature. This includes, but is not limited to, the field of accounting, actuarial science, architecture, auctioneering, auditing, broadcasting, consulting, draftsmanship, education, engineering, financial service broking, health, information technology, journalism, law, management, real estate broking, research, sport, surveying, translation, valuation or veterinary science;

"small business" means, unless the Commissioner in a particular case otherwise directs, any taxpayer who is ordinarily resident or carrying on business in Eswatini whose turnover derived from carrying on of that business is less than five hundred thousand emalangeni (E500,000) in a year of assessment.

"turnover" in relation to a taxpayer who is ordinarily resident or carrying on business in any year of assessment, means the amount shown in the accounts of the taxpayer as the gross proceeds derived in the carrying on of business during the year of assessment, including the gross proceeds arising from the disposal of trading stock and business assets, without the deduction for expenditure or losses incurred in deriving that amount;

PART II APPLICATION OF SCHEDULE

Persons covered

- 2. A person qualifies as a small business if that person is a-
 - (a) natural person (or the deceased or insolvent estate of a natural person that was a registered small business at the time of death or insolvency); or
 - (b) a company,

where the turnover of that person for the year of assessment is below an amount of five hundred thousand Emalangeni (E500 000.00).

Persons excluded from the application of this schedule

- 3. Paragraph 2 does not apply to a person ordinarily resident or carrying on business in Eswatini who-
 - (a) is a professional; or
 - (b) receives investment income.

PART III**Registration**

4. (1) A person that is a small business as defined shall be registered-
- (a) before the beginning of a year of assessment or such later date during that year of assessment as the Commissioner may prescribe by notice in the Gazette;
 - (b) in the case of a person that commenced business activities during a year of assessment, within two months from the date of commencement of business activities; or,
 - (c) with effect from the beginning of that year of assessment.
- (2) A person may only opt to be deregistered from presumptive tax after the lapse of two years of assessments.

Deregistration

5. (1) A registered person may elect in writing to be deregistered from presumptive tax to the normal tax regime before the beginning of a year of assessment or such later date during that year of assessment as the Commissioner may prescribe by notice in the Gazette.
- (2) A registered person shall notify the Commissioner within twenty-one (21) days from the date on which-
- (a) the qualifying turnover of that registered person for a year of assessment exceeds the amount described in paragraph 2, or there are reasonable grounds for believing that the qualifying turnover will exceed that amount; or
 - (b) that registered small business is disqualified in terms of paragraph 3.
- (3) The Commissioner shall, subject to subparagraph (4), deregister a registered person with effect from the beginning of the month following the month during which the event as described in subparagraph (2) (a) or (2) (b) occurred.
- (4) The Commissioner may direct that a person remains a registered small business if the Commissioner is satisfied that the increase in the qualifying turnover of that person to an amount greater than the amount described in paragraph 2 is of a nominal and temporary nature.

Payment of Provisional Tax

6. (1) A small businessman shall be liable to pay an estimated provisional tax annually.
- (2) Notwithstanding sub- paragraph (1) above, a small businessman may pay four instalments of the estimated provisional tax as follows-
- (a) 30 September, a first provisional tax payment equal to twenty-five per cent (25%) of the total estimated tax;
 - (b) 31 December, a second provisional tax payment equal to the difference between fifty per cent (50%) of the total estimated tax and the first provisional payment;

- (c) 31 March, a third provisional tax payment equal to the difference between seventy-five per cent (75%) of the total estimated tax and the sum of the provisional tax payments; and
- (d) 30 June, a final provisional tax payment equal to the difference between one hundred per cent (100%) of the total estimated tax and the sum of the previous provisional tax payments.

Furnishing of Return of Estimates

7. Every taxpayer to whom section 6(4) applies shall furnish an estimate of the turnover for each year of assessment and shall include a statement of the actual turnover of the taxpayer for the previous year of assessment.

Prescribed Returns

8. An estimate of a taxpayer under paragraph 7 shall be in the form prescribed by the Commissioner and shall be furnished to the Commissioner by the due date for payment of the first provisional tax for the year of assessment.

Estimate to apply for the whole year of assessment

9. The estimate of a taxpayer shall remain in force for the whole of the year of assessment unless the taxpayer furnishes a revised estimate to the Commissioner which revised estimate shall only apply to the calculation of the provisional tax payable by the taxpayer after the revised estimate was approved by the Commissioner.

Failure to furnish estimate

10. Where a taxpayer fails to furnish an estimate of gross turnover as required, the estimated gross turnover of the taxpayer for the year of assessment shall be such amount as estimated by the Commissioner.

Set-off of Provisional Tax against Tax payable

11. Each payment of provisional tax shall be credited against the tax payable by the taxpayer in the year of assessment to which the payment relates.

Recovery of Provisional Tax

12. Any payment of provisional tax, when it becomes due and payable, is a debt to the Government, and the provisions of this Order shall apply for the purposes of the collection and recovery of provisional tax by the Commissioner.

PART IV

Amounts received by an associate may be included in qualifying turnover

13. The total amount received from carrying on business activities by an associate in relation to a person described in paragraph 2 (1) (a) or (b) shall be included in the qualifying turnover of that person for purposes of applying paragraph 2, where the Commissioner is satisfied that-

- (a) the associate carries on business activities that should properly be regarded as forming part of the business activities carried on by that person; and
- (b) the main reason or one of the main reasons for the associate carrying on business activities in the way that the associate does is to ensure that the qualifying turnover of that person does not exceed the amount as described in paragraph 2.

Record keeping

14. Notwithstanding the provisions of section 35*bis* of the Order, a registered person shall only retain basic records as defined in Part I.

Applicable tax rate

15. (1) The amount of tax payable for the purposes of section 6(4) in any year of assessment by a small business taxpayer shall be in accordance with the rates in the Third Schedule.

(2) The tax payable under subparagraph (1) shall be reduced by any credit allowed under paragraph 6 for provisional tax paid in respect of amounts included in the turnover of the taxpayer.

Powers of the Commissioner

16. The Commissioner has the powers of inspection in terms of section 36 of this Order.

Transitional clause in respect of losses

17. Losses incurred in the previous year of assessment prior to the introduction of presumptive tax shall not be carried forward.

SEVENTH SCHEDULE
(Under section 69 (2))

Interpretation

1. (1) In this schedule-

“commencement of the carrying on of a project” means the commissioning of machinery and plant after the commencement date;

“development enterprise” means a new business, investment or enterprise that is likely to contribute significantly to-

- (a) the achievement of sustainable economic growth and employment creation in the medium to long term through enhanced competitiveness;
- (b) the development of a knowledge-based economy through research, science and technology; or
- (c) the stimulation of the start-up and growth of technologically intensive industries in Eswatini;

"existing competing enterprises" means those business enterprises, which are currently supplying the domestic market with goods, or services which are similar in all material respects to those proposed by the applicant for tax concessions by means of a development enterprise order;

"infrastructure development" includes the provision of infrastructure, technical services, finance, or equipment to promote the economic development of Eswatini;

"investment company" means a company whose business consists wholly or mainly in the making of investments and the principal part of whose income is derived therefrom.

"manufacturing" means -

- (a) the substantial transformation of tangible property; and
- (b) manufacturing activity of an industrial, scientific or educational nature which promotes industrial, scientific, educational and other development within Eswatini,

but does not include construction, installation, assembly, transportation, power generation, or the provision of public utility services;

"mining" includes every method or process by which any mineral is won from the soil or from any substance or constituent thereof;

"qualifying business" means a business which -

- (a) is incorporated on or after the commencement date;
- (b) commences the carrying on of one qualifying project for the first time on or after the commencement date; and
- (c) has the sole object of carrying on one qualifying project as from the date of such incorporation and which does not carry on any trade other than such qualifying project;

"qualifying project" means a project contemplated in paragraph 4 of this schedule.

Nomination as a development enterprise

2. Notwithstanding any other provisions of this Order, where the Minister is satisfied that an investment project being proposed by a new business is beneficial to the development of the economy, he may, with prior approval of Cabinet, enter into a tax agreement and nominate such a qualifying business as a "development enterprise" granting the tax concessions contemplated in paragraph 3.

Tax concessions

3. A tax concession granted by means of a development enterprise agreement shall be granted for a non-renewal period of ten (10) years in respect of a company tax rate of ten per cent (10 %).

Qualifying investments, business or enterprises and industrial sectors

4. The grant of a development enterprise order shall only be applicable to qualifying new investments, business or enterprises engaged in -

- (a) manufacturing activity of an industrial, scientific or educational nature which promotes industrial, scientific, educational or other development within Eswatini;
- (b) mining or mineral beneficiation;
- (c) energy and power generation, assembly or agro-industries; or
- (d) Tourism

Application evaluation committee

5. (1) The Minister may refer an application for a development enterprise order to a committee comprising of public officials to assist the Minister in evaluating the application in accordance with set criteria, rules or guidance principles considering the purpose of the provisions of this Schedule.

(2) The committee referred to in this paragraph shall, after evaluating the application, make appropriate recommendations to the Minister for the final determination of the Minister and action in terms of paragraph 2.

(3) The committee may -

- (a) evaluate and approve any project, to be carried on by a company, as a qualifying project for the grant of the development enterprise status;
- (b) investigate or cause to be investigated any project for the purposes of this paragraph;
- (c) monitor the development enterprise in order to -
 - (i) determine whether the objectives of that project are being achieved; and
 - (ii) advise the Minister on any future proposed amendment or adjustment thereof.
- (d) require any company contemplated in subparagraph (1) to furnish the committee with any such information or documents as are necessary for the committee to perform its functions in terms of this Schedule; or
- (e) perform such other functions as are assigned to it under this Schedule.

Grant of tax concession to a development enterprise

6. (1) Subject to subparagraph (2), the Minister may, upon examination of application for nomination as a development enterprise, grant or refuse to grant, in writing a tax concession for the purpose of this Schedule.

(2) The Minister shall not grant a tax concession contemplated in this Schedule -

- (a) if the Minister is of the opinion that the project to be carried on by any company-

- (i) is substantially the same concern as was or is carried on by any other person in Eswatini on or before the submission of the application for approval of the project in terms of paragraph 4; or
- (ii) is an undertaking that has been formed by the splitting up or reconstruction of any business already in existence or by transferring assets previously used in the business in order to obtain the tax concession under the provisions of paragraph 3; and

(b) after the commencement of the carrying on of such project by any company.

(3) Notwithstanding the provisions of this schedule, the Minister shall not issue any grant or confer any tax concession to any applicant or nominate a business as development enterprise unless the Minister has first obtained the approval of the Cabinet.

Revocation of grant

7. (1) The Minister may, at any time with the concurrence of the Cabinet, amend or revoke a development enterprise conferred under paragraph 6 in the event any one or all the following events occur-

- (a) failure to meet eligibility criteria;
- (b) failure to comply with tax obligations, including but not limited to, failure to furnish returns or pay tax as evidenced by the Commissioner;
- (c) failure of the business to substantially carry out the development or investment as specified in the development enterprise agreement; or
- (d) where there has been a substantial breach of any conditions as may be specified in the development enterprise agreement.

(2) The Minister shall, before the issuance of a revocation or amending order and before its publication in the Gazette, by notice in writing to the public officer, owner, director or person who appears to the Minister to be in charge of the business or enterprise afford such public officer, owner, director or person an opportunity either to -

- (a) rectify the failure or breach; or
- (b) to show cause why, within such time as may be specified and being not less than thirty (30) days from the date of issue of such notice, the development enterprise agreement should not be amended or revoked.