

# MONTHLY TAX UPDATE

May 2021

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We are honoured to present our May 2021 Monthly Tax Update (“MTU”) which is designed to keep businesses and individuals informed of the latest tax issues and also bring value to both. Through our MTUs, we analyse tax developments to ensure that our valued clients are kept in tune with changes in the tax arena. It is our sincere hope that these MTUs will keep our clients updated with information that includes changes in tax and other related laws, court decisions, announcements and interpretations that bring relevancy to the business environment. We summarise the contents of this issue as follows:

**Penalties for illegal trading in foreign currency:** SI 127 of 2021 is introducing civil penalty orders for offences caused around the Foreign Exchange Auction Trading System. It seeks to resolve issues of the variance between the official exchange rate and the parallel rates.

**Duty on donated goods:** SI 118 of 2021 removes duty on donated motor vehicles for government ministries. It repeals SI 203 of 2020 which removed duty for donated motor vehicles but limited to the education ministry.

**VAT on rice finally scrapped:** The finance minister scrapped VAT on rice imports and supplies bowing down to pressure from millers but has refused to back date the exemption.

**Rebate of duty for printing and packaging manufacturers:** The Minister of Finance and Economic Development has through SI 109 of 2021 added a manufacturer to the list of entities who are eligible to rebate of duty.

**National Annual Budget setting procedures:** SI 127A of 2021 sets standards and define the procedures to be followed in coming up with the National Budget each year.

**Transfer Pricing court case in South Africa:** The case involves the application for separation of a legal issue from an associate legal issue. In the background of this application is a pending income tax appeal.

**VAT on transactions involving residential property.** This sets out the VAT rules applicable on residential property.

**Reminder of 2020 Income Tax returns due date:** The returns for 2020 are about due with the small taxpayers required to submit them by 30 June 2021.

**Fresh incentives for trading on Victoria Fall Stock Exchange:** In a bid to attract traders to invest on VFSE, the finance minister is offering some sweeteners.

**Zimra article on payment of PAYE in foreign and local currency:** This is our analysis of an article posted by the ZIMRA as guidance on the calculation of PAYE in the local and foreign currency.

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## 1. Penalties for illegal trading in foreign currency

### Background

In June 2020 the Government of Zimbabwe by way of Exchange Control Directive RV 175/2020 introduced the Foreign Exchange Auction Trading System. This is a weekly foreign currency auction system designed for the purposes of building market confidence, improving access to foreign currency primarily to importers and to stabilize the exchange rate. From the period June 2020 to around February 2021, the auction system seems to have achieved the purpose of stabilizing the formal exchange rate. However, recently, there has been a widening variance between the official exchange rate and the parallel rate generally attributed to abuse of the auction system, charging of premiums on the Zimbabwean dollar payments, allowance of discounts on United States dollar payments and other like causes. In order to curb the aforesaid challenges, the government has gazetted SI 127 of 2021 which amends the provisions of the Exchange Control Act (Chapter 22:05) (the “Excon Act”) and the Bank Use Promotion Act (Chapter 2r4:24) (the “Bank Use Promotion Act”) by introducing “civil penalties orders” to any defaulters as specified thereto. The summary and analysis of the legal and/or commercial implications thereof is as follows:

### The law and Interpretation

#### Civil penalties orders under the Excon Act

In addition to any other criminal or civil liabilities contained in the Excon Act, the SI repealed and substituted the Schedule to the Excon Act and introduced civil penalty orders. In terms thereof, where any person (natural or juristic) fails to comply with any provision of the Excon Act and Excon regulations for which a civil penalty is specified, the Reserve Bank of Zimbabwe (“RBZ”) may serve an appropriate civil penalty order upon the defaulter. Below is a summary of the specific civil infringements and corresponding penalties:

Offence	Offender	Penalty
Use of foreign currency obtained directly or indirectly from a foreign exchange auction or authorized dealer for any other	Any natural or legal person.	Fixed penalty of ZW\$1,000,000.00 or value of the foreign currency obtained (whichever is greater) PLUS Cumulative penalty of 5% of

purpose than the specified purpose.		outstanding penalty per day up to 90 days.
Refusing to allow any buyer to tender payment for the purchase of goods or services in Zimbabwean dollars at the ruling exchange rate.	Any natural or legal person who is a seller of goods or services.	Fixed penalty of ZW\$50,000.00 or value of the foreign currency charged (whichever is greater) PLUS Cumulative penalty of 5% of outstanding penalty per day up to 90 days.
Submission of an application for foreign currency or exchange control authority with false information without having done reasonable due diligence on the information.	An authorized dealer e.g., a bank.	Fixed penalty of ZW\$5,000,000.00 or value of the foreign currency obtained (whichever is greater) PLUS Cumulative penalty of 5% of outstanding penalty per day up to 90 days.
Selling, displaying or offering goods or services for sale at an exchange rate above the ruling exchange rate or imposing a premium on Zimbabwean dollar payments to encourage payment in foreign currency or allowing a discount on foreign currency payment.	Any natural or legal person who is a seller of goods or services.	Fixed penalty of ZW\$50,000.00 or value of the foreign currency charged (whichever is greater) PLUS Cumulative penalty of 5% of outstanding penalty per day up to 90 days.
Issuing to a buyer a receipt in Zimbabwean dollars for payment received in foreign currency or recording sales other than in the currency in which sale was conducted.	Any natural or legal person who is a seller of goods or services.	Fixed penalty of ZW\$50,000.00 or value of the foreign currency charged (whichever is greater) PLUS Cumulative penalty of 5% of outstanding penalty per day up to 90 days.

### Civil penalties orders under the bank use promotion act

In addition to any other criminal or civil liabilities contained in the Bank Use Promotion Act, the SI introduced a new Fourth Schedule which provides for civil penalty orders. In terms thereof, where any person (natural or juristic) fails to comply with sections 10, 10A, 11, 13 or 18 of the Bank Use Promotion Act, a designated officer (being the Director- General of the Financial Intelligence Unit or any other person authorized by him) may serve an appropriate civil penalty order upon the defaulter. The specific civil infringements and corresponding penalties are as follows:

Offence	Offender	Penalty
Non-compliance with section 10 – failure to open a bank account.	Every trader required to register for VAT purposes, parastatal and	Fixed penalty of ZW\$20,000.00 PLUS Cumulative penalty of ZW\$10,000.00 per day after failing to pay the fixed penalty up to 90 days AND/OR ZW\$20,000.00 per day up to 90 days for failure to take remedial

	moneylender.	action.
Non-compliance with section 10A – failure to avail to customers an electronic means of payment.	Every trader and parastatal.	Fixed penalty of ZW\$100,000.00 PLUS Cumulative penalty of ZW\$10,000.00 per day after failing to pay the fixed penalty up to 90 days AND/OR ZW\$20,000.00 per day up to 90 days for failure to take remedial action.
Non-compliance with section 11 – failure to bank surplus cash in a bank account.	Every trader and parastatal.	Fixed penalty of an amount equivalent to a single day’s banking of cash PLUS Cumulative penalty of 5% of the outstanding fixed penalty per day up to 90 days.
Non-compliance with section 13 – failure to keep records.	Every trader and parastatal.	Fixed penalty of ZW\$200,000.00 PLUS Cumulative penalty of ZW\$10,000.00 per day after failing to pay the fixed penalty up to 90 days AND/OR ZW\$20,000.00 per day up to 90 days for failure to take remedial action.
Non-compliance with section 18 - failure to comply with a disclosure order.	Every trader and parastatal.	Cumulative penalty of ZW\$20,000.00 per day that the defaulter fails to make the required disclosure up to 90 days or until the disclosure is made.

### Analysis and possible legal implications Term of the Finance Amendment Regulations

In terms of section 6 of the Presidential Powers (Temporary Measures) (Chapter 10:20) the SI expires and ceases to have any effect before the 181<sup>st</sup> day from its date of commencement, i.e., approximately within six (6) months. The regulations are therefore ‘temporary’ in nature and meant to address an urgent concern.

#### Prescription of Penalties

In terms of the regulations, the prescription for issuance of civil penalty orders is twenty-four (24) months calculated from the date of the alleged default or when such default ceased to occur.

#### Uncovering of the Corporate Veil

With regards to enforcement of the civil penalty orders, it is apposite to note that where the defaulter is a body corporate, every officer of such body corporate may be named in the civil penalty order in which case they shall be deemed to be in default and shall be jointly and severally liable for payment of the civil penalty orders. Therefore, it pierces the corporate veil to impute liability to every officer of the body corporate, whether or not he was directly involved in the transaction giving rise to the civil penalty order. Thus, the SI offends against the long-established principle of company law, that is, separate corporate personality.

#### Reinforcement of dual currency pricing

In terms of Exchange Control Directive RV 175/2020, all businesses are required or mandated to display a foreign exchange rate board showing the prevailing exchange rates or to display prices in both ZW\$ and US\$. The purpose of this is to provide the customers with an opportunity to settle for payment of goods or services either in US\$ or ZW\$ at the prevailing market rate. Sanctions are then imposed on service providers who seek to deviate from use of the official market rate.

#### Victoria Falls Stock Exchange (VFEX)

According to Exchange Control (Special Provisions for Securities Listed on Victoria Falls Stock Exchange) Regulations SI 196 of 2020, securities listed on Victoria Falls Stock Exchange (VFEX) shall be traded solely in United States Dollars (USD) or any other convertible currency. The phrase ‘convertible currency’ is not defined and can be construed to include the Zimbabwean dollar as the same can be convertible using the prevailing auction rate. It is therefore critical that the VFEX be properly ring-fenced for purposes of boosting investors’ confidence if the objective for which it was established is to be achieved.

#### **Loan Accounts**

Lending in United States Dollars is not allowed in terms of the law unless the transaction is first approved by the Exchange Control Authority/the Reserve Bank of Zimbabwe. Though it sounds untenable if regard is had to the free use of the United States Dollars in the market, it is the law. All USD loans which were not authorized by the Exchange Control Authority can be lawfully repaid at the prevailing Inter Bank Exchange Rate. However, the law has a procedure for amendment in case of a none-compliance.

#### **Know Your Customer (KYC) Liability**

A Bank is rendered liable if it fails to exercise reasonable due diligence on the documents or information it submits in respect of applications for foreign currency or exchange authority. In passing, it is imperative to note that the definition of exchange authority in the Act means the RBZ, however, the Amendment Regulations mistakenly confuse exchange control approval for an exchange control authority. That said, Banks in general ought to be diligent with KYC as any unreasonableness may lead to a civil penalty. What naturally should have been the obligations of the Exchange Control department at the RBZ are now the obligations of a Bank’s Exchange Control Department. That said, what constitute reasonableness cannot have a casting stone definition. An objective test will thus be implemented.

#### **Enforcement of Civil Penalties**

It goes without stating that the civil penalties are only enforceable against formal businesses. It may prove to be very difficult to enforce the penalties against informal traders.

#### **Decision Impact**

The new measures seek, among other things, to stabilize the exchange rate, to avoid abuse of the foreign exchange auction system and promote use of the banking system. However, the civil penalties outlined hereinabove are, without any doubt, severe. Nonetheless, whether the new measures will be effective enough to deter would be offenders or not time will tell. This may also destabilise the economy as the promotion of use of ZWL\$ may trigger runaway inflation or disappearance of goods from the shelves.

## **2. Duty on donated motor vehicles rebate**

### **The law and Interpretation**

SI 203 of 2020 was published to remove the duty on donated operational vehicles including single and double cab trucks, donated by Development Partners and approved by the government exclusively for use in the government’s educational ministry. Now, the recently gazetted SI 118 of 2021 has repealed SI 203 of 2020, and has substituted the provision in the latter SI with amendments of the rebate. The rebate has been provided for donated motor vehicles for government ministries, which effectively extends the rebate to not only donated vehicles for the educational ministry, but to all government ministries. The rebate however is granted on the conditions that the vehicles will not be disposed of so as to come into the possession or consumption by, any person who is not entitled to import it free of duty, except with the consent of the Commissioner and on payment of the duties at the relevant rate.



### Decision Impact

The extension of the rebate to include all government ministries is an incentive for the government which is purposed to assist all government personnel to work towards the creation and enforcement of the rules of a society, defense, foreign affairs, the economy, and public services.

### 3. VAT on rice finally scrapped

#### The law and Interpretation

The finance minister has exempted from VAT imports and supplies of various types of 25kg of rice pre-packaged for retail sale thereby effectively bowing down to pressure mounted by millers and retailers. This is enshrined in SI 125 of 2021 which became effective from 1 May 2021. The details as follows:

Tariff code	Description of goods
1006.1020	Rice in husk (paddy or rough) Pre-packed in immediate packings of less than 25kg for retail sale
1006.2020	Husked (Brown) rice Pre-packed in immediate packings of less than 25kg for retail sale
1006.3020	Semi milled or wholly milled rice, whether or not polished or glazed Pre-packed in immediate packings of less than 25kg for retail sale
006.4020	Broken Rice Pre-packed in immediate packings of less than 25kg for retail sale”.

The products were omitted on the list of exemption by SI26A of 2017. Millers and retailers however have been incorrectly exempting the products since 2017. They have been embattled in war of words with ZIMRA on the matter and in the process rope in the finance minister seeking to have the products exempt since 2017 arguing that the exemption was omitted by SI26A of 2017 in error. The minister denied backdating the exemption arguing that the matter is already before the courts of law. He further argued some players had already engaged ZIMRA on payment plan and that the liability in question had also been eroded by SI33 of 2019.

### Decision Impact

The exemption has the prospective effect meaning that millers and retailers are liable to pay the VAT they did not collect since 2017. The exemption does not however provide adequate relief since the rice suppliers and importers will not be able to claim input tax thereby making the price of the commodities expensive.

### 4. Rebate of duty for printing and packaging manufacturers

#### The law and Interpretation

The finance minister has through SI 109 of 2021 added Lamapex Packaging (Private) Limited to the list of manufacturers eligible to a rebate of duty on imported printing and packaging supplies.



### Decision impact

The rebate of duty has been granted to only one supplier in the printing and packaging industry, which ultimately give a humongous competitive advantage to that supplier. Extending the rebate to other manufacturers could result in the reduction of prices for printing services.

## 5. National Annual Budget setting procedures

### The law and Interpretation

The Minister of Finance and Economic Development has through SI 127A of 2021 defined the procedures to be followed in coming up with the National Budget each year. The procedures include the following:

- (a) preparation of the Budget Strategy Paper by the Ministry of Finance and Economic Development between July and September;
- (b) Ministries provide inputs to Ministry of Finance and Economic Development for the Budget Strategy Paper including providing revised strategic priorities and expenditure intentions by 1st June;
- (c) Ministry of Finance and Economic Development provides Mid-year Fiscal Review to Cabinet no later than 31st July;
- (d) Ministry of Finance and Economic Development provides the Budget Strategy Paper to Cabinet no later than 31st July and provides the Budget Strategy Paper to Parliament for information and comment no later than 31st August;
- (e) Cabinet approves the Budget Strategy Paper no later than 15th August;
- (f) Ministry of Finance and Economic Development issues the Budget Call Circular including indicative budget expenditure ceilings for the following year by 20th September;
- (g) Ministries provide budget submissions to Ministry of Finance and Economic Development by 5th October;
- (h) Ministry of Finance and Economic Development updates the macroeconomic and fiscal information and provides it to Cabinet by 14th September;
- (i) Ministry of Finance and Economic Development completes review of budget submissions by 15<sup>th</sup> October;
- (j) Ministry of Finance and Economic Development and ministries hold budget discussions between 16<sup>th</sup> October to 5th November;
- (k) Ministry of Finance and Economic Development provides draft budget estimates to Cabinet by 20<sup>th</sup> November;
- (l) Cabinet completes consideration of draft budget estimates by 23rd November;
- (m) Minister of Finance and Economic Development presents Budget to Parliament on the last Thursday of November; and
- (n) Budget is debated and approved.

### Decision impact

The procedures are likely to enhance planning by the business as it provides certainty timing of new law and helps taxpayers in timing submission of budget inputs. Therefore, taxpayers can expect the National budget to be provided to them each year in November and make well informed decisions.



## 6. Transfer Pricing court case in South Africa

Case name	ABC (Pty) Ltd and the South African Revenue Service (SARS) IT 14305
Summary Facts	<ul style="list-style-type: none"> <li>• ABC (Pty) Ltd was in the business of manufacturing.</li> <li>• It purchased certain metals, known as the Precious Group of Metals (PGMs), from a related party based in Switzerland (Swiss Entity).</li> <li>• The (SARS) conducted a transfer pricing audit which included a consideration of whether the transaction with the Swiss Entity was at arm's length and concluded the transaction was not at arm's length prompting TP adjustment.</li> <li>• Meanwhile ABC did not specifically test (and document) the transactions for transfer pricing purposes which took place prior to the introduction of mandatory transfer pricing documentation (TPD) in 2016 in South Africa.</li> <li>• SARS therefore based its findings on its own transfer pricing analysis drawn from the guidance in SARS' Practice Note 7 (PN7) and the OECD Transfer Pricing Guidelines (TPG).</li> <li>• ABC appealed against the additional assessment raised by SARS and its appeal it however raised another issue which became the centre point for this case in that it sought to separate another legal issue from the issue raised in the appeal.</li> <li>• The legal issue it sought to separate was in regards to concerns of the powers of SARS as sanctioned by section 31(2) of the Income Tax Act, 58 of 1962.</li> </ul>
Jurisdiction	<ul style="list-style-type: none"> <li>• The Tax Court of South Africa</li> </ul>
Issues for determination	<ul style="list-style-type: none"> <li>• Whether an application for separation of a legal issue should be granted to ABC</li> <li>• Whether practice Note 7 and the OECD Transfer Pricing Guidelines to South African transfer pricing applied to ABC?</li> </ul>
Date of decision	<ul style="list-style-type: none"> <li>• 7 January 2021</li> </ul>
Decision	<ul style="list-style-type: none"> <li>• Both appeals were dismissed.</li> </ul>

### The Facts

ABC (Pty) Ltd was in the business of manufacturing, importing, and selling chemical products which included the manufacture of catalytic converters. In the course of this activity, ABC purchased certain metals, known as the Precious Group of Metals (PGMs), from a related party based in Switzerland (Swiss

Entity). On completion of manufacture, the catalysts would be sold to customers in South Africa known as original equipment manufacturers (OEMs) or more simply motor vehicle manufacturers. The South African Revenue Service (SARS) conducted a transfer pricing audit into the ABC's 2011 year of assessment which included a consideration of whether the transaction between ABC and the Swiss Entity for the purchase of the PGMs was conducted at arm's length. After considering various aspects of the transaction including an analysis of the underlying cost base as well as the functions, risks and assets of ABC in purchasing and manufacturing the catalytic converters, SARS concluded that ABC's Full Cost Mark-Up (FCMU) of 1% fell between the minimum and lower quartile of SARS' arm's length interquartile range achieved by the comparable company dataset. Based on this, an adjustment was warranted. While ABC did make submissions regarding SARS proposed transfer pricing adjustment, it would appear that ABC did not specifically test (and document) the transactions for transfer pricing purposes which took place prior to the introduction of mandatory transfer pricing documentation (TPD) in 2016 in South Africa. SARS therefore based its findings on its own transfer pricing analysis drawn from the guidance in SARS' Practice Note 7 (PN7) and the OECD Transfer Pricing Guidelines (TPG). In this regard, SARS adjusted ABC's FCMU to the median of SARS' arm's length interquartile range achieved by the comparable company dataset despite ABC having provided comments to persuade SARS against the proposed adjustment. ABC had not tested the transactions involving the purchase of the PGMs from the Swiss Entity. This resulted in an increase in ABC's income for the 2011 year of assessment. SARS contended that an adjustment of the FCMU of the transaction is an adjustment for the consideration of the PGM transactions. ABC then appealed against the additional assessment. However, in appealing against the assessment, it raised another issue which became the centre point for this case in that it sought to separate another legal issue from the issue raised in the appeal. The legal issue it sought to separate was in regards to concerns of the powers of SARS as sanctioned by section 31(2) of the Income Tax Act, 58 of 1962 (*equivalent to section 24 of the Zimbabwean Income Tax Act Chapter 23:06*). Section 31(2) of the Act provides for the determination of the taxable income of a person where a transaction entered into by that person results in a tax benefit. The determination of the taxable income is done as if that transaction had been entered into on the terms and conditions that would have existed between independent persons dealing at arm's length. ABC challenged that on a proper reading of section 31(2), stating that SARS was only entitled to adjust the price/consideration paid for the PGMs as between itself and the Swiss Entity. Consequently, ABC argued that the act of adjusting its profits, pursuant to the application of the TNMM and the FCMU, was not a legitimate exercise of transfer pricing power authorized by section 31(2).

Issue	Court reasoning and decision
Whether an application for separation of a legal issue should be granted to ABC	<ul style="list-style-type: none"> <li>• That while ABC disputed additional assessment, the main matter was whether an application for separation of a legal issue should be granted.</li> <li>• That the separation of a legal issue is in terms of Rule 33(4) of the Uniform Rules of Court, and Rule 42(1) of the Tax Dispute Resolution Rules.</li> <li>• That the purpose of separation as per Rule 33(4) was set out in <i>The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association</i> as below: "If, in any pending action, it appears to the court that there is a question of law or fact which may conveniently be decided either before any evidence is led</li> </ul>

	<p>or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.....”</p> <ul style="list-style-type: none"> <li>• That the entitlement to seek the separation of issues was created in the rules so that an alleged case can be tested; or that a factual issue can be determined which can give direction to the rest of the case.</li> <li>• That in simple terms therefore, it allows a separation of a question of law or fact to be decided first before any evidence is led in the main matter.</li> <li>• That this essentially saves costs and time.</li> <li>• That in civil cases, an example is where the parties first agree to determine liability for damages whereas the quantum of damages is then determined.</li> <li>• That by determining liability first, it may be that determination of the amount payable becomes subject to debate.</li> <li>• That it thus follows that while ABC raised an issue of separation, there was a need to unpack the provisions of section 31(2) in determining whether the application for separation should be granted.</li> <li>• That to start with, regardless of what transfer pricing method has been used to determine the arm’s length consideration, ultimately, adjustments are made to the profits to ensure tax is levied on the correct taxable income.</li> <li>• That additionally ABC had in fact referred to the authoritative statement in both the TPGs and PN7 which seeks to tax profits that ought to have accrued to a party.</li> <li>• That on that basis, ABC had pursued its case on the basis that the transactions involving the PGMs had no transfer pricing implications as they were “flow through transactions”.</li> <li>• That ABC did not test whether the PGM transactions complied with the requirements of the arm’s length principle.</li> <li>• That given this, the court agreed with SARS that the issue sought to be separated raised no cogent point of law.</li> <li>• That in dismissing the application for separation, the court held that the question of adjustment does not even arise prior to determining the arm’s length nature of a transaction.</li> <li>• That the inquiry into the arm’s length nature of a transaction is an overriding principle in transfer pricing matters and cannot be back-ranked.</li> <li>• That in other words, the establishment as a fact whether a consideration is or is not at arm’s length precedes the question of adjustment, regardless of what transfer pricing method is employed.</li> <li>• That the ordering of separation was therefore, according to the court, of no practical benefit but would instead raise piecemeal litigation, increase costs, and delay finalisation of the matter.</li> </ul>
<p>Whether practice Note 7 and the OECD Transfer</p>	<ul style="list-style-type: none"> <li>• That SARS had relied on both PN7 and the TPGs in testing the arm’s length nature of the transactions and adjusting ABC’s taxable income.</li> <li>• That ABC on the other hand raised the argument that section 31 makes no reference to the TPGs or PN7.</li> </ul>

<p>Pricing Guidelines to South African transfer pricing applied to ABC?</p>	<ul style="list-style-type: none"> <li>• That ABC submitted that SARS reliance thereon is misplaced basing on <i>Marshall and Others v Commissioner, SARS 80 SATC 400</i>.</li> <li>• That in the Marshall case, the Constitutional Court held as follows in considering the authoritative nature of SARS interpretation notes: “Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned, established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided.”</li> <li>• That the Marshall case in fact supported SARS’ reliance on PN7 in that PN7 and the TPGs demonstrate a practice that is internationally accepted and applied by both taxpayers and SARS alike.</li> <li>• That while ABC raised that South Africa is not a member of the OECD such that reliance on the TPGs is tenuous, the court held that it is necessary for countries to use OECD TPGs to overcome challenges of BEPS (Base Erosion and Profit Shifting).</li> <li>• That the decision in <i>Commissioner of Taxation v Glencore Investments Pty Ltd [2020] FCAFC 187</i>, where the application of the OECD TPGs was rejected was to be looked into.</li> <li>• That, given that the judgment in Glencore was handed down in relation to the 2007 to 2009 financial years, it was doubtful that the same court would reach the same conclusion now.</li> <li>• That even though judgment was handed down in the Glencore case in 2020, BEPS stood on a different footing as compared to when the 2007-2009 assessments were raised.</li> <li>• That the court then concluded that one cannot deny that the TPGs are a world standard in transfer pricing matters.</li> </ul>
<p>Decision</p>	<ul style="list-style-type: none"> <li>• The application for separation of a legal issue was not granted in favour of ABC.</li> <li>• Practice Note 7 and the OECD Transfer Pricing Guidelines to South African transfer pricing applied to ABC.</li> <li>• The assessments are fully justified.</li> <li>• The appeal was hence disallowed in full.</li> </ul>

### Decision Impact

This case discussed various important issues pertaining to the application of Transfer pricing, which greatly affects Zimbabwe as well. It highlights the need for taxpayers to properly test whether their related party transactions comply with the arm’s length principle. Given the increasing focus on transfer pricing matters by the ZIMRA it is important for taxpayers to be aware of the TP legislative requirements and comply with them. We continue to emphasize for taxpayers to be in position of an updated TP policy documentation



which assists greatly in the setting of the arm's length prices and is also a statutory requirement that is to be obliged with. Another important point to note is that complying with TP regulations is important even for the periods prior to the introduction of mandatory transfer pricing documentation.



## 7. VAT on transactions involving residential property

### Background

Zimbabwe is currently experiencing housing construction boom and this has prompted us to take a look at the VAT treatment of transactions involving building, buying and letting of residential property so as to assist the tax paying community avoid legal and financial ramifications thereof. A residential property is property zoned specifically for living or dwelling for individuals or households, distinct from a commercial property which is a real estate that is used for business activities.

### The law and Interpretation

#### Letting of residential property

Generally, the supply of commercial accommodation is subject to VAT at the standard rate, whilst the letting or hiring of a dwelling is VAT exempt. The exemption also applies to the supply for use by employees where this is provided as a fringe benefit in respect of office or employment and the right of occupation is limited to the period of the person's employment or the term of the person's office or a period agreed upon by the employer. However, the distinction between commercial and residential accommodation or dwelling is not always clear. The VAT Act has defined the term dwelling as *“any building, premises, structure or any other place, or any part thereof, used predominantly as a place of residence or abode of any natural person or which is intended for use as a place of residence or abode of any natural person, together with any appurtenances or structure belonging thereto and enjoyed therewith, but does not include a commercial rental establishment”*. The premises should be used predominantly for residential accommodation and suitable for, and capable of, being occupied as a residence or place where people live. On the other hand, the term “commercial accommodation” in the VAT Act contemplates the supply of lodging, or board and lodging, together with domestic goods or services in any residential establishment which is regularly and systematically supplied, but excludes a “dwelling” supplied in terms of an agreement for the letting and hiring thereof. A person who supplies commercial accommodation is entitled to claim VAT on goods or services used in making such a supply including on the price paid for the property. On the other hand, a

person who supplies residential accommodation is denied from claiming input tax incurred on goods or services used to make such supplies and so is on price paid for the property.

### Development of residential property

A land developer for instance who builds residential units for resale must standard rate the transaction. He or she is required to charge VAT on the sale price of the residential property and be entitled to claim VAT incurred for purposes of making such supply. However, where the residential property developed for sale is temporarily converted into leasing as a residential accommodation, the VAT status of the transaction may vary. As stated above, the letting of residential accommodation is a supply exempt from VAT. Therefore, where the developer temporarily lets a residential unit intended for resale, he/she would not be required to account for VAT on the rent or income from such letting. This is treated as a change in use of property as contemplated by the VAT Act requiring an adjustment to the input tax claimed on construction or acquisition of the property. When the unit is subsequently sold there is a deemed change of use from producing exempt supply to making taxable supplies requiring the reclaiming of previously reversed input tax claims. This is rather tedious requiring authorities enacting law that provides for suspension of the contemplated the adjustments if property is to be sold within a short period say within 12 months. The is necessary to reduce the administrative burden on part of taxpayers as consequence of effecting these adjustments.

### Buying and selling of residential property

If the seller is registered for VAT purposes, the purchase price will include VAT, which is payable on transfer by the seller. If the seller is not registered for VAT purposes, then stamp duty is payable by the buyer. It does not matter whether the said property is commercial or residential property. Thus, sale of stands or residential units for instance by registered operator is subject to VAT at 14.5%. Nevertheless, where the property was previously used in transactions involving exempt supply e.g supply of residential accommodation even if the supply is made by a registered operator, the sale will be exempt from VAT. Individuals who are not VAT registered operators selling their homes or fixed properties are subject to stamp duty as opposed to VAT. The VAT and stamp duty are mutually exclusive and it can only be one or the other, with the deciding factor being whether or not the seller is registered for VAT. Meanwhile, sale of residential stands by registered operator is subject to VAT at 14.5%, but the letting of land for purposes erecting residential accommodation is VAT exempt.

### Decision Impact

Transactions involving real property involve huge tax outlays. Besides VAT, one must consider the capital gains tax, income tax, stamp duty and estate duty of the transaction and a lot of other non-tax issues. It is therefore critical for one to approach relevant experts to lessen the chances of making mistakes. With regard to residential property, it is apparent that the way in which it is applied can have a fundamental impact on the incidence of VAT. Investors should obtain advice when buying, selling or letting residential property

## 8. Reminder of 2020 Income tax returns due dates

### Background

The Zimra recently published SI 36 of 2021 which was granting an extension for the submission of income tax returns. This article serves as a reminder of the newly published due dates for the income tax returns which taxpayers ought to take note of.



## The law and interpretation

The returns due date extensions for 2021 were granted as follows:

Returns	2021 Extension
Income tax (ITF 12 C)	a) 30 June 2021 for taxpayers reporting to Small Clients Office. b) 31 July 2021 for all taxpayers reporting to Medium Clients Office. c) 31 August 2021 for all taxpayers reporting to Large Clients Office.
Transfer pricing (ITF 12 C 2)	31 August 2021
Capital Gains Tax (CGT1)	a) 30 June 2021 for taxpayers reporting to Small Clients Office. b) 31 July 2021 for all taxpayers reporting to Medium Clients Office. c) 31 August 2021 for all taxpayers reporting to Large Clients Office

Meanwhile, taxpayers registered at the Zimra under the small client's office should be finalizing their returns and ready to submit them by 30 June. Despite the extension of due dates as above, the payment of QPDs have not been deferred. All QPDs (income tax) should have been paid in full by 20<sup>th</sup> of December 2020. Any shortfall thereof to the extent it exceeds 10% margin of error attracts 10% and 25% interest per annum for foreign currency and ZWL\$ income tax shortfalls, respectively. Income tax (QPDs) is paid in foreign currency on that part of earnings accruing, received or accrued in foreign currency in accordance with the provisions of s 4 A (1) of the Finance Act.

## Decision Impact

The return due dates should be taken note of. Taxpayers are reminded not only to file the income tax returns on time but to prepare their tax matters before the submission of the return, this is so especially for taxpayers with related parties who will need to be in possession of a transfer pricing document.

## 9. Fresh incentives for trading on Victoria Fall Stock Exchange

### Background

The Victoria Falls Stock Exchange (VFEX) was launched on 23 October 2020 as a stock exchange platform created to serve as a stock trading platform for the Victoria Falls Special Economic Zone in order to mobilise capital in foreign currency through Foreign Direct Investment (FDI). The bourse has had a slow kick start with only one counter so far, namely SeedCo International, the Zimbabwe Independent Newspaper has reported.

### The law and interpretation

In order to serve the Stock Exchange from still birth, the finance minister has pumped up fresh incentives to sweeten the deal. Companies that are listed on the Victoria Falls Stock Exchange will be entitled to retention of 100% of export proceeds. Meanwhile, exporters, including miners, currently keep 60% of their foreign earnings in hard currency, while 40% is sold to the central bank at the official exchange rate, but the minister has offered a retention of 80% for companies that export above their monthly average on the increased portion. The following table summarizes the incentives of the VFEX vs ZSE:

Returns	VFEX	ZSE
Disposal of shares or marketable securities listed thereon	Exempt	1% withholding tax
Dividend distributed by a company listed thereon	5%	10%
Export retention of a company listed thereon	100%	60%
Receipts and accruals of the bourse	Exempt	Taxed at 24.72%

### Decision Impact

The VFEX is meant to ring-fencing foreign investors from the stringent measures of the ZSE. Victoria Falls area has been made special economic zone, allowing foreign investors to repatriate 100% of their investment. Whereas, investors struggle to repatriate their investments back home under ZSE and other legacy issues have made the ZSE unattractive over the years. However, both bourses can be very attractive to investors if minister works on ease the conditions of doing business.

## 10. Zimra article on payment of PAYE in foreign and local currency

### Background

Ever since the separation of ZWL\$ and Nostro accounts in October 2018 payment of tax has been challenged especially complying with the law that requires payment of taxes in foreign currencies for incomes received in foreign currency. The main challenge is experienced where income is earned both in foreign currency and the local currency. The ZIMRA published an article which gave guidance on PAYE in foreign currency.

### The law and interpretation

In the article rephrased section 4A(1)(a) of the Finance Act (Chapter 23:04) which states that a person whose taxable income from employment is earned in whole or in part in a foreign currency shall pay tax in the same or another specified foreign currency on so much of that income as is earned, received or accrued in that currency. It further states that, taxpayers are hereby reminded that where remuneration is paid in foreign currency, the PAYE arising from this income should be in foreign currency. The ZIMRA went on to give a basic recap of the tax tables to be used for 2021 for both Forex and Local currencies. The following are the steps highlighted in calculation of PAYE:

Calculation of PAYE where one earns solely in USD or ZWL

- Determine the gross income by adding up basic salary and allowances (remuneration).
- Deduct exempt income and allowable deductions (exempt income includes bonus whilst allowable deductions include contributions to a pension fund).
- Determine taxable income and rate of tax applicable as per PAYE tables.
- Calculate PAYE.
- Add AIDS Levy at 3% to come up with the tax due.

### Calculation of PAYE where one earns in US \$ and RTGS\$

- Convert remuneration earned in RTGS Dollars to foreign currency at the prevailing Interbank rate;
- Add the remuneration determined above, to the remuneration earned in foreign currency to get total remuneration.
- Deduct allowable deductions to obtain the taxable amount. Deductions earned in RTGS\$ should also be converted to foreign currency.
- Calculate PAYE in foreign currency using the foreign currency tax tables.
- Subtract the credits to determine the PAYE payable. Any credits earned in RTGS\$ should be converted to foreign currency using the prevailing interbank rate as at date of running the payroll.
- Compute tax payable in foreign currency and in RTGS proportionately.

The article articulates procedures as per the law well save for few exceptions. To start with, it left out the use of the US \$ tax tables on all foreign currencies. The absence of this might fail to point out which tables to use especially when one receives foreign currency earnings not US \$. Furthermore, the ZIMRA could not clearly indicate the need to use foreign currency tax credits and motoring benefits. Since the law requires for use of US \$ tax tables on earnings received wholly in foreign currency and received with partial foreign currency, it follows then that other statutory amounts that are to be used in calculating PAYE must be those specifically provided in the legislation to be foreign currency amounts used in calculating foreign currency tax. For instance, tax credits and motoring benefits are provided for both in ZWL \$ and US \$, and the US \$ values are used where foreign currency incomes are received. Another issue not mentioned in the article is the basis of splitting the combined PAYE computed using US\$ tax tables. The apportionment basis on the table includes use of proportion of gross income, income or taxable income. Our interpretation of s 4A (1)(a) of Finance Act appears to suggest use of taxable income, which in our view unfairly discriminate those with large chunk of deductions in ZWL\$

### Decision Impact

The guidance by the ZIMRA is commendable. Taxpayers should take note of the advice and apply it. However, they must also apply this guidance with full knowledge of the legislation in mind. This is so to avoid applying the incorrect procedures and then risk being assessed in the future. This is so especially considering for this article the ZIMRA placed a disclaimer noting that the article was for information purposes only and that the ZIMRA takes no responsibility for any loss or damage arising from use of material in this article and no liability will attach to the ZIMRA. Whilst tax rates in US\$ may be favorable compared to ZWL\$ when inflation is on the rise, paying employees in foreign currency may be challenged because of transactions costs to be incurred in order to access goods and services in ZWL\$. This is because goods and services may prove expensive in foreign currency because of the requirement to trade or exchange at auction rate which is further reinforced by the recently gazetted SI127 of 2021.



### 11. Second-hand motor vehicles last importation date extended to 30 June

The Ministry of Industry and Commerce has yet again extended the last importation date for banned second hand motor vehicles to 30 June 2021. The ZIMRA has issued public notice 52 on the matter containing exact contents of public notice 40 save to state that individuals with vehicles purchased and paid for on or before 2 April 2021 and imported into the country by 30 June 2021 will qualify for the license exemption. For further details refer to <https://www.zimra.co.zw/public-notices>. The applications for exemption must therefore be submitted between the 22nd of April 2021 and the 30<sup>th</sup> of June 2021. Any applications submitted after the closing date will not be considered. Only vehicles imported into the country by 30 June will qualify for the license exemption. Furthermore, for qualifying applicants, a letter authorizing importation of the vehicles without an import license shall be issued. On clearance of the vehicle, a copy of the exemption letter should be presented and handed over to ZIMRA. For non-qualifying applications, a written response shall be issued clearly stating the reasons for denial.

### 12. Traffic Zones restrictions on heavy vehicles

The ZIMRA through public notice 51 of 2021 advised transporters & transporter associations, drivers, importers/exporters and clearing agents that Government published Statutory Instrument 124 of 2021 [Customs and Excise (Ports of Entry and Routes) (Amendment) Order 2021 (No. 22)] on 21 May 2021, whose provisions are with effect from 1 January 2021. These regulations amend and replace Statutory Instrument 7 of 2021. The new regulations provide additional clarity in terms of the following:

- Definitions of the categories and classes of vehicles to which the regulations apply, to include all cross border heavy traffic, whether in transit or not.
- Definition of heavy traffic for the purposes of these regulations and for the avoidance of doubt.
- Specifications of the boundaries beyond which traffic passing through Harare should not proceed.
- Designation of Harare Drive East (from the Msasa roundabout to its junction with Lomagundi Road in Bluff Hill) as a restricted thoroughfare for the specified traffic.
- Designation of cargo tracking routes and truck stops throughout Zimbabwe.
- Designation of cargo tracking routes across cities and towns throughout Zimbabwe
- Specification of the fines levied for violations set separately for the owners and drivers of the specified vehicles. Operators and drivers as well as the Associations to which these operators are affiliated, are advised to ensure adherence to these regulations to avoid the heavy penalties set against violations.

### 13. Disclaimer Clauses

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