



Rwanda's new Income Tax Act and the taxation of share transfer transactions

by Dieudonné Nzafashwanayo

April 2018 saw significant legal changes on the Rwandan business and tax scene, from the enactment of a new Companies Act (Law No 17/2018 of 13/04/2018 governing companies), to the enactment of Law No 016/2018 of 13/04/2018 establishing taxes on income (the "new Income Tax Act").

While both pieces of legislation brought a number of changes, the new Income Tax Act is significant in terms of the landmark shift it has introduced. One of the cardinal changes that it brings about relates to the taxation of share transfer transactions. This is a departure from its predecessor (Law No 16/2005 of 18/08/2005 on direct taxes on income) (the "2005 Income Tax Act"), which was quite uncertain in this regard. Article 32 *bis* of the 2005 Income Tax Act provided that:

"Capital gain resulting from sale or cession of commercial immovable property is taxed on a rate of 30%.

Capital gain on secondary market transaction on listed Securities shall be exempted from capital gains tax"

A reading of the second paragraph of article 32 *bis* would suggest that transactions in securities (e.g. shares) other than those traded on public exchange were subject to capital gains tax. Under the same legal provision, only capital gains resulting from secondary market transactions of listed securities were exempt from capital gains tax. However, the 2005 Income Tax Act did not contain any particular provision taxing capital gains from securities transactions. One's point of view would be that if the legislation intended to tax these transactions, then it would have provided for the tax rate and delineated the tax base in more than certain terms. The lack of certainty, which is one of the core principles of establishing tax systems, was interpreted to the benefit of taxpayers in this case. In *Total Rwanda SARL/Engen Rwanda Limited v Rwanda Revenue Authority ("RRA")* (RCOM 0175/11/HCC, 13/01/2012), after an attempt by RRA to treat a stock deal as an asset deal, the Commercial High Court held that share transfer transactions are not subject to income tax. This position was upheld later on, on appeal, by the Supreme Court of Rwanda.

However, it would seem that the taxman would now welcome, with great relief, the new Income Tax Act which has placed matters beyond the shadow of a doubt and imposed capital gains tax on share transfer transactions. Now, the same Act, under its article 36, clearly provides that capital gains tax is charged on the sale or transfer of shares, which will be levied on the difference between the acquisition value of shares and their selling or transfer price. It goes further and remedies any previous uncertainty by providing that the capital gains tax rate will be 5% and imposes on the company, in which the share transfer transaction occurred, the obligation to withhold the capital gains tax on the sale or transfer of shares.

It should be noted that the capital gains tax introduced by the new Income Tax Act will not apply to investors registered in accordance with Law no 06/2015 of 28/03/2015 relating to investment promotion and facilitation.

Another important provision of the new Income Tax Act that is likely to affect share transfer transactions and structuring of transactions, can be found under article 5, which provides that income taxable in Rwanda includes, among others, activities performed in Rwanda by any person and activities performed abroad by a resident of Rwanda, **direct or indirect sale or transfer of shares or debentures**. Although it is not clear from this provision whether share transfer transactions that may lead to an indirect transfer of shares held in a Rwandan company will be taxed in Rwanda, the use of words "direct" or "indirect" arguably suggest that even share transfer transactions occurring offshore in companies holding interests in Rwandan companies may be subject to tax in Rwanda as they may qualify to be indirect sale/transfer of shares. Indeed, this provision is yet to be put to its practical test and we will have to wait for the courts or tax administration (via tax rulings) to interpret it. In all cases, concerned persons have to be mindful of this provision when structuring their investments both at the time of entry into the Rwandan market as well as share transfer transactions when exiting.

We await the practical application of this provision of the new Income Tax Act and other changes will be addressed in upcoming editions.

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