Minimum Chargeable Income: Where the Commissioner - General's Guidance Falls Short

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On 31 March 2023, the Parliament of Ghana enacted the Income Tax (Amendment) Act, 2023, Act 1094 (''Act 1094''), which received presidential assent on April 2, 2023. The amending Act addressed various tax measures aimed at increasing the Government's tax revenue by approximately one billion two hundred and ninety million Ghana Cedis **(GHS1.290b).** Among these measures are the revision of the personal income tax bands for resident individuals, the introduction of withholding tax on the realisation of assets and liabilities, and revision of the treatment of foreign exchange losses.

A notable inclusion in Act 1094 is Section 2A, inserted into the Income Tax Act, 2015, Act 896 (as amended) (the ''ITA''). Section 2A provides that **where a person has reported tax losses for five consecutive years, they may be obligated to calculate and pay taxes on a Minimum Chargeable Income (MCI), set at five percent of turnover.** Exceptions to this rule include persons engaged in farming business and those within their first five years of commencement of operations.[i]

The ITA defines a person's chargeable income for a tax year as the total income from employment, business, or investments, less deductions permitted under the ITA.[ii] Despite this, Act 1094 provides that a person may yet be subject to a MCI even where there is no actual chargeable income.

This legislative change raises two critical questions.

> 1. Does the obligation to calculate MCI commence in the sixth year following five consecutive years of reported tax losses, or is it triggered by the reporting of a tax loss in the sixth year itself?
>
> 2. Who bears the responsibility for computing MCI – the Commissioner-General (CG) of the Ghana Revenue Authority (GRA) or the taxpayer?

This article seeks to explore the ambiguities surrounding the introduction of the MCI for taxpayers and highlights the need for the CG's interpretation of this provision to be finetuned.

Key Considerations with Respect to the MCI

Timing of the MCI

The introduction of the MCI is not a novel concept in the history of Ghana's tax law. Under the erstwhile Income Tax Decree, 1975, SMCD 5, businesses were required to pay taxes of at least five percent of their turnover after their first five years of operation, **regardless of actual profits.** Exceptions were made for persons engaged in mining operations, farming, or those who had maintained adequate accounting records for at least ten consecutive years (or for the entire duration of the business if it was less than ten years) to the satisfaction of the Commissioner.[iii]

Debates in Ghana's Parliament, up to the third (final) reading of the Income Tax (Amendment) (No. 2) Bill, 2022, did not explicitly mention whether section 1 of Act 1094 applies when a person reports a tax loss in its sixth year after declaring tax losses for the previous five years, or whether the provision applies in the sixth year regardless of the person's tax position in that year. The Interpretation Act, 2009, Act 792 (the ''IA''), allows for the use of parliamentary debates as a source of information regarding the intention of Parliament in enacting laws. The case of **Scancom Limited, Ghana Telecom Company and Millicom Ghana Ltd v The Commissioner, Ghana Revenue Authority Suit Nos. FTRM 76/12, FTRM 77/12, FTRM 78/12 High Court, (Economic Crime Division)** was partly resolved by the court's reliance on parliamentary debates as an aid to the interpretation of tax statutes.
Contrasting Act 1094's wording with the words of SMCD 5, which required the calculation of MCI and payment of taxes on same regardless of one's chargeable income position in a particular year, one may infer that the amendment introduced by Act 1094 only targets persons who declare losses in the sixth year as well. This is affirmed by the Practice Note (PN) issued by the CG on MCI, where the CG states in paragraph four that ''...for over the previous five years and continue to declare losses from its operations''.

Under sections 100 and 101 of the Revenue Administration Act, 2016, Act 915 (as amended), the CG is empowered to issue PNs. These are intended to provide consistency in the administration of tax laws and to guide all relevant stakeholders on how the CG interprets provisions of a tax law. It is important to note that PNs are binding on the CG but not on taxpayers. In accordance with the powers conferred on the CG as mentioned, the CG issued a PN on the application of MCI under the ITA on 20th March 2024.

Onus to Determine MCI

The referenced section states that;

> **...a person may be required to compute and pay tax...**

Section 42 of the IA provides that ''... the expression **''may''** shall be construed as permissive and empowering, and the expression **''shall''** as imperative and mandatory.'' This grants the CG a discretionary power to decide whether or not a person is liable to pay tax on an MCI. For instance, businesses in the extractive sector, which typically take a considerable length of time to break even after initial capital investments, may merit such discretionary favour by the CG. Similarly, in SMCD 5, taxpayers who had kept accurate and satisfactory books of account for a significant number of years were exempt from the requirement to pay tax on MCI. However, the CG is required to exercise this discretion in accordance with Article 296 of the 1992 Constitution of the Republic of Ghana.[iv]

The CG's Interpretation of the MCI

Firstly, the PN suggests that the MCI may be determined either by way of self-assessment, original assessment, or adjusted assessment. This contradicts the provision of Act 1094, which places the requirement to calculate MCI and the tax thereon solely on the CG.

Secondly, the CG's interpretation suggests that where a business has been declaring tax losses in all of the previous five years and it utilises unrelieved losses to reduce its profit to zero in the sixth year, to the extent that there remains some unrelieved losses, the business will be deemed to have made a loss in that sixth year. This interpretation by the CG stretches the provisions of Section 17 of the ITA. This is because, the utilisation of unrelieved losses from prior years cannot result in another loss for the current year. That is to say, where the unrelieved losses brought forward are higher than the current year's chargeable income, the losses to be utilised should be restricted to the chargeable income for the current year. This will result in a nil tax position. The remaining losses are then carried forward to subsequent years unless extinguished by the provisions of Section 17 of the ITA.

Additionally, the PN posits that if a person declared a significant tax loss in year one but recorded chargeable income in the ensuing five years, to the extent that the balance of the tax loss incurred in year one, when applied in year six, results in a nil tax position, the taxpayer will be deemed to have made a tax loss for the past five years. For all intents and purposes, this cannot be the position of the law since zero is neither a gain nor a loss. Offsetting the tax loss in year one against subsequent chargeable income does not result in tax losses for those subsequent years.

Recommendation

To curb the inconsistencies and preserve the sanctity of the canon of certainty, I recommend that the following corrections to the PN (albeit not binding on taxpayers) be made by the CG:

(i) The determination of the applicability of tax on an MCI to a taxpayer should be the call of the CG, not taxpayers.
(ii) Unrelieved tax losses brought forward can be utilised up to the amount of the chargeable income made in the current year. This results in a nil tax position. The nil position should not be classified a loss.
(iii) A loss declared in a particular year and carried forward for five years should not call for the application of the MCI in the sixth year after the year in which the loss was declared. This is because the losses carried forward to offset the second to sixth year's chargeable income will only result in nil positions in each of the years.

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[i] Section 2A(2) of the ITA provides that ''subsection (1) does not apply to a person (a) within the first five years of commencement of operations; or (b) engaged in farming''.

[ii] Section 2 of the ITA provides that ''... total of the assessable income of that person for the year from each employment, business or investment less the total amount of deduction allowed that person under this Act''.

[iii] Section 13(5) of SMCD 5 provides that ''the provisions to ... shall not apply to: (a) any person engaged in mining operations; (b) any person engaged in farming; (c) any person who has for a minimum period of ten consecutive years of assessment (or lesser period if the business is less than ten years old) maintained to the satisfaction of the Commissioner adequate books of account and has submitted reliable accounts for all those years''.

[iv] Article 296 of the 1992 Constitution of the Republic of Ghana provides that '' the exercise of discretionary power shall not be arbitrary, capricious or biased...''.

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