SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4796 GIBRALTAR Monday 21st December 2020

LEGAL NOTICE NO. 472 OF 2020

EUROPEAN UNION (WITHDRAWAL) ACT 2019

INCOME TAX ACT 2010 (AMENDMENT) (EU EXIT) REGULATIONS 2020

In exercise of the powers conferred on him by section 11 of the European Union (Withdrawal) Act 2019, the Minister has made these Regulations-

Title.

1. These Regulations may be cited as the Income Tax Act 2010 (Amendment) (EU Exit) Regulations 2020.

Commencement.

2. These Regulations come into operation on IP completion day.

Amendment of Income Tax Act 2010.

3.(1) The Income Tax Act 2010 is amended in accordance with this regulation.

(2) In Schedule 4, for paragraph 8A substitute-

"8A. For the purposes of Part V to Part VII unless the context otherwise requires (and subject to paragraph 22) –

"associated enterprise" means:

(a) an entity in which the taxpayer holds directly or indirectly a participation in terms of voting rights or capital ownership of 25% or more or is entitled to receive 25% or more of the profits of that entity; or

(b) an individual or entity which holds directly or indirectly a participation in terms of voting rights or capital ownership in a taxpayer of 25% or more or is entitled to receive 25% or more of the profits of the taxpayer;

If an individual or entity holds directly or indirectly a participation of 25% or more in a taxpayer and one or more entities, all the entities concerned, including the taxpayer, shall also be regarded as associated enterprises.

"borrowing costs" means interest expenses on all forms of debt, other costs economically equivalent to interest and expenses incurred in connection with the raising of finance, including, without being limited to, payments under profit participating loans, imputed interest on instruments such as convertible bonds and zero coupon bonds, amounts under alternative financing arrangements, such as Islamic finance, the finance cost element of finance lease payments, capitalised interest included in the balance sheet value of a related asset, or the amortisation of capitalised interest, amounts measured by reference to a funding return under transfer pricing rules where applicable, notional interest amounts under derivative instruments
or hedging arrangements related to an entity's borrowings, certain foreign exchange gains and losses on borrowings and instruments connected with the raising of finance, guarantee fees for financing arrangements, arrangement fees and similar costs related to the borrowing of funds;

"consolidated group for financial accounting purposes" means a group consisting of all entities which are fully included in consolidated financial statements drawn up in accordance with the International Financial Reporting Standards or the national financial reporting system of Gibraltar;

"EBITDA" means a taxpayer's taxable revenues before interest, tax, depreciation and amortisation;

"entity" means a company, partnership, trust or foundation;

"exceeding borrowing costs" means the amount by which the deductible borrowing costs of a taxpayer exceed taxable interest revenues and other economically equivalent taxable revenues;

"financial undertaking" means any of the following entities:

(a) a credit institution or an investment firm as defined in point (1) of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council or an alternative investment fund manager (AIFM) as defined in point (b) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council or an undertaking for collective investment in transferable securities (UCITS) management company as defined in point (b) of Article 2(1) of Directive 2009/65/EC of the European Parliament and of the Council;

(b) an insurance undertaking as defined in point (1) of Article 13 of Directive 2009/138/EC of the European Parliament and of the Council;

(c) a reinsurance undertaking as defined in point (4) of Article 13 of Directive 2009/138/EC;

(d) an institution for occupational retirement provision falling within the scope of Directive 2003/41/EC of the European Parliament and of the Council;

(e) pension institutions operating pension schemes which are considered to be social security schemes covered by Regulation (EC) No 883/2004 of the European Parliament and of the Council and Regulation (EC) No 987/2009 of the European Parliament and of the Council as well as any legal entity set up for the purpose of investment of such schemes;

(f) an alternative investment fund (AIF) managed by an AIFM as defined in point (b) of Article 4(1) of Directive 2011/61/EU or an AIF licenced, authorised or otherwise regulated under the laws of Gibraltar;

(g) an undertaking for collective investment in transferable securities (UCITS) in the meaning of Article 1(2) of Directive 2009/65/EC;

(h) a central counterparty as defined in point (1) of Article 2 of Regulation (EU) No 648/2012 of the European Parliament and of the Council; or

(i) a central securities depository as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council;

"long-term public infrastructure project" means:

(a) a recognised public interest project to provide, upgrade, operate and/or maintain a large-scale asset; or

(b) buildings (or parts of buildings) that are let (or sub-let) (the "Property"); and

a. the taxpayer exclusively carries on a property business in relation to the Property, being a business to let real property and/or interests in land, within or Gibraltar; and

b. the borrowing costs in question are incurred in the purchase, development or renovation of the Property; and

c. the debt or financing arrangement in question is secured against the Property; and

d. at the date of the loan or other relevant liability which generates the borrowing costs in question, the Property is expected to generate income for a minimum of ten years; and

e. the Property is recognised in accordance with the International Financial Reporting Standards in force from time to time in the financial statements of the taxpayer for the relevant accounting period; and

f. any lease or other similar interest in land granted by the taxpayer on the Property is granted for less than 50 years; and

g. all transactions carried out by the taxpayer in relation to the Property are carried out in accordance with the arm's length principle; and

h. any income generated by the Property is taxable in Gibraltar;

"standalone entity" means a taxpayer that is not part of a consolidated group for financial accounting purposes and has no associated enterprise or permanent establishment situated in a country other than Gibraltar;

"structured arrangement" means an arrangement involving a hybrid mismatch where the mismatch outcome is priced into the terms of the arrangement or an arrangement that has been designed to produce a hybrid mismatch outcome, unless the taxpayer or an associated enterprise could not reasonably have been expected to be aware of the hybrid mismatch and did not share in the value of the tax benefit resulting from the hybrid mismatch.

"taxpayer" means an ordinarily resident company which has assessable income under the provisions of this Act or a permanent establishment of any such company resident in the United Kingdom, a Member State of the European Union or a third country;

"transfer of assets" means an operation whereby the United Kingdom or a Member State of the European Union loses the right to tax the transferred assets, whilst the assets remain under the legal or economic ownership of the same taxpayer;

"transfer of tax residence" means an operation whereby a taxpayer ceases to be resident for tax purposes in Gibraltar, whilst acquiring tax residence in a Member State of the European Union or third country; and

"transfer of a business carried on by a permanent establishment" means an operation whereby a taxpayer ceases to have taxable presence in - Gibraltar whilst acquiring such presence in the United Kingdom, a Member State of the European Union or third country without becoming

resident for tax purposes in the United Kingdom or that Member State of the European Union or third country.

"tax period" means a tax year, calendar year or any other appropriate period for tax purposes.".

(3) In Schedule 4, for Part V to VII, substitute-

"**PART V**

INTEREST LIMITATION RULE

Interest limitation rule

18.(1) Financial undertakings, including where financial undertakings are part of a consolidated group for financial accounting purposes, and standalone entities shall be excluded from the scope of this Part.

(2) Consolidated groups for financial accounting purposes consists of all entities which are fully included in the consolidated financial statements drawn up in accordance with the International Financial Reporting Standards or the national financial reporting system of Gibraltar. For the purposes of this paragraph, the taxpayer shall be given the right to use consolidated financial statements prepared under accounting standards other than the International Financial Reporting Standards or the national financial reporting system of Gibraltar.

(3) Exceeding borrowing costs incurred by a taxpayer shall be deductible in the tax period in which they are incurred only up to the greater of the following two amounts-

(a) 30% of the taxpayer's EBITDA; or

(b) €3,000,000.

(4) For the purposes of paragraph 18(3)(b) the amount of €3,000,000 shall be considered for the entire group.

(5) The EBITDA shall be calculated by adding back to the assessable income the tax-adjusted amounts for exceeding borrowing costs as well as the tax-adjusted amounts for depreciation and amortisation. Income not assessable in accordance with this Act shall be excluded from the EBITDA of a taxpayer.

(6) Paragraph 19(3) shall not apply to exceeding borrowing costs related to-

(a) loans that were contracted before 17 June 2016, excluding any subsequent modification of such loans; or

(b) loans used to finance a long-term public infrastructure project, where the project operator, borrowing costs, assets and revenues are all within the European Union. In this case, any income from a long-term public infrastructure project is excluded from a taxpayer's EBITDA.

(7) Where a taxpayer is a member of a consolidated group for financial accounting purposes, the taxpayer may choose to either-

(a) fully deduct its exceeding borrowing costs if it can demonstrate that the ratio of its equity over its total assets is equal to or higher than the equivalent ratio of the group and subject to the following conditions-

(i) the ratio of the taxpayer's entity over its total assets is considered to be equal to the equivalent ratio of the group if the ratio of the taxpayer's equity over its total assets is lower by up to two percentage points; and

(ii) all assets and liabilities are valued using the same method as in the consolidated financial statements drawn up in accordance with the International Financial Reporting Standards or the national financial reporting system of Gibraltar;

or

(b) deduct exceeding borrowing costs at an amount in excess of what it would be entitled to deduct under paragraph 18(3). This higher limit to the deductibility of exceeding borrowing costs shall refer to the consolidated group for financial accounting purposes in which the taxpayer is a member and be calculated in two steps-

(i) first, the group ratio is determined by dividing the exceeding borrowing costs of the group vis-à-vis third parties over the EBITDA of the group; and

(ii) second, the group ratio is multiplied by the EBITDA of the taxpayer calculated pursuant to paragraph 18(5).

(8) Exceeding borrowing costs not deductible in a tax period under paragraphs 18(3) to 18(7) may be carried forward indefinitely. Unused interest capacity which cannot be used in a given tax period may be carried forward for a maximum of 5 years.

PART VA

EXIT TAXATION

18A.(1) This paragraph applies in any of the following circumstances-

(a) a taxpayer transfers assets from its head office to its permanent establishment in the United Kingdom, a Member State of the European Union or in a third country in so far as Gibraltar, as the jurisdiction of the head office, no longer has the right to tax the transferred assets due to the transfer;

(b) a taxpayer transfers assets from its permanent establishment in Gibraltar to its head office or another permanent establishment in the United Kingdom, a Member State of the European Union or in a third country in so far as Gibraltar as the jurisdiction of the permanent establishment no longer has the right to tax the transferred assets due to the transfer;

(c) a taxpayer transfers its tax residence to the United Kingdom, a Member State of the European Union or to a third country, except for those assets which remain effectively connected with a permanent establishment in Gibraltar;

(d) a taxpayer transfers the business carried on by its permanent establishment from Gibraltar to the United Kingdom, a Member State of the European Union or to a third country in so far as Gibraltar, as the jurisdiction of the permanent establishment, no longer has the right to tax the transferred assets due to the transfer.

(2) The taxpayer shall be chargeable to tax, at the rates set in accordance with section 24 of this Act, at an amount equal to the market value of the transferred assets which would otherwise produce assessable income under the provisions of this Act at the time of exit of the assets, less their value for tax purposes.

(3) A taxpayer may defer the payment of an exit tax referred to in subparagraph (2), by paying it in instalments over five years, in any of the following circumstances-

(a) where a taxpayer transfers assets from its head office to its permanent establishment in the United Kingdom, a Member State of the European Union or in a third country that is party to the Agreement on the European Economic Area (EEA Agreement);

(b) where a taxpayer transfers assets from its permanent establishment in Gibraltar to its head office or another permanent establishment in the United Kingdom, a Member State of the European Union outside Gibraltar or a third country that is party to the EEA Agreement;

(c) where a taxpayer transfers its tax residence to the United Kingdom, a Member State of the European Union or to a third country that is party to the EEA Agreement;

(d) a taxpayer transfers the business carried on by its permanent establishment to the United Kingdom, a Member State of the European Union or a third country that is party to the EEA Agreement.

(4) Subparagraph (3) shall apply to third countries that are party to the EEA Agreement if they have concluded an agreement with the jurisdiction of the taxpayer on the mutual assistance for the recovery of tax claims.

(5) If a taxpayer defers payment in accordance with subparagraph (3), and there is a demonstrable and actual risk of non-recovery, taxpayers may also be required by the Commissioner to provide a guarantee as a condition for deferring the payment in accordance with subparagraph (3).

(6) Where subparagraph (3) applies, the deferral of payment shall be immediately discontinued and the tax debt becomes recoverable in the following cases-

(a) where the transferred assets or the business carried on by the permanent establishment of the taxpayer are sold or otherwise disposed of;

(b) where the transferred assets are subsequently transferred to a third country;

(c) where the taxpayer's tax residence or the business carried on by its permanent establishment is subsequently transferred to a third country;

(d) where the taxpayer goes bankrupt or becomes insolvent or is wound up;

(e) where the taxpayer fails to honour its obligations in relation to the instalments and does not correct its situation over a reasonable period of time, which shall not exceed 12 months.

(7) Subparagraph (6)(b) and (c) shall not apply to third countries that are party to the EEA Agreement if they have concluded an agreement with the jurisdiction of the taxpayer on the mutual assistance for the recovery of tax claims.

(8) Where a transfer of assets, tax residence or the business carried on by a permanent establishment is from the United Kingdom or a European Union Member State outside Gibraltar to Gibraltar, Gibraltar shall accept the value established by the United Kingdom or the Member State of the European Union of the taxpayer or of the permanent establishment as the starting value of the assets for tax purposes (in accordance with paragraph 18A(2)), unless this does not reflect the market value.

(9) For the purposes of this paragraph, “market value” is the amount for which an asset can be exchanged or mutual obligations can be settled between willing unrelated buyers and sellers in a direct transaction.

(10) Provided that the assets are set to revert to the United Kingdom or a Member State of the European Union as the transferor within a period of 12 months, this paragraph shall not apply to asset transfers related to the financing of securities, assets posted as collateral or where the asset transfer takes place in order to meet prudential capital requirements or for the purpose of liquidity management.

PART VI

CONTROLLED FOREIGN COMPANY RULE

Controlled foreign company rule

19.(1) For the purposes of this Part “controlled foreign company” shall mean an entity or a permanent establishment, not resident in Gibraltar, whose profits are not taxable or are exempt from tax in Gibraltar when the following conditions are simultaneously fulfilled-

(a) in the case of an entity, the taxpayer by itself, or together with its associated enterprises-

(i) holds a direct or indirect participation of more than 50 percent of the voting rights; or

(ii) owns directly or indirectly more than 50 percent of capital; or

(iii) is entitled to receive more than 50 percent of the profits of that entity; and

(b) the actual tax paid on its profits by the entity or permanent establishment is lower than the difference between the tax that would have been charged on the entity or permanent establishment in accordance with this Act and the actual tax paid on its profits by the entity or permanent establishment. For the purposes of this subparagraph, the permanent establishment of a controlled foreign company within the meaning of this paragraph which are not taxable or are exempt from tax in the jurisdiction of the controlled foreign company shall not be taken into account. Furthermore, the tax that would have been charged in the United Kingdom or a Member State of the European Union of the taxpayer means as computed according to the rules of that jurisdiction.

(2) Where an entity or permanent establishment is treated as a controlled foreign company under paragraph 19(1), the non-distributed income of the company or permanent establishment arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage shall be included as income of the taxpayer for that tax period.

(3) For the purposes of paragraph 19(2), an arrangement or a series thereof shall be regarded as non-genuine to the extent that the entity or permanent establishment would not own the assets or would not have undertaken the risk which generate all, or part of, its income if it were not controlled by a company where the significant people functions, which are relevant to those
assets and risks, are carried out and are instrumental in generating the controlled company’s income.

(4) This Part shall not apply to a controlled foreign company-

(a) with accounting profits of no more than €750,000, and non-trading income of no more than €75,000; or

(b) of which the accounting profits amount to no more than 10% of its operating costs for the tax period.

(5) For the purposes of paragraph 19(4)(b), operating costs shall not include (i) the cost of goods sold outside the country where the entity is resident, or the permanent establishment is situated, for tax purposes and (ii) payments to associated enterprises.

Computation of controlled foreign company income

20. The income of the controlled foreign company which is to be included as income of a taxpayer in accordance with paragraph 19(2) shall be calculated as follows-

(a) the income shall be limited to amounts generated through assets and risks which are linked to significant people functions carried out by the controlling company. The attribution of controlled foreign company income shall be calculated in accordance with the arm’s length principle;

(b) the income shall be calculated in proportion to the taxpayer’s participation in the entity as defined in paragraph 19(1)(a);

(c) the income shall be included in the tax period of the taxpayer in which the tax year of the entity ends;

(d) where the entity distributes profits to the taxpayer, and those distributed profits are included in the assessable income of the taxpayer, the amounts of income previously included as income of the taxpayer pursuant to paragraphs 19(1) to 19(5) shall be deducted from the income of the taxpayer when calculating the amount of tax due on the distributed profits, in order to ensure there is no double taxation;

(e) where the taxpayer disposes of its participation in the entity or of the business carried out by the permanent establishment, and any part of the proceeds from the disposal previously has been included in the income of the taxpayer pursuant to paragraphs 19(1) to 19(5), that amount shall be deducted from the income of the taxpayer when calculating the amount of tax due on those proceeds, in order to ensure there is no double taxation; and

(f) the Commissioner shall allow a deduction of the tax paid by the entity or permanent establishment in its state of residence or location from the tax liability of the taxpayer in accordance with section 37 of this Act.

PART VII

HYBRID MISMATCH

Hybrid mismatch.

21.(1) For the purpose of this Part "hybrid mismatch" means a situation involving a taxpayer or, with respect to paragraph 25, an entity where-

(a) a payment under a financial instrument gives rise to a deduction without inclusion outcome and-

(i) such payment is not included within a reasonable period of time; and

(ii) the mismatch outcome is attributable to differences in the characterisation of the instrument or the payment made under it;

(b) a payment to a hybrid entity gives rise to a deduction without inclusion and that mismatch outcome is the result of differences in the allocation of payments made to the hybrid entity under the laws of the jurisdiction where the hybrid entity is established or registered and the jurisdiction of any person with a participation in that hybrid entity;

(c) a payment to an entity with one or more permanent establishments gives rise to a deduction without inclusion and that mismatch outcome is the result of differences in the allocation of payments between the head office and permanent establishment or between two or more permanent establishments of the same entity under the laws of the jurisdictions where the entity operates;

(d) a payment gives rise to a deduction without inclusion as a result of a payment to a disregarded permanent establishment;

(e) a payment by a hybrid entity gives rise to a deduction without inclusion and that mismatch is the result of the fact that the payment is disregarded under the laws of the payee jurisdiction;

(f) a deemed payment between the head office and permanent establishment or between two or more permanent establishments gives rise to a deduction without inclusion and that mismatch is the result of the fact that the payment is disregarded under the laws of the payee jurisdiction; or

(g) a double deduction outcome occurs.

(2) For the purposes of subparagraph (1)(a), a payment under a financial instrument shall be treated as included in income within a reasonable period of time where-

(a) the payment is included by the jurisdiction of the payee in a tax period that commences within 12 months of the end of the payer's tax period; or

(b) it is reasonable to expect that the payment will be included by the jurisdiction of the payee in a future tax period and the terms of payment are those that would be expected to be agreed between independent enterprises.

(3) For the purposes of this paragraph-

(a) a payment representing the underlying return on a transferred financial instrument shall not give rise to a hybrid mismatch under subparagraph (1)(a) where the payment is made by a financial trader under an on-market hybrid transfer provided the payer jurisdiction requires the financial trader to include as income all amounts received in relation to the transferred financial instrument;

(b) a hybrid mismatch shall only arise under subparagraph (1)(e), (f) or (g) to the extent that the payer jurisdiction allows the deduction to be set off against an amount that is not dual inclusion income;

(c) a mismatch outcome shall not be treated as a hybrid mismatch unless it arises between associated enterprises, between a taxpayer and an associated enterprise, between the head office and permanent establishment, between two or more permanent establishments of the same entity or under a structured arrangement.

(4) For the purposes of this paragraph and paragraphs 23 to 28-

(a) “mismatch outcome” means a double deduction or a deduction without inclusion;

(b) “double deduction” means a deduction of the same payment, expenses or losses in the jurisdiction in which the payment has its source, the expenses are incurred or the losses are suffered (payer jurisdiction) and in another jurisdiction (investor jurisdiction); and in the case of a payment by a hybrid entity or permanent establishment the payer jurisdiction is the jurisdiction where the hybrid entity or permanent establishment is established or situated;

(c) “deduction without inclusion” means the deduction of a payment or deemed payment between the head office and permanent establishment or between two or more permanent establishments in any jurisdiction in which that payment or deemed payment is treated as made (payer jurisdiction) without a corresponding inclusion for tax purposes of that

payment or deemed payment in the payee jurisdiction; and the payee jurisdiction is any jurisdiction where that payment or deemed payment is received, or is treated as being received under the laws of any other jurisdiction;

(d) "deduction" means the amount that is treated as deductible from the taxable income under the laws of the payer or investor jurisdiction (and the term "deductible" shall be construed accordingly);

(e) "inclusion" means the amount that is taken into account in the taxable income under the laws of the payee jurisdiction; and-

(i) a payment under a financial instrument shall not be treated as included to the extent that the payment qualifies for any tax relief solely due to the way that payment is characterised under the laws of the payee jurisdiction; and

(ii) the term "included" shall be construed accordingly;

(f) "tax relief" means a tax exemption, reduction in the tax rate or any tax credit or refund (other than a credit for taxes withheld at source);

(g) "dual inclusion income" means any item of income that is included under the laws of both jurisdictions where the mismatch outcome has arisen;

(h) "person" means an individual or entity;

(i) "hybrid entity" means any entity or arrangement that is regarded as a taxable entity under the laws of one jurisdiction and whose income or expenditure is treated as income or expenditure of one or more other persons under the laws of another jurisdiction;

(j) "financial instrument" means any instrument to the extent that it gives rise to a financing or equity return that is taxed under the rules for taxing debt, equity or derivatives under the laws of either the payee or payer jurisdictions and includes a hybrid transfer;

(k) "financial trader" is a person or entity engaged in the business of regularly buying and selling financial instruments on its own account for the purposes of making a profit;

(l) "hybrid transfer" means any arrangement to transfer a financial instrument where the underlying return on the transferred financial instrument is treated for tax purposes as derived simultaneously by more than one of the parties to that arrangement;

(m) "on-market hybrid transfer" means any hybrid transfer that is entered into by a financial trader in the ordinary course of business, and not as part of a structured arrangement;

(n) "disregarded permanent establishment" means any arrangement that is treated as giving rise to a permanent establishment under the laws of the head office jurisdiction and is not treated as giving rise to a permanent establishment under the laws of the other jurisdiction.

Associated enterprise.

22.(1) For the purposes of this Part the definition of "associated enterprise" in paragraph 8A is modified as follows.

(2) Where the mismatch outcome arises under paragraph 21(1)(b), (c), (d), (e) or (g) or where an adjustment is required under paragraph 25, the rate of 25% is replaced by the rate of 50%.

(3) A person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.

(4) An associated enterprise also means-

(a) an entity that is part of the same consolidated group for financial accounting purposes as the taxpayer,

(b) an enterprise in which the taxpayer has a significant influence in the management, or

(c) an enterprise that has a significant influence in the management of the taxpayer.

Denial of deductions.

23.(1) To the extent that a hybrid mismatch results in a double deduction-

(a) the deduction shall be denied in Gibraltar where it is the investor jurisdiction; and

(b) where the deduction is not denied in the investor jurisdiction, the deduction shall be denied in Gibraltar where it is the payer jurisdiction.

(2) Notwithstanding subparagraph (1), any such deduction is eligible to be set off against dual inclusion income whether arising in a current or subsequent tax period.

24.(1) To the extent that a hybrid mismatch results in a deduction without inclusion-

(a) the deduction shall be denied in Gibraltar where it is the payer jurisdiction; and

(b) where the deduction is not denied in the payer jurisdiction, the amount of the payment that would otherwise give rise to a mismatch outcome shall be included in income in Gibraltar (for the purposes of the calculation of tax in accordance with section 11 of this Act) where Gibraltar is the payee jurisdiction.

(2) Subparagraph (1) does not apply in relation to hybrid mismatches resulting from a payment of interest under a financial instrument to an associated enterprise where-

(a) the financial instrument has conversion, bail-in or write down features;

(b) the financial instrument has been issued with the sole purpose of satisfying loss absorbing capacity requirements applicable to the banking sector and the financial instrument is recognised as such in the taxpayer's loss absorbing capacity requirements;

(c) the financial instrument has been issued-

(i) in connection with financial instruments with conversion, bail-in or write down features at the level of a parent undertaking,

(ii) at a level necessary to satisfy applicable loss absorbing capacity requirements,

(iii) not as part of a structured arrangement; and

(d) the overall net deduction for the consolidated group under the arrangement does not exceed the amount that it would have been had the taxpayer issued such financial instrument directly to the market.

(3) The exclusion in subparagraph (2) applies in relation to accounting periods ending on or before 31 December 2022.

(4) Subparagraph (1)(a) does not apply in relation to hybrid mismatches as defined in paragraph 21(1)(b), (c), (d) or (f).

25.(1) A deduction shall be denied in Gibraltar for any payment by a taxpayer to the extent that such payment directly or indirectly funds deductible expenditure giving rise to a hybrid mismatch through a transaction or series of transactions between associated enterprises or entered into as part of a structured arrangement.

(2) But subparagraph (1) does not apply to the extent that one of the jurisdictions involved in the transaction or series of transactions has made an equivalent adjustment in respect of such hybrid mismatch.

26.(1) To the extent that a hybrid mismatch involves disregarded permanent establishment income which is not subject to tax in Gibraltar in the case of a taxpayer resident in Gibraltar for tax purposes, the taxpayer must include (for the purposes of the calculation of tax in accordance with section 11 of this Act) the income that would otherwise be attributed to the disregarded permanent establishment.

(2) Subparagraph (1) applies unless income is exempted under a double taxation treaty that applies in relation to Gibraltar.

27. To the extent that a hybrid transfer is designed to produce a relief for tax withheld at source on a payment derived from a transferred financial instrument to more than one of the parties involved, where Gibraltar is the jurisdiction of the taxpayer, the benefit of such relief is limited in proportion to the net taxable income regarding such payment.

Tax residency mismatches.

28.(1) To the extent that a deduction for payment, expenses or losses of a taxpayer who is resident for tax purposes in two or more jurisdictions is deductible from the tax base in both jurisdictions, Gibraltar as the jurisdiction of the taxpayer shall deny the deduction to the extent that the other jurisdiction allows the duplicate deduction to be set off against income that is not dual-inclusion income.

(2) If the other jurisdiction is the United Kingdom or a Member State of the European Union, Gibraltar as the jurisdiction where the taxpayer is not deemed to be a resident according to the double taxation treaty concerned shall deny the deduction.”.

(4) In Schedule 5-

(a) In the title for Part I substitute “PARENT AND SUBSIDIARY COMPANY RULE” for “PARENT AND SUBSIDIARY DIRECTIVE”; and

(b) In the title of Part II substitute “TAXATION APPLICABLE TO INTEREST AND ROYALTY PAYMENTS MADE BETWEEN ASSOCIATED COMPANIES OF DIFFERENT MEMBER STATES” for “TAXATION APPLICABLE TO INTEREST AND ROYALTY PAYMENTS MADE BETWEEN ASSOCIATED COMPANIES OF DIFFERENT MEMBER STATES RULE”.

Dated: 18th December 2020.

F R PICARDO,
Minister with responsibility for taxation.

EXPLANATORY MEMORANDUM

These Regulations amend the anti-avoidance provisions in Schedule 4 to the Income Tax Act 2010 to provide for deficiencies that arise as a result of Gibraltar's exit from the European Union.