

SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 3977 of 17 January, 2013

LEGAL NOTICE NO. 5 OF 2013.

INTERPRETATION AND GENERAL CLAUSES ACT

INCOME TAX ACT 2010 (AMENDMENT) REGULATIONS 2013

In exercise of the powers conferred upon it by section 23(g)(ii) of the Interpretation and General Clauses Act and for the purpose of transposing, into the law of Gibraltar, Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, the Government has made the following Regulations—

Title and commencement.

1.(1) These Regulations may be cited as the Income Tax Act 2010 (Amendment) Regulations 2013.

(2) These Regulations come into operation on 1 January 2013.

Amendment of the Income Tax Act 2010.

2. The Income Tax Act 2010 (the “Act”) is amended in accordance with regulation 3.

Substitution of new sections 4 to 5F.

3. For sections 4 to 5B of the Act substitute the following—

“Information requests from or to Member States.

4.(1) The Commissioner shall comply with any request from the competent authority of a Member State to provide any tax compliance information which the Commissioner has or can obtain through administrative enquiries under section 5.

(2) The Commissioner shall comply with a request as soon as reasonably practicable and in any event within the period of—

- (a) two months beginning with the date on which the request is received, where the Commissioner has the information at that date, or
 - (b) six months beginning with the date on which the request is received, where the Commissioner obtains the information through administrative enquiries.
- (3) The Commissioner and the requesting authority may vary a limit in subsection (2)(a) or (b) where they think it appropriate by reason of special circumstances.
- (4) If the Commissioner cannot comply with a request within the limit set by subsection (2) he shall—
 - (a) inform the requesting authority as soon as reasonably practicable and in any event within the period of three months beginning with the date on which the request is received, and
 - (b) set a period within which he expects to be able to comply with the request.
- (5) The Commissioner shall acknowledge a request as soon as reasonably practicable and in any event within the period of seven working days beginning with the date on which the request is received; and an acknowledgment must be made electronically if possible.
- (6) If the Commissioner considers that a request cannot be complied with unless additional background information is provided by the requesting authority—
 - (a) he shall notify the requesting authority within the period of one month beginning with the date on which the request is received, and
 - (b) subsection (2) shall then apply as if the request had been received when the additional information is received.
- (7) The Commissioner need not comply with a request if in his opinion the requesting authority has not exhausted the usual

sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives.

- (8) If the Commissioner is unable to comply with a request, or declines to comply on grounds falling within section 5E(3), he shall inform the requesting authority, with his reasons, as soon as reasonably practicable and in any event within the period of one month beginning with the date on which the request is received.
- (9) The Commissioner may make a request for information to the competent authority of a Member State in accordance with Article 5 of the Cooperation Directive.

Administrative enquiries.

- 5.(1) The Commissioner shall make any necessary administrative enquiries to obtain tax compliance information requested by a competent authority in accordance with section 4.
- (2) The Commissioner shall comply with any reasoned request by a competent authority for a specific administrative inquiry unless the Commissioner decides that the enquiry is unnecessary, in which case he shall inform the requesting authority of his reasons.
- (3) In conducting an administrative enquiry the Commissioner—
 - (a) has all the powers that he has under this Act for any enforcement or investigative purposes, and
 - (b) must follow the same procedures as he would when acting on his own initiative or at the request of another public authority in Gibraltar (and must, in particular, comply with any condition or restriction imposed on those powers under this Act).
- (4) The Commissioner shall provide original documents requested by a requesting authority, unless the Commissioner considers that it would be contrary to this Act or any other enactment to do so.

Exchange of information about foreign residents.

- 5A.(1) The Commissioner shall provide to the competent authority of a Member State relevant tax compliance information concerning residents in that Member State, in respect of—
- (a) income from employment;
 - (b) directors' fees;
 - (c) life insurance products on which information is not required to be communicated in accordance with any other European Union legislation;
 - (d) pensions; and
 - (e) ownership of and income from immovable property.
- (2) Tax compliance information is relevant for the purposes of subsection (1) if it is in the Commissioner's tax files and is retrievable in accordance with the procedures for gathering and processing information in Gibraltar.
- (3) The Commissioner may indicate to the competent authority of a Member State and the European Commission—
- (a) that he does not wish to receive information of a kind listed in subsection (1), or
 - (b) that he does not wish to receive information of a kind listed in subsection (1) about income or capital not exceeding a specified threshold amount.
- (4) The Commissioner shall comply with subsection (1) in respect of the tax year beginning on 1 July 2014 and in respect of taxable periods in Member States beginning on or after 1 January 2014.
- (5) Compliance shall be effected at least once a year, during the period of six months beginning with the end of the tax year during which the information becomes available.

- (6) The Commissioner shall ensure that the European Commission is informed about the volume of information provided under this section, or received from Member States in accordance with Article 8 of the Cooperation Directive; and the Commissioner's information must—
 - (a) include information about the costs and benefits, both for the Government and for other persons, of the exchange of information, and
 - (b) be provided before 1 July 2016 and thereafter at not more than yearly intervals.
- (7) This section comes into operation on 1 January 2015 in relation to the tax years and periods specified herein.

Other exchange of information with Member States.

- 5B.(1) The Commissioner shall provide to the competent authority of a Member State tax compliance information if in his opinion—
- (a) it may be relevant to a loss of tax in that State;
 - (b) a reduction of or exemption from tax in Gibraltar may lead to or increase a liability to tax in that State;
 - (c) business dealings between a person liable to tax in one Member State and a person liable to tax in the other Member State are conducted through Gibraltar in such a way that a saving in tax may result in one or both of those Member States;
 - (c) a saving of tax may result from artificial transfers of profits within groups of enterprises;
 - (d) information provided to the Commissioner by the competent authority of a Member State has enabled information to be obtained which may be relevant in assessing liability to tax in that Member State.

- (2) The Commissioner may provide to the competent authority of a Member State any tax compliance information which may be useful to the competent authority of that Member State.
- (3) The Commissioner shall comply with subsection (1) as soon as reasonably practicable and in any event within the period of one month beginning with the date on which the information comes to the Commissioner's knowledge.
- (4) The Commissioner shall acknowledge information received from the competent authority of a Member State in accordance with Article 9 of the Cooperation Directive as soon as reasonably practicable and in any event within the period of seven working days beginning with the date on which the information is received; and an acknowledgment must be made electronically if possible.

Administrative cooperation with tax authorities of Member States.

- 5C.(1) The Commissioner shall, with the prior approval of the Minister, make such arrangements as appear to him to be necessary for the purpose of giving effect to agreements between Gibraltar and Member States under Article 11 of the Cooperation Directive (involvement of foreign tax officials).
- (2) For the purpose of subsection (1)–
 - (a) the Commissioner may arrange for officials of a Member State to be present in the offices where staff or agents of the Commissioner are carrying out their duties;
 - (b) the Commissioner may arrange for officials of a Member State to be present during administrative enquiries carried out in Gibraltar;
 - (c) the Commissioner may provide information to officials of a Member State;
 - (d) officials of a Member State may, in the presence of staff or agents of the Commissioner, interview persons and examine records to the same extent as the

Commissioner could do in relation to the tax affairs of Gibraltar;

- (e) enforcement powers available to the Commissioner in respect of failure to cooperate with enquiries or investigations may be exercised by the Commissioner where a person fails to cooperate with officials of a Member State;
 - (f) powers may be exercised by or on behalf of officials of a Member State only if they produce on request written authority stating their identity and official capacity.
- (3) The Commissioner may participate in simultaneous controls proposed by one or more Member States, under Article 12 of the Cooperation Directive, relating to one or more persons of common or complementary interest, with a view to exchanging information obtained.
 - (4) The Commissioner may propose to the competent authority of one or more Member States the establishment of simultaneous controls under that Article, giving reasons for the choice of persons to be the subject of the controls and specifying a timetable for the controls.
 - (5) Where the Commissioner decides not to participate in simultaneous controls proposed by a Member State he shall inform the competent authority of that State, giving his reasons.
 - (6) In respect of each simultaneous control operation proposed by the Commissioner or in which he agrees to participate, the Commissioner shall appoint a representative with responsibility for supervising and coordinating the control operation.
 - (7) The Commissioner shall comply with any request of the competent authority of a Member State to make arrangements to notify a specified person of an instrument or decision which emanates from the administrative authorities of that State and relates to the application in that State of tax legislation.

- (8) The Commissioner's duty under subsection (7)–
- (a) is confined to a duty to make arrangements of a kind normally made by the Commissioner;
 - (b) is subject to compliance by the requesting competent authority with the requirements of Article 13(2) and (4) of the Cooperation Directive; and
 - (c) includes a duty to respond to the requesting competent authority as soon as reasonably practicable and to inform that authority of the date on which any notification arrangements are effected.
- (9) The Commissioner may–
- (a) make a request to the competent authority of a Member State for a person in that State to be notified of an instrument or decision relating to tax in Gibraltar;
 - (b) effect notification, to a person in a Member State, of an instrument or document relating to tax in Gibraltar by registered mail or electronic means, notwithstanding any provision of the law of Gibraltar as to the method of notification, if the Commissioner's inability to use registered mail or electronic means would result in the competent authority of that State not being required to comply with a request by the Commissioner under Article 13 of the Cooperation Directive.
- (10) Where the Commissioner provides information to the competent authority of a Member State in accordance with the Cooperation Directive and the competent authority requests permission to use the information for purposes other than the administration and enforcement of tax, the Commissioner shall grant the request if the information could be used for those additional purposes by the Commissioner in accordance with the law of Gibraltar.

Sharing experience of tax cooperation with Member States.

- 5D.(1) Where the Commissioner receives information from the competent authority of a Member State in accordance with exchange of information on request or spontaneous exchange he shall comply with any request of that competent authority to provide feedback about the information in accordance with arrangements made by the European Commission pursuant to Article 14(1) of the Cooperation Directive.
- (2) The Commissioner shall comply with subsection (1) as soon as reasonably practicable and in any event within the period of three months beginning with the date on which the necessary information is available to him.
- (3) The Commissioner shall provide feedback to Member States on the receipt or provision of information by way of automatic exchange in accordance with arrangements agreed with Member States pursuant to Article 14(2) of the Cooperation Directive.
- (4) The Commissioner shall participate in arrangements operated by the European Commission for the sharing of experience, and the development of guidelines, in accordance with Article 15 of the Cooperation Directive.

Sections 4 to 5D: supplemental.

5E.(1) In this section and sections 4 to 5D—

“administrative enquiries” means enquiries addressed to any Government department or other public authority in Gibraltar and any other controls, checks or action taken by the Commissioner in the performance of his duties with a view to ensuring the proper application of tax legislation;

“automatic exchange” means the communication of information in accordance with section 5A;

“competent authority” in relation to a Member State means the authority which has been designated as such by that

Member State for the purposes of the Cooperation Directive, and includes a central liaison office, liaison department or competent official (all of which have the meaning given by Article 3 of the Cooperation Directive) acting pursuant to delegation under the Directive in accordance with Article 4;

“the Cooperation Directive” means Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, as amended from time to time;

“exchange of information on request” means the communication of information in accordance with sections 4 and 5;

“information” includes documents;

“spontaneous exchange” means the communication of information in accordance with section 5B;

“tax” means income tax and any other tax to which the Cooperation Directive applies in accordance with Article 2;

“tax compliance information” means information that is foreseeably relevant to the administration or enforcement of the law of any Member State concerning tax; and

“third country” means a country that is not a Member State.

(2) Information received by the Commissioner under sections 4 to 5D—

- (a) may be provided or used for any purpose of the Cooperation Directive (including further disclosure in accordance with Article 16(3));
- (b) may be used for the administration and enforcement of tax;

- (c) may be used for the assessment and enforcement of other taxes and duties covered by section 25 of the Mutual Assistance (European Union) Act 2005;
 - (d) may be used for the assessment and enforcement of compulsory social security contributions;
 - (e) may be used in connection with judicial and administrative proceedings that may involve penalties, initiated as a result of infringements of tax law (subject to any general rule or provision governing the rights of defendants and witnesses in such proceedings);
 - (f) subject to paragraphs (a) to (e), is to be treated for the purposes of the law of Gibraltar relating to admissibility, authentication, confidentiality or other protection in the same way as other information received by the Commissioner (and is, in particular, to be subject to relevant law on data protection in accordance with Article 25 of the Cooperation Directive); and
 - (g) may be used for other purposes with the permission of the competent authority which provided the information, subject to paragraph (f).
- (3) Sections 4 to 5D do not require or permit the Commissioner—
- (a) to make enquiries or to provide information if the law of Gibraltar would prohibit the Commissioner from making enquiries of that kind, or obtaining information of that kind, for the purposes of the exercise of his other functions under this Act,
 - (b) to provide information to a Member State which is unable, for legal reasons, to provide similar information to the Commissioner, or
 - (c) to provide information where in the Commissioner's opinion it would lead to the disclosure of a commercial, industrial or professional secret or of a

commercial process, or of information whose disclosure would be contrary to public policy;

and where the Commissioner relies on this subsection in declining to take action he shall inform any requesting authority of his reasons.

- (4) Subsection (3) does not permit the Commissioner to decline—
 - (a) to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person; except that the Commissioner may refuse the transmission of requested information where such information concerns taxable periods prior to 1 January 2011 and where the transmission of such information could have been refused on the basis of Article 8(1) of Directive 77/799/EEC if it had been requested before 11 March 2011;
 - (b) to cooperate with a Member State to as wide an extent as the Commissioner cooperates with a third country.
- (5) Sections 4 to 5D—
 - (a) do not affect the application of any enactment or rule of law relating to mutual assistance between countries in relation to criminal matters, and
 - (b) are without prejudice to any obligations of Gibraltar under any Convention or bilateral or multilateral agreements with one or more countries in relation to wider administrative cooperation.
- (6) For the purposes of obtaining information in accordance with sections 4 to 5D the Commissioner may apply any power or duty (including any related enforcement provision) that would be available to him if he required the information for the purposes of any of his other functions under this Act (and the Commissioner must use his powers aimed at gathering information even though he does not need the information for the purpose of the exercise of his other functions).

- (7) In complying with sections 4 to 5D the Commissioner shall—
- (a) so far as reasonably practicable, use any relevant standard forms adopted by the European Commission in accordance with Articles 20 and 26 of the Cooperation Directive;
 - (b) so far as reasonably practicable, use the electronic means and common platform described in Articles 3 (12), (13) and 21 of the Cooperation Directive;
 - (c) conduct operations in any language agreed between him and the competent authorities of the Member States, using translations where the Commissioner or another competent authority gives reasons why a translation is necessary having regard to special circumstances.
- (8) The Commissioner's obligations in respect of information under sections 4 to 5D extend to information obtained by him from a third country only to the extent that further disclosure of that information is allowed pursuant to the agreement with that third country.
- (9) The Commissioner may communicate to a third country information obtained in accordance with the Cooperation Directive, provided that—
- (a) the communication is made in accordance with a provision of the law of Gibraltar, or administrative arrangements, permitting the communication of personal data to third countries,
 - (b) the competent authority of the Member State from which the information originates has consented to the communication, and
 - (c) the third country has given an undertaking to provide the cooperation required to gather evidence of the irregular or illegal nature of transactions which appear to contravene or constitute an abuse of tax legislation.

- (10) The Commissioner is the competent authority in Gibraltar for the purposes of the Cooperation Directive.
- (11) Where sections 4 to 5D impose obligations on the Commissioner in relation to matters that do not relate to income tax and are not within the Commissioner's general responsibilities—
 - (a) the Minister shall make arrangements for compliance with the obligations by the relevant public authority in Gibraltar, and
 - (b) that public authority shall comply with arrangements made by the Minister;

and references to the Commissioner include (except where the context otherwise requires) references to such other public authority as well as to any central liaison office, liaison department or competent official (within the meaning of Article 3 of the Cooperation Directive) acting pursuant to delegation made by the Commissioner in accordance with Article 4 of the Cooperation Directive.

- (12) The Minister, in consultation with the Commissioner, shall take all measures necessary to—
 - (a) ensure effective internal coordination between the bodies referred to in subsection (11) ;
 - (b) establish direct cooperation with the competent authorities of the Member States ; and
 - (c) ensure the smooth operation of the administrative cooperation arrangements provided for in the Cooperation Directive.

Review of operation of sections 4 to 5E.

5F.(1) The Minister shall from time to time review the operation of sections 4 to 5E.

(2) The Minister shall ensure that the European Commission is provided with—

- (a) any relevant information necessary for the evaluation of the effectiveness of administrative cooperation in accordance with the Cooperation Directive in combating tax evasion and tax avoidance, and
- (b) a yearly assessment of the effectiveness of the automatic exchange of information referred to in section 5A as well as the practical results achieved.”.

Dated 17th January, 2013.

F R PICARDO,
Chief Minister.
For the Government.

EXPLANATORY MEMORANDUM

These Regulations transpose into the law of Gibraltar Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC by way of minimum amendments to the Income Tax Act 2010.

The Regulations require the Commissioner of Income Tax to provide certain kinds of tax information to the tax authorities of other Member States, and to cooperate with their enquiries and investigations.

According to the Global Forum on Transparency and Exchange of Information for Tax Purposes, of the Organisation for Economic Co-operation and Development (OECD), Council Directive 2011/16/EU has effect equivalent to a Tax Information Exchange Agreement (TIEA); the effect of the transposition of the Directive by these Regulations will therefore be that Gibraltar will be party to TIEA-equivalent arrangements with all 27 Member States of the European Union.