

SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4656 GIBRALTAR Thursday 30th January 2020

LEGAL NOTICE NO. 55 OF 2020.

INTERPRETATION AND GENERAL CLAUSES ACT

INCOME TAX (AMENDMENT) REGULATIONS 2020

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 (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, the Government has made the following Regulations—

Title.

1. These Regulations may be cited as the Income Tax (Amendment) Regulations 2020.

Commencement.

2. These Regulations come into operation on 1 July 2020.

Scope

3. These Regulations amend the Income Tax Act 2010 for the purpose of giving effect in the law of Gibraltar to Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

Amendment of Income Tax Act 2010

4. After Part 1B of the Income Tax Act 2010 (Country by Country Reporting) insert—

“PART 1C

REPORTABLE CROSS-BORDER ARRANGEMENTS

Interpretation

10ZE.(1) In this Part—

“the Cooperation Directive” has the meaning given by section 5E(1);

“the 2018 Information Exchange Directive” means Council Directive (EU) 2018/822 amending the Cooperation Directive;

“associated enterprise” has the meaning given by section 10ZF;

“bespoke arrangement” means any cross-border arrangement that is not a marketable arrangement;

“cross-border arrangement” has the meaning given by section 10ZG;

“hallmark” means a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance, as listed in Schedule 11;

“intermediary” has the meaning given in section 10ZH;

“marketable arrangement” means a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised;

“relevant taxpayer” means any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement; and

“reportable cross-border arrangement” means any cross-border arrangement that contains at least one of the hallmarks set out in Schedule 11.

(2) Other expressions have the same meaning in this Part as in Part 1B.

Associated enterprise

10ZF.(1) In this Part “associated enterprise” means a person who is related to another person in at least one of the following ways—

- (a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person;
- (b) a person participates in the control of another person through a holding that exceeds 25 % of the voting rights;
- (c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25% of the capital;
- (d) a person is entitled to 25% or more of the profits of another person.

- (2) If more than one person participates, as referred to in subsection (1)(a) to (d), in the management, control, capital or profits of the same person, all persons concerned shall be regarded as associated enterprises.
- (3) If the same persons participate, as referred to in subsection (1)(a) to (d), in the management, control, capital or profits of more than one person, all persons concerned shall be regarded as associated enterprises.
- (4) 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.
- (5) In indirect participations—
 - (a) the fulfilment of requirements under subsection (1)(c) shall be determined by multiplying the rates of holding through the successive tiers, and
 - (b) a person holding more than 50% of the voting rights shall be deemed to hold 100%.
- (6) An individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single person.

Cross-border arrangement

10ZG.(1) In this Part “cross-border arrangement” means an arrangement concerning either more than one Member State or a Member State and a third country where at least one of conditions in subsection (2) is met.

- (2) Those conditions are that—
 - (a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;
 - (b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;
 - (c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;
 - (d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;

- (e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.
- (3) For the purposes of this Part, an arrangement also includes a series of arrangements.
- (4) An arrangement may comprise more than one step or part.

Intermediary

10ZH.(1) In this Part “intermediary”—

- (a) means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement; and
 - (b) also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.
- (2) For the purpose of subsection (1)(b)—
- (a) any person has the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement; and
 - (b) for that purpose, that person may refer to all relevant facts and circumstances as well as available information and their relevant expertise and understanding.
- (3) In order to be an intermediary, a person shall meet at least one of the following additional conditions (and the previous subsections of this section are subject to this subsection): the intermediary must—
- (a) be resident for tax purposes in a Member State;
 - (b) have a permanent establishment in a Member State through which the services with respect to the arrangement are provided;
 - (c) be incorporated in, or governed by the laws of, a Member State; and
 - (d) be registered with a professional association related to legal, taxation or consultancy services in a Member State.

Reportable cross-border arrangements: exchange of information by intermediaries

10ZI.(1) Intermediaries must file information that is within their knowledge, possession or control on reportable crossborder arrangements with the Commissioner within the period of 30 days beginning—

- (a) on the day after the reportable cross-border arrangement is made available for implementation; or
- (b) on the day after the reportable cross-border arrangement is ready for implementation; or
- (c) when the first step in the implementation of the reportable cross-border arrangement has been made,

whichever occurs first.

- (2) Notwithstanding subsection (1), intermediaries referred to in section 10ZH(1)(b) must also file information within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.
- (3) In the case of marketable arrangements, a periodic report must be made by the intermediary every 3 months providing an update which contains new reportable information as referred to in section 10ZK(2)(a), (d), (g) and (h) that has become available since the last report was filed.
- (4) Where the intermediary is liable to file information on reportable cross-border arrangements with the competent authorities of more than one Member State, such information is to be filed in Gibraltar only if Gibraltar features first in the list below—
 - (a) the Member State where the intermediary is resident for tax purposes;
 - (b) the Member State where the intermediary has a permanent establishment through which the services with respect to the arrangement are provided;
 - (c) the Member State which the intermediary is incorporated in or governed by the laws of;
 - (d) the Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services.
- (5) Where, pursuant to subsection (4), there is a multiple reporting obligation, the intermediary is exempt from filing the information in Gibraltar if it has proof, in accordance with any relevant national law, that the same information has been filed in a Member State outside Gibraltar.

- (6) Intermediaries have the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the law of Gibraltar; and
 - (a) where this subsection applies, intermediaries must notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations under section 10ZJ; and
 - (b) intermediaries are only entitled to a waiver to the extent that they operate within the limits of the relevant law of Gibraltar in respect of their professions.
- (7) Where there is more than one intermediary, the obligation to file information on the reportable cross-border arrangement lies with all intermediaries involved in the same reportable cross-border arrangement.
- (8) An intermediary is exempt from filing the information only to the extent that it has proof, in accordance with any relevant national law, that the same information referred to in section 10ZK(2) has already been filed by another intermediary.
- (9) Intermediaries—
 - (a) must file information on reportable cross-border arrangements the first step of which was implemented between the date of entry into force and the date of application of the Cooperation Directive, and
 - (b) must file information on those reportable cross-border arrangements by 31 August 2020.

Reportable cross-border arrangements: exchange of information by relevant taxpayers

- 10ZJ.(1) Where there is no intermediary or the intermediary notifies the relevant taxpayer or another intermediary of the application of a waiver under section 10ZI(6), the obligation to file information on a reportable cross-border arrangement lies with—
- (a) the other notified intermediary, or
 - (b) if there is no such intermediary, the relevant taxpayer.
- (2) The relevant taxpayer with whom the reporting obligation lies must file the information within 30 days, beginning—
- (a) on the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or is ready for implementation by the relevant taxpayer, or

- (b) when the first step in its implementation has been made in relation to the relevant taxpayer, whichever occurs first.
- (3) Where the relevant taxpayer has an obligation to file information on the reportable cross-border arrangement with the competent authorities of more than one Member State, such information is to be filed in Gibraltar only if Gibraltar features first in the list below—
 - (a) the Member State where the relevant taxpayer is resident for tax purposes;
 - (b) the Member State where the relevant taxpayer has a permanent establishment benefiting from the arrangement;
 - (c) the Member State where the relevant taxpayer receives income or generates profits, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State;
 - (d) the Member State where the relevant taxpayer carries on an activity, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State.
- (4) Where, pursuant to subsection (3), there is a multiple reporting obligation, the relevant taxpayer is exempt from filing the information if it has proof, in accordance with any relevant national law, that the same information has been filed in another Member State.
- (5) Where the reporting obligation lies with the relevant taxpayer and where there is more than one relevant taxpayer, the relevant taxpayer that is to file information in accordance with subsection (1) is the one that features first in the list below—
 - (a) the relevant taxpayer that agreed the reportable cross-border arrangement with the intermediary;
 - (b) the relevant taxpayer that manages the implementation of the arrangement.
- (6) Any relevant taxpayer shall only be exempt from filing the information to the extent that it has proof, in accordance with any relevant national law, that the same information referred to in section 10ZK(2) has already been filed by another relevant taxpayer.
- (7) Relevant taxpayers—
 - (a) must file information on reportable cross-border arrangements the first step of which was implemented between the date of entry into force and the date of application of the Cooperation Directive, and

- (b) must file information on those reportable cross-border arrangements by 31 August 2020.

Communication of information by Commissioner

10ZK.(1) The Commissioner where the information was filed pursuant to this Part shall, by means of an automatic exchange, communicate the information specified in subsection (2) to the competent authorities of all Member States, in accordance with the practical arrangements adopted pursuant to Article 21 of the Cooperation Directive (as amended by the 2018 Information Exchange Directive).

(2) The information to be communicated by the Commissioner under subsection (1) must contain the following, as applicable—

- (a) the identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of an individual), residence for tax purposes, TIN and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;
- (b) details of the hallmarks that make the cross-border arrangement reportable;
- (c) a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy;
- (d) the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made;
- (e) details of the national provisions that form the basis of the reportable cross-border arrangement;
- (f) the value of the reportable cross-border arrangement;
- (g) the identification of the relevant taxpayer or taxpayers' Member State, and any Member States which are likely to be concerned by the reportable cross-border arrangement; and
- (h) the identification of any other person in a Member State likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked.

- (3) The fact that a tax administration does not react to a reportable cross-border arrangement shall not imply any acceptance of the validity or tax treatment of that arrangement.
- (4) To facilitate the exchange of information referred to in subsection (1), the Commissioner shall comply with any practical arrangements adopted by the European Commission in accordance with Article 8ab(16) of the Cooperation Directive (as inserted by the 2018 Information Exchange Directive).
- (5) In accordance with Article 8ab(17) of the Cooperation Directive (as inserted by the 2018 Information Exchange Directive), the European Commission is not to have access to information referred to in subsection(2)(a), (c) and (h).
- (6) The automatic exchange of information must take place within one month of the end of the quarter in which the information was filed.
- (7) The first information must be communicated by 31 October 2020.
- (8) In complying with provisions of this Part the Commissioner shall—
 - (a) use any relevant standard forms adopted by the European Commission in accordance with Article 20 of the Cooperation Directive;
 - (b) adopt any relevant linguistic arrangements provided for in Article 20of the Cooperation Directive;
 - (c) use the central directory on administrative cooperation in the field of taxation developed and provided by the European Commission under Article 21(5) of the Cooperation Directive; and
 - (d) ensure information is provided in an official and working language of the European Union.
- (9) Until the central directory mentioned in subsection (8)(c) is operational, the Commissioner shall ensure the information is exchanged using the electronic means and common platform described in Article 3(12), (13) and 21 of the Cooperation Directive and the applicable practical arrangements.
- (10) In this Part “automatic exchange” has the meaning given by Article 3 of the Cooperation Directive.

Penalties.

10ZL. The provisions of sections 10U to 10ZA apply in relation to a failure to comply with a provision of this Part, and in relation to the provision of inaccurate information when purporting to comply with a provision of this Part, as they apply in relation to failing to comply with a provision of Part 1B or providing inaccurate information when purporting to comply with a provision of that Part.”

5.(1) Section 5F of the Income Tax Act 2010 (Cooperation Directive: review of operation of exchange of information) is amended as follows.

(2) In subsection (1) after “Part 1B” insert “, Part 1C”.

(3) In subsection (2)(b) after “Part 1B” insert “, Part 1C”.

6. After Schedule 10 to the Income Tax Act 2010 insert the Schedule 11 set out in the Schedule to these Regulations.

SCHEDULE

NEW SCHEDULE 11 TO THE INCOME TAX ACT 2010

“SCHEDULE 11

REPORTABLE CROSS-BORDER ARRANGEMENTS: HALLMARKS

Section 10ZE(1)

Part I. Main benefit test

Generic hallmarks under category A and specific hallmarks under category B and under points (b)(i), (c) and (d) of paragraph 1 of category C may only be taken into account where they fulfil the “main benefit test”.

That test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

In the context of hallmark under paragraph 1 of category C, the presence of conditions set out in points (b)(i), (c) or (d) of paragraph 1 of category C cannot alone be a reason for concluding that an arrangement satisfies the main benefit test.

Part II. Categories of hallmarks

A. Generic hallmarks linked to the main benefit test

1. An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.
2. An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to:
 - (a) the amount of the tax advantage derived from the arrangement; or
 - (b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.

3. An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.

B. Specific hallmarks linked to the main benefit test

1. An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.
2. An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.
3. An arrangement which includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features.

C. Specific hallmarks related to cross-border transactions

1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:
 - (a) the recipient is not resident for tax purposes in any tax jurisdiction;
 - (b) although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:
 - (i) does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; or
 - (ii) is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the OECD as being non-cooperative;
 - (c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes;
 - (d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes;
2. Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.
3. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.

4. There is an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.

D. Specific hallmarks concerning automatic exchange of information and beneficial ownership

1. An arrangement which may have the effect of undermining the reporting obligation under the laws implementing Union legislation or any equivalent agreements on the automatic exchange of Financial Account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements. Such arrangements include at least the following:

- (a) the use of an account, product or investment that is not, or purports not to be, a Financial Account, but has features that are substantially similar to those of a Financial Account;
- (b) the transfer of Financial Accounts or assets to, or the use of jurisdictions that are not bound by the automatic exchange of Financial Account information with the State of residence of the relevant taxpayer;
- (c) the reclassification of income and capital into products or payments that are not subject to the automatic exchange of Financial Account information;
- (d) the transfer or conversion of a Financial Institution or a Financial Account or the assets therein into a Financial Institution or a Financial Account or assets not subject to reporting under the automatic exchange of Financial Account information;
- (e) the use of legal entities, arrangements or structures that eliminate or purport to eliminate reporting of one or more Account Holders or Controlling Persons under the automatic exchange of Financial Account information;
- (f) arrangements that undermine, or exploit weaknesses in, the due diligence procedures used by Financial Institutions to comply with their obligations to report Financial Account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.

2. An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:

- (a) that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and
- (b) that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the

beneficial owners of the assets held by such persons, legal arrangements or structures; and

- (c) where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive (EU) 2015/849, are made unidentifiable.

E. Specific hallmarks concerning transfer pricing

1. An arrangement which involves the use of unilateral safe harbour rules.
2. An arrangement involving the transfer of hard-to-value intangibles. The term “hard-to-value intangibles” covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises:
 - (a) no reliable comparables exist; and
 - (b) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.
3. An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50 % of the projected annual EBIT of such transferor or transferors if the transfer had not been made.”

Dated: 30th January 2020.

F R PICARDO,
Chief Minister,
For the Government.

EXPLANATORY MEMORANDUM

These Regulations amend the Income Tax Act 2010 for the purpose of implementing Council Directive (EU) 2018/822 of 25 May 2018 (“the Directive”) amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

The Directive imposes a new obligation on EU-based tax consultants, banks, lawyers, and other intermediaries to disclose any cross-border arrangement that contains one or more features or “hallmarks,” if they are identified as intermediaries for the purposes of the Directive.

The geographical scope of the new reporting requirements comprises arrangements within the EU, as well as between Member States and third countries.

The hallmarks cover a range of structures and transactions, including certain deductible payments which are taxed at a rate of zero or nearly zero when received and intercompany transactions which meet specific transfer pricing hallmarks, such as any transfer of hard-to-value intangibles.