

# SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4813 GIBRALTAR Thursday 21st January 2021

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LEGAL NOTICE NO. 78 OF 2021.

## EUROPEAN UNION (WITHDRAWAL) ACT 2019

### INCOME TAX ACT 2010 (AMENDMENT) (EU EXIT) REGULATIONS 2021

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 2021.

#### **Commencement.**

2. These Regulations are deemed to have come into operation on 1 January 2021.

#### **Amendment of Income Tax Act 2010.**

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

(2) In Part 1C, for sections 10ZE to 10ZL, substitute-

#### **“Interpretation.**

10ZE.(1) In this Part-

“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

“relevant State” means-

- (a) a Member State of the European Union; or
- (b) Gibraltar; or
- (c) the United Kingdom;

“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 more than one relevant State or a relevant State and another 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 relevant State;
- (b) have a permanent establishment in a relevant State through which the services with respect to the arrangement are provided;
- (c) be incorporated in, or governed by the laws of, a relevant State; and
- (d) be registered with a professional association related to legal, taxation or consultancy services in a relevant State.

**Reportable cross-border arrangements: exchange of information by intermediaries.**

10ZI.(1) Intermediaries must, subject to subsection (1A), file information that is within their knowledge, possession or control on reportable cross-border 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.

(1A) The period of 30 days for filing information referred to in subsection (1) begins by 1 January 2021 where-

- (a) a reportable cross-border arrangement is made available for implementation or is ready for implementation, or where the first step in its implementation has been made between 1 July 2020 and 31 December 2020; or
- (b) intermediaries within the meaning of section 10ZH(1)(b) provide, directly or by means of another person, aid, assistance or advice between 1 July 2020 and 31 December 2020.

(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, subject to subsection (3A), 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.

(3A) The first periodic report under subsection (3) must be made by intermediaries by 30 April 2021.

(4) Where the intermediary is liable to file information on reportable cross-border arrangements with the competent authorities of more than one relevant State, such information is to be filed in Gibraltar only if Gibraltar features first in the list below-

- (a) the jurisdiction where the intermediary is resident for tax purposes;
- (b) the jurisdiction where the intermediary has a permanent establishment through which the services with respect to the arrangement are provided;
- (c) the jurisdiction which the intermediary is incorporated in or governed by the laws of;
- (d) the jurisdiction 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 relevant State other than 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 25 June 2018 and 1 July 2020, and
- (b) must file information on those reportable cross-border arrangements by 28 February 2021.

**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, subject to subsection 2A), 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.

(2A) The period of 30 days for filing information referred to in subsection (2) begins by 1 January 2021 where-

- (a) a reportable cross-border arrangement is made available for implementation or is ready for implementation, or where the first step in its implementation has been made between 1 July 2020 and 31 December 2020; or
- (b) intermediaries within the meaning of section 10ZH(1)(b) provide, directly or by means of another person, aid, assistance or advice between 1 July 2020 and 31 December 2020.

(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 relevant State, such information is to be filed in Gibraltar only if Gibraltar features first in the list below-

- (a) the jurisdiction where the relevant taxpayer is resident for tax purposes;
- (b) the jurisdiction where the relevant taxpayer has a permanent establishment benefiting from the arrangement;
- (c) the jurisdiction 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 relevant State;
- (d) the jurisdiction 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 relevant 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 a relevant State other than Gibraltar.

(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 25 June 2018 and 1 July 2020; and
- (b) must file information on those reportable cross-border arrangements by 28 February 2021.

**Communication of information by Commissioner.**

10ZK.(1) The Commissioner where the information was filed pursuant to this Part shall, by means of exchange, communicate the information specified in subsection (2) to the competent authorities of all other relevant States.

(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' jurisdiction, and any jurisdictions which are likely to be concerned by the reportable cross-border arrangement, where the term "jurisdiction" means any relevant State; and
- (h) the identification of any other person in a jurisdiction likely to be affected by the reportable cross-border arrangement, indicating to which such person is linked, where the term "jurisdiction" means any relevant State.

(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) The exchange of information must take place within one month of the end of the quarter in which the information was filed.

(5) The first information must be communicated by 30 April 2021.

**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.”.

(2) For Schedule 11, substitute-

**“SCHEDULE 11**

**REPORTABLE CROSS-BORDER ARRANGEMENTS:  
HALLMARKS**

**Section 10ZE(1)**

1. An arrangement which may have the effect of undermining the reporting obligation under the laws implementing agreements on the automatic exchange of Financial Account information 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 are made unidentifiable.

For the purposes of this sub-paragraph, the terms “beneficial ownership” or “beneficial owner” shall be interpreted in a manner consistent with the latest Financial Action Task Force Recommendations and shall include any natural person who exercises control over a legal person or legal arrangement. In the case of a trust, such term means any settlor, trustee, protector (if any), beneficiary or class of beneficiaries and any other natural person exercising ultimate effective control over the trust, and in the case of a legal arrangement other than a trust, such term means persons in equivalent or similar positions.

In this Schedule, any capitalised term has the meaning given in Section VIII of the Common Reporting Standard set out in Schedule 4 to the International Co-operation (Improvement of International Tax Compliance) Regulations 2016.”.

Dated: 21<sup>st</sup> January 2021.

F R PICARDO,  
Minister with responsibility for taxation ,  
including coordination of international exchange of information.

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### **EXPLANATORY MEMORANDUM**

These Regulations amend the Income Tax Act 2010 to provide for deficiencies that arise as a result of Gibraltar’s exit from the European Union.