

**FIRST SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3510 of 29 December, 2005



I ASSENT,

FRANCIS RICHARDS,
GOVERNOR.

22nd December, 2005.



GIBRALTAR

No. 69 of 2005

AN ORDINANCE to amend the Income Tax Ordinance in order to transpose into the law of Gibraltar Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, and the amendments made to Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums by Council Directive 2003/93/EC of 7 October 2003, Council Directive 2004/56/EC of 21 April 2004 and Council Directive 2004/106/EC of 16 November 2004, and matters connected thereto.

ENACTED by the Legislature of Gibraltar.

Title and commencement.

1. This Ordinance may be cited as the Income Tax (Amendment) (No.3) Ordinance 2005 and comes into force on the day of publication.

Amendment of the Income Tax Ordinance.

2.(1) The Income Tax Ordinance is amended in accordance with the provisions of this section.

(2) For section 4B(3), there is substituted the following subsection–

“(3) Subject to subsections (4) and (5) where the conditions set out in this section are met the Commissioner shall arrange for the conduct of any enquiries necessary to obtain the information requested by the competent authority of another member State; and for that purpose -

(a) in order to obtain the information sought, the Commissioner shall proceed as though acting on his own account; and

(b) the provisions of this Ordinance conferring powers on the Commissioner to call for information or documents shall have effect as if the references in those provisions to a tax liability included a reference to a liability to tax on income or capital in another member State.”.

(3) For section 4B(4) there shall be substituted the following subsection–

“(4) Nothing in this section or section 4A shall impose an obligation on the Commissioner to conduct any enquiry or provide information to the competent authority of another member State where any law or administrative practices would prevent him from conducting such enquiry or collecting such information for the purposes of his functions under the remainder of this Ordinance.”

(4) For section 4B(5) there shall be substituted the following subsection–

“(5) The Commissioner may refuse to provide information where the competent authority of the member State requesting

that information is unable for reasons of fact or law to provide the same type of information.”

(5) Section 4B(6)(a) is amended by inserting after the words “raises no objection” the words “at the time when it first supplies the information”.

(6) The following subsection is added after subsection 4B(6)–

“(6A) Information made known to the Commissioner under the Directive may be used for the assessment of any tax, levy or duty as the Minister with responsibility for public finance may provide by notice in the Gazette.”

(7) Section 4B(7) is amended by inserting in the appropriate place the following definition–

“tax” means tax to which Article 1(1) of the Directive applies”.

(8) The following shall be inserted after section 4B–

“Notification.

4C.(1) Subject to subsection (2), at the request of the competent authority of another Member State, the Commissioner shall, in accordance with the law of Gibraltar, notify the person in respect of whom the information is being sought of all instruments and decisions which emanate from the administrative authorities of the other Member State and concern the application in that State’s territory of legislation on taxes covered by the Directive.

(2) Subsection (1) applies only where the request for notification indicates the subject of the instrument or decision to be notified and specifies the name and address of the the person in respect of whom the information is being sought, together with any other information which tends to facilitate identification of that person.

(3) Where the Commissioner has received a request referred to in subsection (1), he shall immediately inform the competent authority that has made the request for notification of his response to the request and shall notify that authority, in

particular, of the date of notification of the decision or instrument to the person in respect of whom the information is being sought.

Co-ordinated investigations.

4D.(1) Where—

(a) the tax situation of one person or of a number of connected persons is of common or complementary interest to Gibraltar and any number of other Member States; and

(b) the Commissioner is of the opinion that a co-ordinated investigation with the respective competent authorities of those other Member States would be more effective than an investigation conducted by the Commissioner alone,

the Commissioner may agree to conduct an investigation into that person's tax affairs in Gibraltar in co-ordination with the competent authorities of those other Member States who would conduct a like investigation in their respective home States, with a view to exchanging the information thus obtained.

(2) Where subsection (1) applies, the Commissioner shall notify the competent authority in those other Member States concerned of the cases which, in his view, should be subject to a co-ordinated investigation, giving reasons for his choice, as far as possible, by providing the information which led to his decision, and specifying the period of time during which it is proposed that such an investigation be conducted.

(3) On receipt of a proposal for a co-ordinated investigation from another Member State, the Commissioner shall confirm his agreement or communicate his reasoned refusal to the authority that has made the proposal within a reasonable period of time.

(4) The Minister with responsibility for public finance shall designate a person with responsibility for supervising and coordinating co-ordinated investigations under this section.”.

(9) Section 6(1) is amended by inserting after the reference “6.(1)” the words “Subject to the provisions of Part IIIA”.

(10) Section 40(1) is amended by inserting after the reference “40(1)” the words “Subject to the provisions of Part IIIA”.

(11) The following Part shall be inserted after Part III -

“PART IIIA

**TAXATION APPLICABLE TO INTEREST AND ROYALTY
PAYMENTS MADE BETWEEN ASSOCIATED
COMPANIES OF DIFFERENT MEMBER STATES**

Interpretation of Part.

47A..(1) In this Part, unless the context otherwise requires—

“company” has the same meaning as the expression “company of a member State” in article 3(a) the Directive as set out in Schedule 2;

“Directive” means Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States;

"interest" means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; penalty charges for late payment shall not be regarded as interest;

"permanent establishment" means a fixed place of business situated in Gibraltar through which the business of a company of another Member State is wholly or partly carried on.

"royalties" means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films and software, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; payments for the use of, or the right to use, industrial, commercial or scientific equipment shall be regarded as royalties;

“source State” means the State from which a company or permanent establishment makes a payment.

(2) In this Part, a company is an "associated company" of a second company if, at least—

- (a) the first company has a direct minimum holding of 25 % in the capital or voting rights of the second company; or
- (b) the second company has a direct minimum holding of 25 % in the capital or voting rights of the first company; or
- (c) a third company has a direct minimum holding of 25 % both in the capital or voting rights of the first company and in the capital of the second company.

Holdings must involve only companies resident in European Community territory.

(3) Terms used in this Part but not defined shall be interpreted in accordance with the provisions of the Directive.

Application of Part.

47B.(1) This Part shall not apply in the following cases—

- (a) payments which are treated as a distribution of profits or as a repayment of capital under the law of the source State;
- (b) payments from debt-claims which carry a right to participate in the debtor's profits;
- (c) payments from debt-claims which entitle the creditor to exchange his right to interest for a right to participate in the debtor's profits;
- (d) payments from debt-claims which contain no provision for repayment of the principal amount or where the repayment is due more than 50 years after the date of issue.

(2). Where, by reason of a special relationship between the payer and the beneficial owner of interest or royalties, or between one of them and some

other person, the amount of the interest or royalties exceeds the amount which would have been agreed by the payer and the beneficial owner in the absence of such a relationship, the provisions of this Part shall apply only to the latter amount, if any.

Scope of Part.

47C.(1) Interest or royalty payments arising in Gibraltar shall be exempt from any taxes imposed on those payments, whether by deduction at source or by assessment, provided that the beneficial owner of the interest or royalties—

- (a) is a company of another Member State; or
- (b) a permanent establishment situated in another Member State of a company of a Member State.

(2) Subsection (1)—

- (a) shall apply only where the company which is the payer, or the company whose permanent establishment is treated as the payer of interest or royalties—
 - (i) is an associated company of the company which is the beneficial owner, or whose permanent establishment is treated as the beneficial owner, of that interest or those royalties; and
 - (ii) has been so associated for an uninterrupted period of at least two years;
- (b) shall not apply where interest or royalties are paid by or to a permanent establishment of a company situated in a State outside the EEA and the business of the company is wholly or partly carried on through that permanent establishment.

(3) Subsection (1) shall apply only where the Commissioner has issued an exemption certificate in accordance with section 47H.

(4) Notwithstanding any provision in this Part to the contrary, the Commissioner may, in his absolute discretion, require the deduction of tax at

source where he is not satisfied that that the requirements of this Part have been fully complied with.

Special provision for Greece, Spain and Portugal.

47D.(1) This section shall not apply in the case of Spain 6 years and in the case of Greece and Portugal from 8 years after article 17(2) and (3) of Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments comes into force.

- (2) Where a company or permanent establishment situated in Gibraltar—
- (a) receives interest or royalties from an associated company of Greece or Portugal;
 - (b) receives royalties from an associated company of Spain;
 - (c) receives interest or royalties from a permanent establishment situated in Greece or Portugal of an associated company; or
 - (d) receives royalties from a permanent establishment situated in Spain of an associated company,

there shall be allowed an amount equal to the tax paid in Greece, Spain or Portugal on that income as a deduction from the tax on the income of the company or permanent establishment which received that income.

(3) The deduction provided for in subsection (2) shall not exceed the lower of—

- (a) the tax payable in Greece, Spain or Portugal on such income which—
 - (i) in the case of Greece and Portugal will be at a rate not exceeding 10% during the first four years and 5% during the final four years; and
 - (ii) in the case of Spain, will be at a rate not exceeding 10%; or
- (b) that part of the tax on the income of the company or permanent establishment which received the interest or

royalties, as computed before the deduction is given, which is attributable to those payments under the Income Tax Ordinance where the permanent establishment is situated in Gibraltar.

Criterion for establishing permanent establishment as payer

47E. A permanent establishment shall be treated as the payer of interest or royalties only insofar as those payments represent a tax-deductible expense for the permanent establishment under this Ordinance.

Criteria for establishing identity of beneficial owner.

47F.(1) A company shall be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person.

(2) A permanent establishment shall be treated as the beneficial owner of interest or royalties—

- (a) if the debt-claim, right or use of information in respect of which interest or royalty payments arise is effectively connected with that permanent establishment; and
- (b) if the interest or royalty payments represent income in respect of which that permanent establishment is subject in the Member State in which it is situated to one of the taxes mentioned in Article 3(a)(iii) of the Directive as set out in Schedule 2 or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of this Part in addition to, or in place of, those existing taxes.

Identity of payer and beneficial owner: supplementary.

47G. Where a permanent establishment of a company of a Member State is treated as the payer, or as the beneficial owner, of interest or royalties, no other part of the company shall be treated as the payer, or as the beneficial owner, of that interest or those royalties for the purposes of this Part.

Certificates of exemption.

47H.(1) An exemption certificate may be issued at the request of the officer of a company to which this Part applies or its appointed agent.

(2) On receipt of a request under subsection (1), the Commissioner shall determine whether to issue an exemption certificate within three months of receipt of the request.

(3) An exemption certificate under subsection (1) shall be valid for 12 months from the date of issue.

Information to be provided in a request under section 47H.

47I.(1) A person requesting the issue of an exemption certificate under section 47H shall provide a written statement certifying that the payment concerned is one to which section 47C(1) applies.

(2) For the purposes of subsection (1), the written statement shall provide—

- (a) proof of residence for tax purposes of the company which is the beneficial owner, and where necessary, the existence of a permanent establishment;
- (b) information as to the beneficial ownership of the company set out in paragraph (a) of the income in respect of which the payment is made;
- (c) details of the corporation tax or tax corresponding to that tax to which the company set out in paragraph (a) is subject;
- (d) information establishing that the payer, the company and its beneficial owners are associated companies within the meaning of this Part and, in particular, sections 47A(2) and 47C(2)(a)(ii);
- (e) a copy of the loan agreement or other document providing the legal justification for the interest payment.

Requirements where conditions for exemption cease to be satisfied.

47J. Where the person who requested the issue of the exemption certificate, the payer or the beneficial owner become aware that any requirement subject to which the certificate is issued has ceased to be satisfied—

- (a) he shall immediately notify the Commissioner and the other parties of the fact; and
- (b) the exemption certificate shall become ineffective,

and the Commissioner shall cancel the exemption certificate by notice in writing to the person who requested it and the payer.

Recovery of tax not deducted.

47K. If, after an exemption certificate has been issued, it is discovered that any of the requirements of this Part was not satisfied, and tax deductible from a payment was not so deducted, that tax may be recovered whether by assessment or otherwise in such manner as the Commissioner deems appropriate.

Repayment by company of tax deducted.

47L.(1) Where the paying company or permanent establishment has withheld tax at source to be exempted under this Part, an application may be made to the Commissioner for that tax to be refunded at source.

(2) A claim pursuant to subsection (1) shall contain the information requested under section 47I(2) and shall be submitted not later than two years from the date when the interest or royalties are paid to the beneficial owner.

(3) The Commissioner shall refund excess tax withheld at source within one year following due receipt of the application and relevant supporting information.

Regulations.

47M.(1) The Minister with responsibility for public finance may make regulations for carrying this Part into effect and the regulations may, in

particular, make such supplementary provision for the better administration of this Part.”.

(2) Regulations made under subsection (1) may give effect to any agreement or arrangement that may be entered into by the Government of Gibraltar with any other country in relation to any matter falling within the scope of this Ordinance.

(3) Regulations made under subsection (1) may provide for the levying of such fees and the creation of such offences as the Minister deems appropriate.

(12) The following Schedule shall be inserted after Schedule 1—

“SCHEDULE 2

Sections 47A and 47F

PART 1

ARTICLE 3(a) of DIRECTIVE 2003/49/EC

“For the purposes of this Directive—

- (a) the term "company of a Member State" means any company:
 - (i) taking one of the forms listed in the Annex hereto;
and
 - (ii) which in accordance with the tax laws of a Member State is considered to be resident in that Member State and is not, within the meaning of a Double Taxation Convention on Income concluded with a third state, considered to be resident for tax purposes outside the Community; and
 - (iii) which is subject to one of the following taxes without being exempt, or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of this Directive in addition to, or in place of, those existing taxes -
 - impôt des sociétés/vennootschapsbelasting in Belgium;
 - selskabsskat in Denmark;
 - Körperschaftsteuer in Germany;
 - Φόρος εισοδήματος νομικών προσώπων in Greece,
 - impuesto sobre sociedades in Spain;
 - impôt sur les sociétés in France;

- corporation tax in Ireland;
- imposta sul reddito delle persone giuridiche in Italy;
- impôt sur le revenu des collectivités in Luxembourg;
- vennootschapsbelasting in the Netherlands;
- Körperschaftsteuer in Austria;
- imposto sobre o rendimento da pessoas colectivas in Portugal;
- yhteisöjen tulovero/inkomstkatten för samfund in Finland;
- statlig inkomstskatt in Sweden;
- corporation tax in the United Kingdom.

PART 2

ANNEX TO DIRECTIVE 2003/49

ANNEX

List of companies covered by Article 3(a) of the Directive

- (a) Companies under Belgian law known as: 'naamloze vennootschap/société anonyme, commanditaire vennootschap op aandelen/société en commandite par actions, besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée' and those public law bodies that operate under private law;
- (b) companies under Danish law known as: 'aktieselskab' and 'anpartsselskab';
- (c) companies under German law known as: 'Aktiengesellschaft, Kommanditgesellschaft auf Aktien, Gesellschaft mit beschränkter Haftung' and 'bergrechtliche Gewerkschaft';
- (d) companies under Greek law known as: 'ἀνώνυμη εταιρεία';
- (e) companies under Spanish law known as: 'sociedad anónima, sociedad comanditaria por acciones, sociedad de responsabilidad limitada' and those public law bodies which operate under private law;
- (f) companies under French law known as: 'société anonyme, société en commandite par actions, société à responsabilité limitée' and industrial and commercial public establishments and undertakings;
- (g) companies in Irish law known as public companies limited by shares or by guarantee, private companies limited by shares or by guarantee, bodies registered under the Industrial and Provident Societies Acts or building societies registered under the Building Societies Acts;
- (h) companies under Italian law known as: 'società per azioni, società in accomandita per azioni, società a responsabilità limitata' and public and private entities carrying on industrial and commercial activities;
- (i) companies under Luxembourg law known as: 'société anonyme, société en commandite par actions and société à responsabilité limitée';
- (j) companies under Dutch law known as: 'naamloze vennootschap' and 'besloten vennootschap met beperkte aansprakelijkheid';
- (k) companies under Austrian law known as: 'Aktiengesellschaft' and 'Gesellschaft mit beschränkter Haftung';
- (l) commercial companies or civil law companies having a commercial form, cooperatives and public undertakings incorporated in accordance with Portuguese law;
- (m) companies under Finnish law known as: 'osakeyhtiö/aktiebolag, osuuskunta/andelslag, säästöpankki/sparbank' and 'vakuutusyhtiö/försäkringsbolag';
- (n) companies under Swedish law known as: 'aktiebolag' and 'försäkringsaktiebolag';
- (o) companies incorporated under the law of the United Kingdom.

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Passed by the Gibraltar House of Assembly on the 13th day of December, 2005.

D. J. REYES,

Clerk to the Assembly.

**Printed by the Gibraltar Chronicle Limited
Printing Office, 2, Library Gardens,
Government Printers for Gibraltar,
Copies may be purchased at 6, Convent Place, Price £0.80p .**