

**SECOND SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 4325 of 15 December, 2016

LEGAL NOTICE NO. 246 OF 2016.

INTERPRETATION AND GENERAL CLAUSES ACT

INCOME TAX ACT 2010 (AMENDMENT) REGULATIONS 2016

In exercise of the powers conferred upon it by section 23(g) of the Interpretations and General Clauses Act, and in order to transpose into the law of Gibraltar, Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, the Government has made the following Regulations-

Title.

1. These Regulations may be cited as the Income Tax Act 2010 (Amendment) Regulations 2016.

Commencement.

2. These Regulations come into operation on 1 January 2017.

Amendment of Act.

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

(2) In section 5A(6)(b), for “1 July 2016”, substitute “1 January 2018”.

(3) In section 5B, after subsection (2), insert-

“(2A) The Commissioner shall provide tax compliance information to the competent authority of a Member State on a bilateral or multilateral advance pricing arrangement excluded under section 10E if-

(a) the international tax agreement under which the advance pricing arrangement was negotiated permits its disclosure;

- (b) the competent authority of the relevant third country gives permission for the information to be disclosed; and
- (c) the Commissioner considers the information meets the requirements of this section.”.

(4) In section 5E-

- (a) in the section heading, for “Sections 4 to 5D”, substitute “Cooperation Directive”; and
- (b) in subsection (8), after “4 to 5D” insert “and Part 1A”.

(5) In section 5F-

- (a) in the section heading, for “sections 4 to 5E”, substitute “exchange of information”;
- (b) in subsection (1), after “4 to 5E”, insert “, Part 1A”;
- (c) in subsection (2)(b), after “section 5A”, insert “, Part 1A”;
- (d) after subsection (2), insert-

“(3) Where the Commissioner receives a report or document produced by the European Commission using information transmitted under Article 23 of the Cooperation Directive-

- (a) that information may only be used for analytical purposes; and
- (b) must not be published or made available to any person or body without the express agreement of the European Commission.”.

(6) After section 10, insert-

“PART IA

**ADVANCE CROSS-BORDER RULINGS AND PRICING
ARRANGEMENTS**

Interpretation.

10A.(1) In this Part-

“advance cross-border ruling” means an agreement, communication or other instrument or action with similar effect including one issued, amended or renewed in the context of a tax audit which-

- (a) is issued, amended or renewed by, or on behalf of-
 - (i) the Government or the Commissioner; or
 - (ii) in the case of a communication made by a Member State under Article 8a of the Cooperation Directive, the Government or tax authority of a Member State, or the Member State’s territorial or administrative subdivisions including local authorities,irrespective of whether it is effectively used;
- (b) is issued, amended or renewed to a particular person or a group of persons, and upon which that person or group of persons is entitled to rely;
- (c) concerns the interpretation or application of a legal or administrative provision concerning the administration or enforcement of-
 - (i) Gibraltar laws relating to Gibraltar taxes; or
 - (ii) in the case of a communication made by a Member State under Article 8a of the Cooperation Directive, the national law of a Member State relating to taxes of the Member State or the Member State’s territorial or administrative subdivisions, including local authorities;
- (d) relates to a cross-border transaction or to the question of whether or not activities carried on by a person in

another jurisdiction create a permanent establishment;
and

- (e) is made in advance of the transactions or of the activities in another jurisdiction potentially creating a permanent establishment or in advance of the filing of a tax return covering the period in which the transaction or series of transactions or activities took place,

and for the purposes of this definition, a cross-border transaction may involve, but is not restricted to, the making of investments, the provision of goods, services, finance or the use of tangible or intangible assets and does not have to directly involve the person receiving the advance cross-border ruling;

“advance pricing arrangement” means any agreement, communication or any other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit, and which-

- (a) is issued, amended or renewed by, or on behalf of-
 - (i) the Government or the Commissioner alone or with the Government or tax authority of a Member State including any territory or administrative subdivision thereof, including local authorities, or
 - (ii) in the case of a communication made by a Member State under Article 8a of the Cooperation Directive, the government or tax authority of one or more Member States including any territory or administrative subdivision thereof, including local authorities,

irrespective of whether it is effectively used;

- (b) is issued, amended or renewed to a particular person or a group of persons, and upon which that person or group of persons is entitled to rely; and

- (c) determines in advance of cross-border transactions between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment;

“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;

“enterprise” means any form of conducting business;

“Member State” means a Member State of the European Union;

“transfer prices” means the prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises, and “transfer pricing” is to be construed accordingly;

“working day” means a day other than-

- (a) Saturdays and Sundays;
- (b) any day that is a bank holiday or public holiday in Gibraltar under the Banking and Financial Dealings Act or the Interpretation and General Clauses Act;
- (c) any day appointed in Gibraltar as a day of public thanksgiving or mourning.

(2) An enterprise is an associated enterprise when-

- (a) it participates directly or indirectly in the management, control or capital of another enterprise; or
- (b) the same persons participate directly or indirectly in the management, control or capital of two or more enterprises.

Meaning of cross-border transaction.

10B. In this Part, a “cross-border transaction” means-

- (a) in relation to an advance cross-border ruling, a transaction or series of transactions where-
 - (i) not all of the parties to the transaction or series of transactions are resident for tax purposes in Gibraltar, or in the case of a communication made by a Member State under Article 8a of the Cooperation Directive, in the Member State issuing, amending or renewing the advance cross border ruling;
 - (ii) any of the parties to the transaction or series of transactions is simultaneously resident for tax purposes in more than one jurisdiction;
 - (iii) one of the parties to the transaction or series of transactions carries on business in another jurisdiction through a permanent establishment and the transaction or series of transactions forms part or the whole of the business of the permanent establishment;
 - (iv) the transaction or series of transactions include arrangements made by a person in respect of business activities in another jurisdiction which that person carries on through a permanent establishment; or
 - (v) the transaction or transactions have a cross border impact;
- (b) in relation to an advance pricing arrangement, a transaction or series of transactions-
 - (i) involving associated enterprises which are not all resident for tax purposes in the territory of a single jurisdiction; or
 - (ii) a transaction or series of transactions which have a cross border impact.

Obligation to exchange information.

10C.(1) The Commissioner shall ensure that the information set out in section 10D in respect of relevant advance cross-border rulings and relevant advance pricing arrangements is provided to the competent authorities of Member States and the European Commission in accordance with section 10K and the practical arrangements adopted under Article 21 of the Cooperation Directive.

(2) An advance cross-border ruling or advance pricing arrangement is relevant if it was issued, amended or renewed-

- (a) after 31 December 2013; or
- (b) between 1 January 2012 and 31 December 2013 and were valid on 1 January 2014.

(3) An advance cross-border ruling is not relevant if it exclusively concerns and involves the tax affairs of one or more natural persons.

(4) An advance cross-border ruling and advance pricing arrangement is not relevant if it was issued, amended or renewed-

- (a) before 1 April 2016; and
- (b) to a person or group of persons-
 - (i) not conducting mainly financial or investment activity; and
 - (ii) with group-wide annual net turnover (as defined in Schedule 9 of the Companies Act 2014) of less than €40,000,000 or its Sterling equivalent in the fiscal year preceding the date of issuance, amendment or renewal of those advance cross-border rulings or advance pricing arrangement.

(5) The Commissioner shall ensure information is provided under this section-

- (a) where an advance cross-border ruling or advance pricing arrangement was issued, amended or renewed after 31 December 2016, within three months following the end of the calendar year during which that issuance, amendment or renewal took place;
- (b) before 1 January 2018 where the cross-border ruling or pricing arrangement was issued, amended or renewed before 31 December 2016.

Information to be exchanged.

10D.(1) For the purposes of section 10C, and subject to subsection (2), the information to be provided to competent authorities of Member States and the European Commission is-

- (a) the dates of issuance, amendment or renewal of the advance cross-border ruling or advance pricing arrangement;
- (b) the start date of the period of validity of the advance cross-border ruling or advance pricing arrangement, if specified;
- (c) the end date of the period of validity of the advance cross-border ruling or advance pricing arrangement, if specified;
- (d) the type of the advance cross-border ruling or advance pricing arrangement;
- (e) the amount of the transaction or series of transactions of the advance cross-border ruling or advance pricing arrangement if such amount is referred to in the advance cross-border ruling or advance pricing arrangement;
- (f) the identification of the method used for determination of the transfer pricing or the transfer price itself in the case of an advance pricing arrangement;

- (g) the identification of Member States, if any, likely to be concerned by the advance cross-border ruling or advance pricing arrangement; and
- (h) the indication whether the information communicated is based upon the advance cross-border ruling or advance pricing arrangement itself or upon the request referred to in section 10E(2).

(2) In addition to the information set out in subsection (1), the competent authorities of Member States shall be provided with-

- (a) identification of the person, other than a natural person, and where appropriate the group of persons to which the advance cross-border ruling or advance pricing arrangement belongs;
- (b) a summary of the content of the advance cross-border ruling or advance pricing arrangement including a description of the relevant business activities or transactions or series of transactions provided in abstract terms without leading to the disclosure of-
 - (i) a commercial, industrial or professional secret;
 - (ii) a commercial process; or
 - (iii) information whose disclosure would be contrary to public policy;
- (c) a description of the set of criteria used for the determination of the transfer pricing or the transfer price itself in the case of an advance pricing arrangement;
- (d) the identification of any person other than a natural person in a Member State, if any, likely to be affected by the advance cross-border ruling or advance pricing arrangement and indicating to which Member States the affected persons are linked.

Exclusion.

10E.(1) Subject to subsection (2), information on bilateral or multilateral advance pricing arrangements with countries outside of the European Union may not be provided under this Part where they were negotiated under an international tax agreement that does not permit disclosure to third parties.

(2) Where information on advance pricing arrangements is excluded under subsection (1), the Commissioner shall ensure that information is provided in respect of those arrangements where-

- (a) it would otherwise be provided under sections 10C and 10D; and
- (b) that information is contained in the request that lead to the issuance of the excluded bilateral or multilateral advance pricing arrangement.

Confirmation of Receipt.

10F.(1) Where Gibraltar is identified by a Member State as likely to be concerned by the advance cross-border ruling or advance pricing arrangement in a communication made under Article 8a of the Cooperation Directive, the Commissioner shall ensure that receipt of the information is confirmed to the competent authority of that Member State within 7 working days of receipt.

(2) Where 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 is operational, the confirmation under subsection (1) shall not be provided.

Additional Information.

10G. The Commissioner may make a request under section 4(9) for additional information on an advance cross-border ruling or advance pricing arrangement communicated by a competent authority of a Member State, including the full text of such ruling or arrangement.

Statistics.

10H.(1) The Commissioner shall ensure the European Commission is-

- (a) informed of the volume of information provided under this Part and received from Member States in accordance with Article 8a of the Cooperation Directive; and
- (b) is provided, as far as possible, with information on costs and benefits relating to-
 - (i) exchanges of information referred to in paragraph (a); and
 - (ii) any potential changes;

for the Government and for other persons.

(2) Information under this section must be provided before 1 January 2018, and thereafter at not more than yearly intervals.

Feedback.

10I. The Commissioner shall provide feedback to Member States on the receipt or provision of information under this Part or Article 8a of the Cooperation Directive, in accordance with arrangements agreed with those Member States pursuant to Article 14(2) of that Directive.

Use of Information.

10J. Section 5E(2) and (3)(c) shall apply to information obtained and provided under this Part.

Method of exchange.

10K.(1) In complying with this Part, the Commissioner shall-

- (a) use the standard form adopted by the European Commission under Article 20(5) and 26 of the Cooperation Directive;

- (b) 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
- (c) ensure information is provided in an official and working language of the European Union.

(2) Until the central directory mentioned in subsection (1)(b) is operational, the Commissioner shall ensure the information is exchanged using the electronic means and common platform described in Articles 3(12), (13) and 21 of the Cooperation Directive and the applicable practical arrangements.”.

Dated 15th December, 2016.

G H LICUDI QC,
Minister with responsibility for the coordination
of international exchange of information.
For the Government.

EXPLANATORY MEMORANDUM

These Regulations transpose into the law of Gibraltar, Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

