

**SECOND SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 4368 of 25 May, 2017

LEGAL NOTICE NO. 101 OF 2017.

INTERPRETATION AND GENERAL CLAUSES ACT

INCOME TAX ACT 2010 (AMENDMENT) REGULATIONS 2017

In exercise of the powers conferred upon it by section 23(g)(ii) of the Interpretation and General Clauses Act, and in order to transpose into the law of Gibraltar, Council Directive (EU) 2016/881 of 25 May 2016 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 2017.

Commencement.

2. These Regulations come into operation on 5 June 2017.

Amendment of Act.

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

(2) In section 5E(8), for “and Part 1A”, substitute “, Part 1A and Part 1B”.

(3) In section 5F(1) and (2)(b), after “Part 1A”, insert “, Part 1B”.

(4) After section 10K, insert-

“PART 1B

COUNTRY BY COUNTRY REPORTING

Interpretation.

10L. In this Part-

“consolidated financial statements” means the financial statements of an MNE group in which the assets, liabilities, income, expenses and cash flows of the ultimate parent entity and the constituent entities are presented as those of a single economic entity;

“constituent entity” means any of the following-

- (a) a separate business unit of an MNE group that is included in the consolidated financial statements of the MNE group for financial reporting purposes, or would be so included if equity interests in such business unit of an MNE group were traded on a public security exchange;
- (c) any business unit prescribed under paragraph (a) that is excluded from the MNE group’s consolidated financial statements solely on size or materiality grounds;
- (c) a permanent establishment of any separate business unit of the MNE group included in paragraph (a) or (b) provided the business unit prepares a separate financial statement for the permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes;

“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;

“country by country report” means a report that contains the information set out in section 10Q;

“enterprise” means any form of conducting business by a person referred to in points (b), (c) and (d) of Article 3, point (11) of the Cooperation Directive;

“fiscal year” means an annual accounting period with respect to which the ultimate parent entity of the MNE group prepares its financial statements;

“group” means a collection of enterprises related through ownership or control such that it is either required to prepare consolidated financial statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on in public securities exchange;

“international agreement” means the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, any bilateral or multilateral tax convention, or any tax information exchange agreement to which Gibraltar is party, and that by its terms provides legal authority for the exchange of tax information between jurisdictions, including automatic exchange of such information;

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

“MNE group” means a group that includes two or more enterprises the tax residence for which is in different jurisdictions, or includes an enterprise that is resident for tax purposes in one jurisdiction and is subject to tax with respect to the business carried out through a permanent establishment in another jurisdiction, and is not excluded under section 10M;

“qualifying competent authority agreement” means an agreement that is between authorised representatives of Gibraltar and a non-European Union jurisdiction that are parties to an international agreement and that requires the automatic exchange of country by country reports;

“reporting fiscal year” means the fiscal year, the financial and operational results of which are reflected in the country-by country report;

“surrogate parent entity” means one constituent entity of the MNE group that has been appointed by such MNE group as a sole substitute for the ultimate parent entity, to file the country by country report in that constituent entity’s jurisdiction of tax residence, on behalf of the MNE group in accordance with section 10P;

“systemic failure” with respect to a jurisdiction means-

- (a) the jurisdiction has a qualifying competent authority agreement in effect but has suspended automatic exchange for reasons other than those allowed in accordance with the terms of that agreement; or
- (b) the jurisdiction otherwise persistently failed to provide the competent authority in Gibraltar with country by country reports in its possession of MNE groups that have constituent entities in Gibraltar;

“ultimate parent entity” means a constituent entity of an MNE group that meets the following criteria-

- (a) it owns directly or indirectly a sufficient interest in one or more other constituent entities of such MNE group such that it is required to prepare consolidated financial statements under accounting principles generally applied in its jurisdiction of tax residence, or would be so required if its equity interests were traded on a public securities exchange in its jurisdiction of tax residence;
- (b) there is no other constituent entity of such MNE group that owns directly or indirectly an interest described in paragraph (a) in the entity.

Excluded MNE group.

10M. An MNE group is excluded under this Part with respect to any fiscal year of the group if the group has a total consolidated group revenue of less than EUR 750 000 000 during the fiscal year immediately preceding the reporting fiscal year as reflected in its consolidated financial statements for that fiscal year.

Ultimate parent entity reporting.

10N. Where an ultimate parent entity is resident in Gibraltar for tax purposes, that ultimate parent entity must provide the Commissioner with a country by country report for each fiscal year.

Constituent entity reporting.

10O.(1) Subject to section 10P(3), a constituent entity resident for tax purposes in Gibraltar that is not an ultimate parent entity must provide the Commissioner with a country by country report for each fiscal year where-

- (a) the ultimate parent entity of the MNE group is not required to provide a country by country report in its jurisdiction of tax residence;
- (b) the jurisdiction in which the ultimate parent entity is resident for tax purposes does not have a qualifying competent authority agreement with Gibraltar on the date on which the constituent entity must provide the report under section 10T; or
- (c) there has been a systemic failure by the jurisdiction of tax residence of the ultimate parent entity and the Commissioner has notified the constituent entity resident in Gibraltar that such a failure has occurred.

(2) Where a constituent entity is required to provide a country by country report under subsection (1), that constituent entity must request its ultimate parent entity to provide it with all information necessary to prepare a country by country report with respect to each fiscal year.

(3) Where the constituent entity makes a request under subsection (2), but is unable to obtain or acquire all necessary information to prepare a complete country by country report, it must-

- (a) notify the Commissioner that the ultimate parent entity has refused to make the necessary information available; and

(b) provide the Commissioner with all the relevant information in its possession that it would include in a country by country report.

(4) A notification under subsection (1)(c) shall be made in such manner or form as the Commissioner by determine from time to time.

(5) Where the Commissioner receives a notification under subsection (3)(a), he shall inform all Member States of the refusal notified.

(6) Where a constituent entity fails to make a request in accordance with subsection (2), or to provide all relevant information in its possession in accordance with subsection (3), section 10U shall apply as if the failure were a failure to provide a country by country report under subsection (1).

(7) For the purposes of subsection (3)(a), the ultimate parent entity is deemed to have refused to provide information if the relevant information is not provided to the requesting constituent entity before the day of notification under section 10R(4).

Surrogate parent entity reporting.

10P. (1) An MNE group may designate a constituent entity as a surrogate parent entity if-

- (a) more than one constituent entity of the same MNE group is resident for tax purposes in the European Union;
- (b) one or more of the conditions set out in section 10O(1)(a), (b) and (c) or point (b) of the first paragraph of Section II to Annex III of the Cooperation Directive apply; and
- (c) the constituent entity designated can obtain or acquire all the information required to file a country by country report for each fiscal year.

(2) Where an MNE group designates a surrogate parent entity in Gibraltar, that entity must-

- (a) provide the Commissioner with a country by country report for each fiscal year; and
- (b) notify the Commissioner that the report provided in accordance with paragraph (a) is intended to satisfy the requirement on all constituent entities of the MNE group resident for tax purposes in the European Union.

(3) Where a constituent entity would otherwise be required to provide a country by country report under section 10O, that section shall not apply if-

- (a) the MNE group of which it is a constituent entity has provided a country by country report in respect of that fiscal year through a surrogate parent entity;
- (b) the country by country report has been provided on or before the date specified in section 10T to the competent authority of the jurisdiction of tax residence of the surrogate parent entity; and
- (c) where the surrogate parent entity is resident for tax purposes outside the European Union,
 - (i) the jurisdiction of tax residence of the surrogate parent entity-
 - (A) requires the filing of country by country reports conforming to the requirements of section 10Q(1);
 - (B) has a qualifying competent authority agreement in effect to which Gibraltar is a party at the date specified for the provision of the country by country report in section 10T;
 - (C) has not notified the Commissioner that there has been a systemic failure;

- (ii) the surrogate parent entity has notified the competent authority of its jurisdiction, by no later the last day of the reporting fiscal year, that it is the surrogate parent entity; and
- (iii) the Commissioner has received a notification in accordance with section 10R(2).

Country by country report.

10Q.(1) A country by country report provided under this Part shall contain the following information in respect of the MNE group concerned-

- (a) with regard to each jurisdiction in which the MNE group concerned operates, aggregate information relating to the amount of its-
 - (i) revenue,
 - (ii) profit or loss before income tax,
 - (iii) income tax paid,
 - (iv) income tax accrued,
 - (v) stated capital,
 - (vi) accumulated earnings,
 - (vii) number of employees, and
 - (viii) tangible assets other than cash or cash equivalents;
- (b) identification of each constituent entity of the MNE group setting out-
 - (i) the jurisdiction of tax residence of that constituent entity; and,

- (ii) where different from that jurisdiction of tax residence, the jurisdiction under the laws of which that constituent entity is organized; and
- (iii) the nature of the main business activity of that constituent entity.

(2) The country by country report must specify the currency of the amounts referred to in that report.

Notification obligations.

10R.(1) A constituent entity resident for tax purposes in Gibraltar must notify the Commissioner if it is-

- (a) an ultimate parent entity;
- (b) a surrogate parent entity; or
- (c) required to provide a report under section 10O.

(2) Where a constituent entity resident for tax purposes in Gibraltar does not fall within the categories prescribed in subsection (1), it must notify the Commissioner of the-

- (a) identity; and
- (b) jurisdiction of tax residence,

of the constituent entity required to file the country by country report on behalf of its MNE group.

(3) A notification under subsections (1) and (2) must be made in writing no later than the last day for filing of the tax return of the notifying constituent entity for the preceding fiscal year.

(4) A notification under section 10O(3)(a) or 10P(2)(b) must be made in writing and not later than 12 months after the last day of the fiscal year to which the country by country report relates.

Form and manner of delivery.

10S.(1) Reports provided or notifications made to the Commissioner under this Part shall be delivered in such form and manner, including by electronic means, as may be specified by the Commissioner from time to time.

(2) Reports provided or notifications made otherwise than in the form and manner specified by the Commissioner are to be treated as not having been provided or made.

Time by which country by country reports are to be provided.

10T.(1) Country by country reports required to be provided under this Part shall be provided to the Commissioner no later than 12 months after the last day of the fiscal year to which the country by country report relates.

(2) The first country by country report shall be provided-

- (a) by an ultimate parent entity or its surrogate parent entity for the fiscal year commencing on or after 1 January 2016; and
- (b) by a constituent entity providing a report under section 100 for the fiscal year commencing on or after 1 January 2017.

Penalties for failure to comply with Part.

10U.(1) A person is liable to a penalty of £300 if he fails to-

- (a) provide a country by country report; or
- (b) make a notification,

as required in accordance with this Part.

(2) If-

- (a) a penalty under subsection (1) is assessed; and
- (b) the failure in question continues after the person has been notified of the assessment,

the person is liable to a further penalty, for each subsequent day on which the failure continues, of an amount, subject to section 10Z, not exceeding £60 for each such day.

Penalties for failure to comply with Part.

10V.(1) Where-

- (a) a person provides inaccurate information when-
 - (i) providing a country by country report; or
 - (ii) making a notification; and
- (b) the conditions set out in subsection (2) are met,

the person is liable to a penalty not exceeding £3,000 in respect of the report or notification to which the inaccuracy relates.

(2) The conditions are-

- (a) the person knows of the inaccuracy at the time the report is provided or notification is made; or
- (b) the person discovers the inaccuracy after the report is provided or notification is made and fails to take reasonable steps to inform the Commissioner of that discovery.

Matters to be disregarded in relation to liability to penalties.

10W.(1) Liability to a penalty under sections 10U and 10V does not arise if the person otherwise liable to the penalty satisfies the Commissioner that there is reasonable excuse for the failure or the provision of inaccurate information.

(2) For the purposes of this section, it is not a reasonable excuse-

- (a) that there are insufficient funds to do something; or
- (b) that a person relies on another person to do something.

(3) If a person has a reasonable excuse for a failure but the excuse ceases, the person is to be treated as continuing to have the excuse

if the failure is remedied without unreasonable delay after the excuse ceases.

Assessment of penalties.

10X.(1) If a person becomes liable to a penalty under this Part, the Commissioner may assess the penalty.

(2) If the Commissioner does so, he must notify the person.

(3) An assessment of the penalty under section 10U must be made within the period of-

- (a) 6 years in respect of a failure to provide a country by country report; or
- (b) 12 months in respect of a failure to make a notification,

beginning on the date on which the person became liable to the penalty.

(4) An assessment of a penalty under section 10V must be made within the earlier of-

- (a) 12 months beginning with the date on which the inaccuracy first came to the attention of the Commissioner; or
- (b) 6 years beginning with the date on which the person became liable to the penalty.

Appeals against penalty.

10Y.(1) A person may by notice appeal against the assessment of a penalty notified to that person-

- (a) on the grounds that liability to the penalty does not arise; or
- (b) as to the amount of a penalty.

(2) Notice of an appeal under subsection (1) must be given-

- (a) in writing;
 - (b) before the end of the period of 30 days beginning with the date on which notification under section 10X was given; and
 - (c) to the Commissioner and the Tribunal.
- (3) The notice must state the grounds of appeal.
- (4) On an appeal under subsection (1)(a), the Tribunal may confirm or cancel the assessment.
- (5) On an appeal under subsection (1)(b), the Tribunal may-
- (a) confirm the assessment; or
 - (b) substitute another assessment that the Commissioner had power to make.

Application for increased daily default penalty.

10Z.(1) Subsection (2) applies if-

- (a) a person is liable to a penalty under section 10U and a penalty is assessed under section 10X; and
- (b) the failure in respect of which that assessment is made continues for more than 30 days beginning with the date on which the notification of that assessment is given.

(2) Where this section applies, the Commissioner may make an application to the Tribunal for permission to assess an increased daily penalty under section 10U but must notify the person liable to the penalty of the application at the time of making it.

(3) If the Tribunal determines that an increased daily penalty may be assessed then for each applicable day on which the failure continues, the person's liability to a penalty under section 10U shall be for the increased amount determined by the Tribunal.

(4) The Tribunal may not determine an amount exceeding £1000 for each applicable day.

(5) If the Tribunal determines an increased daily penalty, the Commissioner must notify the person.

(6) The notification under subsection (5) must specify the future day from which the increased penalty is to apply.

(7) That day and any subsequent day is an “applicable day” for the purposes of subsection (3) and (4).

Enforcement of penalties.

10ZA.(1) A penalty under this Part must be paid before the end of the period of 30 days beginning with the date mentioned in subsection (2).

(2) The date is the date on which notification is given in respect of a penalty under section 10X, or if a notice of appeal is given, the date on which the appeal is finally determined or withdrawn.

(3) A penalty due under this Part is a debt due to Government and recoverable as a civil debt.

Exchange of information by Commissioner.

10ZB.(1) Where the Commissioner receives a country by country report under this Part, he shall communicate that report to any Member State in which, on the basis of the information in that report, one or more constituent entities of the MNE group are either resident for tax purposes or subject to tax with respect to the business carried out through a permanent establishment.

(2) Subject to subsection (3), the communication under subsection (1) must take place within 15 months of the last day of the fiscal year of the MNE group to which the report relates.

(3) The first communication under subsection (1) shall be in relation to the fiscal year of the MNE group commencing on or after 1 January 2016 and must take place within 18 months of the last day of that fiscal year.

(4) Communication by the Commissioner under subsection (1) shall be carried out-

- (a) using the standard form provided in Tables 1, 2 and 3 of Section III of Annex III of the Cooperation Directive; and
- (b) by electronic means using the common platform described in Articles 3(12), (13) and 21(6) of the Cooperation Directive; and
- (c) adopting the linguistic arrangements provided for in Article 20(6) of that Directive.

Feedback.

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

Use of information.

10ZD.(1) Section 5E(3)(c) shall apply to information communicated under this Part or Article 8aa of the Cooperation Directive.

(2) Information received by the Commissioner under this Part or Article 8aa of the Cooperation Directive 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).

(3) Information communicated under this Part or Article 8aa of the Cooperation Directive shall be used for-

- (a) assessing high-level transfer-pricing risks and other risks related to base erosion and profit shifting, including assessing the risk of non-compliance by

members of the MNE group with applicable transfer-pricing rules; and

(b) economic and statistical analysis where appropriate.

(4) The Commissioner may not base transfer-pricing adjustments on information communicated pursuant to this Part or Article 8aa of the Cooperation Directive.

(5) Subsections (3) and (4) do not prohibit the use of information communicated pursuant to this Part or Article 8aa of the Cooperation Directive as the basis for making-

(a) further enquiry into an MNE group's transfer-pricing arrangement or other tax matters in the course of a tax audit; or

(b) appropriate adjustments to the taxable income of a constituent entity.”.

Dated 25th May, 2017.

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) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

